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Introduction. The Long Invisibilization of Sexual Violence Against Women as Crime Against Humanity: The Need for a Constitutional Analysis of International Judicial Doctrine

Marilisa D'Amico, Tania Groppi, Costanza Nardocci, Irene Spigno

Violence against women is globally recognized as a multifaceted phenomenon. From the CEDAW Convention's General Comment No. 19, through the Belem do Pará Convention, to the Istanbul Convention, efforts in tackling violence against women have expanded worldwide from Europe to the Americas.

Despite efforts in fighting violence against women have united lawmakers and courts of law, western literature has over the years extensively preferred focusing on intimate partner violence and domestic violence, without likewise shedding light on other diverse and widespread violent conducts that see women disproportionately affected.

There exists yet in fact a variety of forms of violence against women that lack adequate safeguard by International Human Rights and Criminal Law Courts and that have likewise not been adequately addressed in the academic debate.

Reference is chiefly made to violence perpetrated against women, which quite often encompasses slavery-related conduct. Sexual violence performed in the public sphere, in the forms of rape, gang rape, and genocidal rape, has, therefore, quite often been seated in the backseat of the academic debate, in favour of a legislative and jurisprudence's inclination to hinge on intimate-partner and domestic violence.

Secondly, beyond the private sphere, violence against women, especially of sexual nature, has historically and very commonly featured war times and armed conflicts nurturing and deriving from cruel interethnic relations among social groups.

By way of critically investigating landmark cases, the special issue aims at disclosing some of the most relevant violent conduct against women perpetrated by States or non-State actors in the perspective of criminal international law and human rights law.

The proposed analysis features a selection of the examined forms of violence against women and they are regrouped into the following categories: sexual enslavement; genocidal rape. Each form of violence is read and interpreted through the lens of the examined case, following the purposes of unravelling, and showing major traits, developments, challenges, and criticisms.

Judgments issued by Human Rights and International Criminal Courts on sexual violence against women generate a significant constitutional and human rights law concern as of their severe impact on women's human rights.

Despite the inherent limits of international law, mainly related to States will accept the contentious jurisdiction of International Courts and the enforceability of their judgments, the international judicial doctrine, developed on sexual and gender-based violence against women in contexts where gender-based violence constitutes a structural problem as the consequence of armed conflicts (as in cases held by the International Criminal Tribunal for Former Yugoslavia, the International Criminal Court for Ruanda, the International Criminal Court, the Special Court for Sierra Leona or even in some judged by the Inter-American Court of Human Rights) or for structural violence against women by action or omission of the State (as in the cases of Turkey or Mexico), highlights that constitutional principles and national laws are no longer enough.

However, the intervention of international law is deemed necessary and the phenomenon of the constitutionalization of international law somehow tends to correct those weaknesses shown under international law. Therefore, a constitutional paradigm in analyzing international case law is still fundamental. Furthermore, the choice to focus the analysis on international jurisprudence aims to highlight the fundamental role of judges and Courts in protecting women's rights. Not surprisingly, it was at the international level that movements in favor of women's rights took their first steps and put pressure on national agendas in different parts of the world.

The aim of the Special Issue is, therefore, to analyse the international and constitutional arguments, principles, and criteria, Human Rights and Criminal International Courts developed in their case-law on sexual violence by separately looking at its variety of forms: sexual violence in and beyond armed conflicts, sexual slavery, sexual torture, genocidal sexual violence, among the others. The choice is since, although gender violence is a much wider concept, judgments concerning sexual violence against women provide reliable indicators to assess the status of the health of women's rights in contemporary democratic states.

Mindful of the need to analyse international leading cases under a constitutional and comparative paradigm, the Special Issue includes relevant case-law issued from

International Criminal Courts, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Ruanda, and the International Criminal Court, Regional Human Rights Courts, as the Inter-American Court of Human Rights and the European Court of Human Rights.

The selected case-law analysis will be preceded by an introductory article describing the importance of the selected topic (sexual violence against women) and the chosen methodology (the case-law analysis under the constitutional perspective of international law).

A Keynote article on the evolution of the international judicial doctrine on sexual and gender-based violence against women will precede the proposed case-law analysis.

The Special Issue is multidisciplinary in its aim and scope. It embraces a constitutional, comparative, and international human rights law approach, without neglecting the political and economic resonance of the phenomenon at stake.

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The Long Unfinished Struggle to Ensure Accountability for Sexual and Gender-Based Violence Under International Law*

Anna Myriam Roccatello-Kelli Muddell

CONTENTS: 1. Importance of Gains in Sexual Violence Jurisprudence. – 2. Safeguarding the Gains Made. – 3. Pushing the Boundaries.

1. Importance of Gains in Sexual Violence Jurisprudence

Throughout history, wars have been accompanied by massive human rights violations, bringing an enormous amount of suffering to civilians of all ages, gender, religion, and ethnicity. However, the brunt of this suffering has disproportionately been born by women. Historically, women were considered as a "spoil of war" for the victorious army. Rape and other forms of sexual violence were thus commonly perceived as an unavoidable consequence of conflict, as rather than a criminal act, and even when these violations were not dismissed as mere collateral damage of war, they were not understood as rising to the level of prosecution.

One of the most striking examples of how women's bodies were used in conflict while silence has pervaded history is from the Second World War (WWII). Between 1932 and the end of WWII, the Japanese Government was involved in establishing and maintaining a system of sexual slavery throughout Asia[1]. The derogatory term of "comfort stations" were used to describe the centers that made up this system, while its victims were referred to as "comfort women"[2]. After its invasion of Nanking, during which an estimated 20,000 women were raped, the Japanese government, fearful that such violence posed a risk to the peaceful cooperation of populations in its occupied territories, as well as to the sexual health of its soldiers, responded with a policy aimed

* *Double-blind peer reviewed in accordance with the Journal guidelines.*

1 G.J. McDougall, *Addressing State Responsibility for the Crime of Military Sexual Slavery during the Second World War: Further Attempts for Justice for the Comfort Women*, in *Korean Journal of International and Comparative Law*, 1, 2013, p. 137 ff.

2 *Ivi*, p. 139 ff.

at creating a controlled sexual environment through the establishment of "comfort stations".

The Government of Japan has repeatedly minimized the seriousness of the violations stemming from this system[3]. For example, the Government has argued that victims were paid for their labor. Yet detailed testimony by former sex slaves indicates that women and girls were abducted, sold by impoverished families, or promised jobs as nurses or factory workers. The victims were captive and forced to provide sexual services for soldiers. Estimates indicate that the Japanese military forced between 100,000 and 200,000 women and girls into sexual slavery, with each victim being raped at least five times a day. To minimize its legal liability, the Government has argued that the rape centers only lasted five years, but this number is believed not to be accurate. While there is debate over the figures, relying on even the lowest estimates[4] reveals that this system resulted in approximately 125 million rapes took place across Korea, the Philippines, Burma, China, Taiwan, and Indonesia[5].

Following World War II, the victorious Allied governments established the first international criminal tribunals to pursue accountability for massive human rights violations. Without a doubt, the International Military Tribunal (IMT or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE or Batavia Tribunal) contributed significantly to the development of international criminal law. For the first time in history, references to "crimes against peace", "war crimes", and "crimes against humanity" were used. While these tribunals contributed significantly to the advent of the modern international justice movement, they failed to achieve accountability for victims of sexual violence.

The Batavia Tribunal ignored the hundreds of thousands of Asian victims of the Japanese system, limiting the proceedings to the 35 Dutch women held at a "comfort station" in Indonesia. The trial resulted in the conviction of seven officers and four civilian "comfort station" operators for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners. While this ruling is important in and of itself, it is also significant as it indicates that

[3] *Ivi*, p. 145 ss. After denial of involvement, the Japanese Government recognized its role in establishing the rape centers in an official study: «On the issue of wartime 'comfort women' of 4 August 1993 by the Japanese Cabinet Councilors' Office on External Affairs and in a statement by the Chief Cabinet Secretary on the same date».

[4] Scholars and activists do not adhere to any of these low estimates be it number of women held, number of rapes a day, or duration of program. The number reported would nevertheless be the result of calculations made on the basis of estimates given by the few who argue the system was not as large as it was. See S. Sato, *The Japanese Army and Comfort Women in World War II*, in G. Campbell - E. Elbourne (eds.), *Sex, Power, and Slavery*, Ohio, 2014, p. 258 ff.

[5] S.J. Vanderweert, *Seeking Justice for Comfort Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japenese Army May Find Their Best Hope of Success in U.S. Federal Courts*, in *North Carolina Journal of International Law*, 27, 1, 2001, p. 141 ff.

there was sufficient evidence to hold that the comfort centers were not a civilian operation, as Japan had claimed[6]. Perhaps more striking is the fact that the trials utilized testimonies from Indonesian women as evidence to pursue justice for the Dutch victims, and yet no charges were brought for the enslavement of the Indonesian victims. This demonstrates how factors such as race, class, and ethnicity, among others, may impact victims' access to justice. While groundbreaking jurisprudence on sexual violence has been set over the last several decades, issues of intersectionality still often apply in determining whose rights are protected and which victims remain invisible.

As mentioned, the comfort women case is characterized by Japan's denial of legal liability on several substantive grounds and by its related unwillingness to engage with victims fully[7]. Despite the foundational international efforts to establish justice and accountability for the massive human rights violations committed during the Second World War, these stories remained buried until 1991, when the first comfort women admitted publicly that they had been sex slaves of the Japanese military[8]. While their stories are now better known, the few remaining survivors still wait to receive an adequate apology and reparations.

When discussing the international advancements in prosecuting sexual violence, it is critical to remember the "comfort women". The lack of legal accountability for the sexual slavery they endured, as well as their decades of silence, epitomizes the historical invisibility of crimes against women. Despite being an integral part of the war arsenal, sexual violence was largely unacknowledged before the 1990s[9]. In the rare cases in which sexual violence was raised, it was justified as an inevitable consequence of war, a form of collateral damage[10]. It is important to remind ourselves of the relatively short time in which the advancements in jurisprudence that we will discuss over the next few days have taken place.

After decades of struggle by activists, international and regional legal bodies began to prosecute sexual and gender-based violence (SGBV) as a serious violation of human rights. Several key developments in the 1990s led to this shift, namely the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The prosecution of sexual violence by the Tribunals was fraught with traditional resistance, as demonstrated by their first set of indictments which failed to recognize sexual violence[11]. These crimes

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[6] *Ibidem*.

[7] G J., McDougall, *op cit.*, p. 145.

[8] C. Sung Chung, *Korean Women Drafted for Military Sexual Slavery by Japan*, in K. Howard (ed.), *True Stories of the Korean Comfort Women*, London, 1995, p. 11 ff.

[9] R. Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, in *Law McGill Law Journal*, 46, 1, 2000, p. 220.

[10] N. Buchowska, *Violated or Protected. Women's Rights in Armed Conflicts after the Second World War*, in *International Comparative Jurisprudence*, 2016, p. 75.

[11] R. Copelon, *op cit.*, p. 224.

were only investigated and indicted after the concerted pressure of women's rights organizations.

The role of women's activists and NGOs is exemplified in the *Prosecutor* v. *Jean Paul Akayesu* case before the ICTR[12]. Initially, there were no charges for gender-related crimes, even though women's and human rights organizations had documented extensive evidence of rape and other forms of sexual violence throughout Rwanda[13]. Several NGOs[14] prepared and submitted an amicus curiae brief that eventually led the Prosecutor to indicate his intention to amend the indictment and include charges of rape and general allegations of sexual violence[15]. Also crucial to its inclusion was the presence of Judge Navanethem Pillay of South Africa on the bench, the only woman judge on the Trial Chamber hearing the case with extensive expertise in gender-related crimes[16].

The *Akayesu* Trial Chamber Judgement carried monumental legal significance[17]. The ICTR concluded that rape and other forms of sexual violence were used as an instrument of genocide. It also recognized that the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity. This was the first landmark conviction of either genocide or crimes against humanity for sexual violence. The judgment also recognized forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity. Specifically, forced nudity was cited as an example of sexual violence not involving touching[18]. The Trial Chamber also articulated a seminal definition of sexual violence and rape under international law[19]. Sexual violence was defined as «any act of a sexual nature…under circumstances which are coercive»[20]. The Tribunal also noted that sexual violence is not limited to physical invasion of the body and need not involve penetration or even physical contact.

[12] ICTR, *Prosecutor v. Jean Paul Akayesu* (Trial Judgment), Case No. ICTR-96-4-T, 2 September 1998.

[13] R. Copelon, *op cit.*, p. 225.

[14] IWHR, the Working Group on Engendering the Rwanda Tribunal, organized by a dedicated group of recent grads from the University of Toronto Faculty of Law, and the Center for Constitutional Rights in New York City.

[15] R. Copelon, *op cit.*, p. 226.

[16] *Ibidem.*

[17] ICTR, *Prosecutor v. Jean Paul Akayesu*, cit., para. 26.

[18] *Ivi,* para. 688.

[19] *Ibidem*; see also ICTR, *Prosecutor v. Jean Paul Akayesu* (Appeal Judgment), Case No. ICTR-96-4-T, 1 June 2001.

[20] ICTR, *Prosecutor v. Jean Paul Akayesu* (Trial Judgment), cit., para. 598.

Although the ICTY appeared to adopt the broad definition of the ICTR initially, the *Furundžija* case shifted towards a more precise definition of rape[21]. The most significant aspects of gender in this judgment are found in the development of the understanding of torture utilizing sexual violence. Significantly, the Trial Chamber acknowledged the efforts undertaken by international bodies in redressing the use of rape as a means of torture and, as such, a violation of international law[22]. The defendant was found guilty on two counts of war crimes, namely torture and abetting in outrages upon personal dignity, including rape. Furundůija did not commit the physical act of sexual violence, his conduct being limited to the interrogation of a woman prisoner during the sexual assault committed by another soldier. Nevertheless, the ICTY found him criminally responsible for his presence and his acts or omissions during the assault, making him liable for aiding and abetting in the rape of the prisoner.

Another major achievement was made in the ICTR case of *Prosecutor v. Gacumbitsi*. Its appeals decision established that under coercive circumstances, non-consent can be inferred from background circumstances rather than being a separate element to be proven[23]. Hence, if the conduct occurred within a detention facility or during a genocide campaign, non-consent can be inferred. In other words, the ICTR, while affirming that consent is part of the definition of rape, also held that it does not have to be proven when there are coercive circumstances.

The recognition of sexual violence as a prosecutorial priority in these cases, and others to be discussed over the coming days, is due to the essential role played by women's organizations in fighting the resistance to making gender inclusiveness a priority. As stated by Rhonda Copelon, a leading academic and activists who was at the forefront of the global movement that fought for these advancements: «The interrelationship between mobilization at every level and international legal change exemplifies the basic principle that human rights, like law itself, are not autonomous, but rise and fall based on the course and strength of peoples' movements and the popular and political pressure and cultural change they generate»[24].

Similarly persistent efforts to influence the negotiations to draft the Rome Statute of the International Criminal Court (ICC) were key to it recognizing a spectrum of gender crimes that had never been formally articulated in any international instrument.[25]. In addition to rape, it includes enforced prostitution, sexual slavery, forced pregnancy, sex trafficking, and other crimes of sexual violence within the crimes against humanity and war crimes provisions. Furthermore, through its identification

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[21] ICTY, *Prosecutor v. Anto Furundžija* (Trial Judgment), Case No. IT-95-17-1, 10 December 1998, para. 185.

[22] *Ivi*, para. 163.

[23] ICTR, *Sylvestre Gacumbitsi v. The Prosecutor* (Appeal Judgement), Case No. 2001-64-A, 7 July 2006, paras. 155-157.

[24] R. Copelon, *op cit.*, p. 220.

[25] Rome Statute of the International Criminal Court, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

of separate sexual and gender crimes, including gender-based persecution, the Statute acknowledges the peculiar and aggravating harms caused by different violations[26].

Lessons from the various cases to be discussed over the next few days have taught us that there must be a concentrated effort both in prosecutorial policies, as well as those guiding other organs of the court, to effectively address SGBV. Procedures ensuring that victims are provided with a safe space to testify, their information is kept confidential and they receive necessary services to ensure their psychological wellbeing is not jeopardized are of the utmost appointment. These must be guided by clear policy, but also overseen by trained personnel at every level of the court.

2. Safeguarding the Gains Made

The groundbreaking cases that will be analyzed during this conference reflect a mainstreaming of women's rights into the normative structures of international humanitarian law. While these advances must be celebrated, we must not lose sight of how far we still must go in addressing SGBV in conflict and non-conflict settings. I would like to highlight several issues that urgently require our attention if the gains we have made are to be safeguarded and the voices of the victims who continue to remain invisible are surfaced.

Despite the extraordinary progress that had been made in accountability efforts for sexual violence, gender justice remains a very contested issue in international criminal law[27]. The Rome Statute created a solid foundation for the International Criminal Court both in terms of defining sexual and gender-based crimes and establishing necessary procedures to deal with victims of SGBV; however, it has struggled to meet what has been expected of it.

The ICC suffered a slow start to its handling of sexual and gender-based violence, marked by a limited prosecutorial response by its first Prosecutor, Luis Moreno Ocampo. For example, in the 2012 *Lubanga* case[28], despite evidence pointing to widespread sexual violence against child soldiers and rape being routinely committed against young girls, charges related to sexual violence were not brought. After receiving widespread scrutiny, the Prosecutor included them in the 2014 *Katanga* case[29]. This was the first-time sexual violence charges had appeared in an ICC indictment. Unfortunately, there was no conviction for these crimes, as the ICC held

[26] Women's Caucus for Gender Justice for the ICC, *Recommendations and Commentary for December 1997 Prep Com on the Establishment of an International Criminal Court*, WC.6.1, WC.6.1-4.

[27] R. Copelon, *op cit.*, p. 233.

[28] ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Decision on establishing the principles and procedures to be applied to reparations), Case No. ICC-01/04-01/06-2904, 7 August 2012, para. 191.

[29] ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, 7 March 2014.

that the evidence was insufficient to determine whether the defendant knew about the rape and sexual slavery being committed by his subordinates. Victims of sexual violence suffered yet another setback.

In 2014, the Rome Statute provisions were combined with the Policy Paper on Sexual and Gender-Based Crimes, the first policy issued by the ICC's Office of the Prosecutor. The Policy was the culmination of the efforts of the ICC's second Prosecutor, Fatou Bensouda, to reinforce the Office's expertise and commitment to the prosecution of SGBV[30]. This detailed policy also highlighted the significant gaps existing between the crimes identified in the Statute and the effectiveness of the Court's investigations, prosecutions, and convictions on SGBV.

While the OTP policy has led to improvements in the court's functioning, the Court has still faced challenges. In the 2016 *Bemba* case[31], the accused was found guilty on two counts of crimes against humanity and three counts of war crimes, all of them including rape committed by fighters under Bemba's command. Unfortunately, on 8 June 2018, a divided Appeals Chamber reversed the conviction acquitting Bemba for these crimes[32]. The Appeals Chamber's failure to recognize Bemba's liability reflected a persisting absence of critical gender-competent analysis in the ICC[33]. Fortunately, the ICC has shown some improving in the last few years. On 8 July 2019, the ICC Trial Chamber convicted *Bosco Ntaganda* on 18 charges of war crime and crimes against humanity, including rape and sexual slavery[34]. While the original indictment did not include those charges, following the verdict in the *Lubanga* case, the indictment was amended and expanded to rape and sexual slavery[35]. On 30 March 2021, the Appeals Chamber[36] delivered its judgments confirming the decision of the Trial Chamber, thus setting an important precedent as the first final conviction for crimes of conflict-related sexual violence.

The ICC recently convicted Dominic Ongwen, a former commander in the Lord's Resistance Army, in a landmark judgment. The Prosecutor's charges against

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[30] ICC, *Office of The Prosecutor, Policy Paper on Sexual and Gender-Based Crimes*, 2014, in: *https://www.icc-cpi.int/iccdocs/otp/OTP-Policy- Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.*

[31] ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, 21 March 2016.

[32] ICC, *Prosecutor v. Bemba* (Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute"), Case No. ICC-01/05-01/08 A, 8 June 2018.

[33] *Ivi*, para 621.

[34] ICC, *Prosecutor v. Bosco Ntaganda*, Judgment (Trial Chamber), Case No. ICC-01/04-02/06, 8 July 2019.

[35] ICC, *Prosecutor v. Bosco Ntaganda* (Decision on the Prosecutor's Application under Article 58), Case No. ICC-01/04-02/06, 13 July 2012.

[36] ICC, *Prosecutor v. Bosco Ntaganda* (Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'), Case No. ICC-01/04-02/06-2666, 30 March 2021.

Ongwen reflect the influence offered by the 2014 Sexual and Gender-Based Crimes Policy. The Policy and its guidance empowered the Office of the Prosecutor to engage directly on gender. As in *Ntaganda*, the initial arrest warrant against Ongwen did not include any charges for sexual and gender-based crimes. However, after Ongwen was arrested and transferred to the ICC, the Prosecutor raised the number of charges from seven to seventy[37]. Nineteen of these charges were related to sexual and gender-based crimes. The Pre-Trial Chamber II unanimously confirmed all counts against Ongwen, representing the highest number of sexual and gender-based crimes confirmed by an ICC Pre-Trial Chamber to date[38].

In February 2021, the Trial Chamber found Ongwen guilty of 61 counts of war crimes and crimes against humanity, including all of the nineteen counts relating to charges of sexual and gender-based crimes[39]. The judgment is considered a turning point in the advancement of gender justice. It is not only the first conviction for forced pregnancy[40] as a standalone crime, as a war crime, and a crime against humanity; it is also the first to expressly consider the reproductive autonomy of women.

The judgment also contributed to the evolution of the conceptualization of the crime of forced marriage, charged as «another inhumane act» constituting a crime against humanity. As the crime of forced marriage is not included in the Rome Statute, the Court's interpretation of the act was critical. In its judgment, the Court rejected the notion that forced marriage is subsumed by the crime of enslavement or by the crimes of rape or sexual slavery. Instead, the Court interpreted forced marriage as an independent crime that satisfied the legal elements of «other inhumane acts» as a crime against humanity under Article 7(1)(k).

As this section illustrates, despite the ICC being a well-resourced court whose statute, policies, and procedures are considered to form best practice on handling SGBV, it still faces significant challenges in its investigations, prosecutions, and convictions on SGBV. Legal accountability for sexual violence under international law is not a foregone conclusion. The successful experiences before the ICC have been due to the ongoing perseverance of women's groups to document violations and make submissions to the Court, as well as the enhanced policy and expertise within the OTP. The *Al Hassan* case, whose trial opened in July 2020, takes the ICC into promising new territory as it is the first-time gender-based persecution as a crime against humanity

[37] ICC, *Prosecutor v. Dominic Ongwen* (Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II), Case No. ICC-02/04-01/15-422-Red, 23 March 2016, paras. 96-101.

[38] *Ibidem.*

[39] ICC, *Prosecutor v. Dominic Ongwen* Judgment (Trial Chamber), Case No. ICC-02/04-01/15, 4 February 2021.

[40] ICC Statute, art. 7(2)(f). The Rome Statute describes forced pregnancy as the «unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law».

will be adjudicated[41]. This case offers the ICC the possibility to develop groundbreaking jurisprudence, taking gender justice within the international legal framework to a new level.

3. Pushing the Boundaries

Before we begin to speak about the serious gaps in the advancements made so far and how the field must grow if it is to reflect the reality of who is targeted by gender crimes and what can contribute to the prevention of such crimes, I want to reiterate that pushing these boundaries does not imply that ongoing vigilance is not needed to protect the gains achieved to date. Being critical of where we are does not undermine the struggle it took to get here. To acknowledge that injustice still exists for certain victims and that those victims are often not represented by those who have fought and continue to fight for female sexual violence victims does not mean that their fight is not valid or should be over. The evolution of jurisprudence that we will discuss over the next few days required continuous questioning of who international justice efforts were failing and why. As feminists and gender justice advocates, we cannot become complacent with the answers we already know, even if we are still fighting for others to recognize those answers.

One of the most significant gaps in how sexual and gender-based violence is conceptualized and pursued under international law is around *who is considered* a victim. An unintended consequence of the intense struggle by women's groups to shift the international legal community's perception from sexual violence as an unfortunate consequence of conflict to it being a weapon of war was that such violence became synonymous with the experience of women. Following from this rationale, the creation of gender-sensitive accountability processes focused only on the challenges faced by women, who were often treated as a monolithic group, in accessing justice. The way individuals experience human rights violation is much more complicated and shaped by the gender roles and expectations placed on them by society.

While it may take place in lower numbers, men have often been targeted for sexual violence during times of repression or conflict. For example, male victims of rape, gang rape, electric shock and beating of genitals, genital mutilation, and forced nudity have been documented in contexts as diverse as Chile, Cambodia, Iraq (under United States' occupation), Sierra Leone, Sri Lanka, and South Africa. At one

[41] ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, (Pre-Trial Chamber), Case No. ICC-01/12-01/18, 13 november 2019.

concentration camp in Sarajevo, 80% of the 5,000 male prisoners were reported to have been raped[42].

As the issue has been discussed more in the media over the last fifteen years, it is becoming increasingly understood that sexual violence against men is integral to the tactics used by many warring parties and repressive regimes. During the conflict in Syria, human rights groups documented that male political detainees have been subjected to forced nudity, electric shocks and beatings to the genitals, and rape[43]. The recent awareness has also shed light on historic SGBV against men. In 2009 reparation litigation was pursued against the Government of the United Kingdom (U.K.) for colonial era abuses during the Mau Mau uprising of the 1950-60s in Kenya. Men who had suffered abuses, such as castration, in colonial detention centers were part of the claimants. In a rare moment of justice, the U.K. Government awarded reparations in 2013[44].

Despite increased visibility, sexual violence against men is still largely unreported. Stigma against male victims is incredibly high in most contexts, and the majority of those who would document such cases – human rights workers, humanitarian aid providers and medical professionals – do not consistently look for the signs of such abuse as they do for women. Unfortunately, even when SGBV against men is identified, there tend to be two responses that inhibit the violations from being adequately addressed. In its work ICTJ has identified a fear among those working on accountability for SGBV that speaking about sexual violence against men and boys will jeopardize the hard-won fight to get policymakers, legal practitioners, and even human rights actors to focus on the rampant sexual violence that is still taking place against women. Primarily, there is a concern that resources to provide accountability and rehabilitation for sexual violence, at the international and local level, will have to accommodate another universe of victims in a world where the needs of female victims are still not being addressed.

Another way that the blind spot regarding men as victims of SGBV manifests itself is in how they are characterized in legal proceedings. Very few cases in international courts have had evidence of such crimes presented, and most cases where relevant charges are raised do not reflect the sexual nature of the crimes. For example, in *Prosecutor vs. Duško Tadić* the ICTY found the defendant guilty of inhumane acts as a crime against humanity and cruel treatment as a war crime for forcing a male detainee to perform oral sex on another prisoner and bite off one of his testicles. However, neither the indictment nor the judgment acknowledged the sexual nature of the offences[45]. Other cases before the ICTY, ICTR, and Special Court for Sierra Leone

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[42] A. Kapur - K. Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts*, New York, 2016, p. 6 ss. In: *https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf*.

[43] *Ivi*, p. 8.

[44] *Ivi*, p. 24 ff.

[45] *Ivi*, p. 17.

also failed to recognize sexual violence against men and boys in indictments and judgements despite evidence being present and admitted.

Even with the progressive gender-neutral language of the Rome Statute, the ICC has struggled to appropriately address such violence. In its examination into the Kenyan 2007-08 post-election violence, the Prosecutor documented cases of the forcible circumcision of men from the Luo ethnic community by those from the Kikuyu ethnic group. In this case the prosecutor moved to charge these acts as «other forms of sexual violence»; however, the Pretrial Chamber fell short. Despite hearing evidence that the perpetrators conveyed their intent to emasculate the victims as the acts were being committed, the Chamber ruled that these violations should be categorized as «other inhumane acts»[46]. The evidence clearly indicated that the specific targeting of Luo males was an ethnically motivated display of masculine dominance[47].

The risk in not correctly identifying this violence is that the sexual nature of the crimes and the harms and consequences that they cause are obscured. By not applying the same standard of legal analysis to sexual crimes against men as we do for women, courts fail to recognize the societal dynamics that fuel sexual violence regardless of who the victim is. For justice processes to contribute to preventing this type of violence from recurring, they must understand the motivations behind it. Sexual violence is considered an effective tool against both men and women because it uses their prescribed gender roles against them. Much has been written about how sexual violence is a weapon of war used against women because of their roles as wives and mothers. It is a means by which perpetrators can bring shame on families and communities and impact the future of each through reproductive harm. However, the same motivation exists behind sexual violence against men. In many societies, the definition of being a man is connected to their ability to exert power over others and being a victim of sexual violence is inconsistent with this role. Through sexual violence, perpetrators erode the capacity of men to provide for their families and be leaders in the community[48].

Recognizing the complex influence gender roles have over why and how victims are targeted for SGBV goes beyond recognizing male victims of sexual violence. Little acknowledgement has been made within both the international legal community and broader transitional justice field of how individuals are often targeted for human rights violations because they deivate from gender norms. For example, in ISIS-controlled Iraq men and women were forced to adhere to a strict code of how they were to behave and dress according to their gender. Those whose conduct was seeing as not following these rules were considered "gender transgressors" and subjected to torture and often

[46] ICC, *Prosecutor v. Kenyatta* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), Case No. ICC-01/09-02/11, 23 January 2012, para. 265.

[47] W. Kamau-Rutenberg - W. Wazima, *A gender analysis of forced male circumcisions during Kenya's post-election violence*, 2009. In: *http://africanarguments.org/2009/07/17/watu-wazima-a-gender-analysis-of-forced-male-circumcisions-duringkenya%E2%80%99s-post-election-violence/*.

[48] A. Kapur - K. Muddell, *op cit.*, p. 4 ff.

death. In 2017, gender justice advocates made a submission to the ICC arguing that ISIS had committed systematic gender-based persecution constituting crimes against humanity as well as the war crime of torture based on gender discrimination[49].

The targeting of individuals during periods of conflict or repression because of their sexual orientation or gender identity is not a new phenomenon[50]; however, these already marginalized victims have been almost entirely ignored by past accountability efforts for human rights violations. Through its arguments the submission sought to broaden the discourse on gender crimes and «expand the understanding of discrimination, including where gender, sexual orientation, and gender identity intersect»[51]. While this submission was not acted upon, it has expanded the discussion on gender crimes, and in and of itself is a victory for gender justice advocates who fought a very contentious battle to ensure that the crime of gender-based persecution was included in the Rome Statute.

The ICC could take advantage of the effort to broaden the legal landscape through the *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, which is the first case of gender-based persecution be adjudicated at the international level. Similar to ISIS in Iraq, the Malian jihadist imposed restrictions on individuals based upon their gender and severely punished those who violated them; however, such gender restrictions have been considered in the case in question only for women. The Prosecutor has argued that Al Hassan and other members of Ansar Addine severely deprived these women and girls of their fundamental rights, including the right to physical integrity, right to not be held in slavery, and right to freedom of association[52].

Fortunately, innovative legal thinking on how to pursue violations against those who deviate from gender norms is not confined to the sphere of international justice. In the last few years, ICTJ helped a local Colombian LGBTQI rights organization, Colombia Diversa, on a project analyzing how gender ideologies of the warring parties combined with existing social prejudices to give rise to human rights violations targeting LGBTQI individuals. The research demonstrates how this conflict-related violence exacerbated already existing discrimination and violence against those perceived as deviating from gender norms. Colombia Diversa argued that mechanisms existed throughout society to control the behaviors of those with diverse sexual orientations or gender identities, and that this discrimination and violence permeated

[49] Human Rights and Gender Justice Clinic of the City University of New York School of Law, MADRE, and the Organization of Women's Freedom in Iraq, communication to ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL), 2017.

[50] K. Muddell, *Sexual Minorities Study: LGBT Issues and Transitional Justice*, New York, 2007.

[51] L. Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, in *William & Mary Journal of Race, Gender, and Social Justice*, 24, 3, 2018, p. 518 ff.

[52] ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, cit.

every aspect of a combatant's socialization. Based upon these findings Colombia Diversa created a legal argument that reconceptualized the idea of systematicity, asserting that conflict-related violence against LGBTQI individuals could not be characterized as random but was part of the system of warfare conducted by both the Colombian military and armed groups. In addition to publishing a book, the group made submissions to both the country's Truth and Reconciliation Commission and Special Jurisdiction for Peace.

The final gap in the contribution of international jurisprudence on SGBV that I believe is vital to keep in mind is how, or if, it is applied in local jurisdictions. As very few cases can be heard before regional and international courts, prosecutions at the national level are vital and can offer a greater chance of impact. In ICTJ's experience these proceedings can provide greater access to witnesses, evidence, and victims as well as judges, staff, lawyers, and material in local languages. Though national trials still require a proactive approach to outreach and public relations, it is more likely that the public will receive information about national trials than about trials happening on the international stage, well outside the country. This increased visibility contributes to the possibility that bringing perpetrators to account will signal a kind of normative shift from a culture of impunity to one of accountability. This is vitally important given the levels of stigma and silence that can exist around sexual and gender-based crimes.

Unfortunately, there are several major challenges to ensuring that domestic jurisdictions are capable of meaningfully prosecuting these types of violations. First, very often domestic laws often contain very restrictive definitions of SGBV. For instance, some definitions may only recognize female victims or may limit the definition of sexual violence to rape[53]. Even if adequately defined laws are in place and applicable, many countries face other challenges to prosecuting SGBV. First, there is often a significant gap between a law and its implementation. A law is only as good as the attitudes of those who are tasked with upholding it and protecting the population. Changing attitudes can take much longer than crafting new laws. For example, after Apartheid ended, South Africa passed progressive laws on gender-based violence, but in practice there is still significant impunity for these crimes[54].

In many domestic settings, ordinary courts do not have the expertise or capacity to try massive human rights violations. Certain countries, such as Colombia, Tunisia, and Uganda, have established specific mechanisms within their national judicial system for this purpose. In Uganda, the International Crimes Division (ICD) was created within the country's High Court and mandated to prosecute genocide, war crimes and crimes against humanity. The Rome Statute was domesticated into Ugandan law with the passage of the 2010 International Criminal Court Act, which criminalized a broad range of sexual offenses not previously captured under domestic law. Unfortunately,

[53] K. Muddell - S. Hawkins, *Gender, and Transitional Justice: A Training Module Series, Module 4. International Center for Transitional Justice,* New York, 2018, p. 23 ff.

[54] *Ibidem.*

as the Act cannot be applied retrospectively, most forms of conflict-related sexual violence that took place during the conflict cannot be prosecuted by the ICD[55].

The Ugandan example also demonstrates how progressive steps within domestic systems can be undermined by a lack of political will. Both the ICD and Directorate of Public Prosecutions have adopted guidelines for protecting witnesses and victims of sexual crimes, as well as to ensure that specialized training for the handling of SGBV cases takes place with their staff. However, inadequate budgetary allocations have hindered the development of appropriate protection measures, and there still exists an insufficient number of competent personnel (medical, police and prosecutors) with the relevant skills and attitudes to conduct effective investigation and prosecutions of sexual crimes[56].

There is one final comment that I would like to make. The gaps in applying international jurisprudence in national courts speaks to the importance of adequate law reform, but also the reform of institutions that have allowed such violence to thrive. When a country emerges from a period of conflict or repression, various transitional justice tools are often employed to address a legacy of human rights violations. Quite often governments will adopt different types of measures, such as criminal justice, truth-seeking and reparations. These efforts are meant to address the past, but also provide guarantees that this type of violence will never happen again.

Unfortunately, while institutional reform is one of the agreed upon elements of transitional justice, often it is overlooked. However, even if the most responsible are prosecuted, laws are changed, and victims are acknowledged, the culture of institutions that were either directly involved in committing acts of violence or did not question it will perdure.

For example, after Kenya's 2007 post-election violence, a new constitution established numerous government entities dedicated to gender equality and legal protections for women. However, ICTJ found during a series of trainings for mid-level police officers a multitude of problems hindering the so much needed progress on investigating sexual violence. First, officers reported being unaware of how sexual violence was criminalized. They had never been exposed to what the laws consisted of. Second, many reported preferring to resolve a reported incident of sexual violence by bringing together the family of the victim and the perpetrator. This was indicative of their own biases that such violence belonged in the private sphere and did not warrant the seriousness of a crime meant to be investigated by police. Finally, those who knew the law and wanted to pursue investigations reported that their efforts were often shut down by their supervisors. This latter observation reflects the challenge with the use of trainings to reform police or other parts of the security sector. Given the

[55] International Center for Transitional Justice, *Interview with Sarah Kasande*, Head of Uganda Office, 2020.

[56] *Ibidem*.

reliance of these institutions on hierarchy, for reform to take place, those high up in the chain of command must be the ones who are demanding it.

More importantly than anything discussed so far, accountability for gender and sexual crimes requires a shift in the culture of institutions and societal perceptions of this type of violence. International jurisprudence has evolved tremendously since the establishment of the international tribunals, but it still fails to deliver justice to many victims and, specifically, certain categories of victims. The international legal community must continue to evolve, transforming the narrow way in which it views sexual violence and interprets gender. Any advances in these areas have been pushed forward by select gender justice advocates. The broader gender justice movement must push past its preconceived notions and challenge itself to evolve just as it challenged international law to do so decades ago.

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Abstract: As a result of decades of struggle by gender justice activists, international and regional bodies began in the 1990s to prosecute conflict related sexual and gender-based violence (SGBV). This paper recognizes the critical evolution of international jurisprudence since then. However, it argues that academics, practitioners, and actors cannot become complacent with these advances. There is a necessity to question which international justice efforts are failing and why, and work to expand current thinking on gender justice issues to fill the gaps that contribute to the invisibility of certain groups of victims.

Toward this end, the paper examines the various gaps in how sexual and gender-based violence is conceptualized and pursued under international law.

Abstract: Come risultato di decenni di lotta da parte di attivisti per la giustizia di genere, gli organismi internazionali e regionali hanno iniziato a partire dagli anni Novanta a perseguire la violenza sessuale e di genere correlata ai conflitti (SGBV). Il presente testo riconosce l'evoluzione critica della giurisprudenza internazionale, tuttavia, sostiene che gli accademici, i professionisti e i diversi attori che interagiscono non possono diventare compiacenti con questi progressi. È necessario chiedersi quali sforzi di giustizia internazionale stiano fallendo e perché, e lavorare per espandere il pensiero attuale sulle questioni della giustizia di genere per colmare le lacune che contribuiscono all'invisibilità di alcuni gruppi di vittime. A tal fine, il presente testo esamina le varie lacune nel modo in cui la violenza sessuale e di genere viene concettualizzata e sanzionata nel diritto internazionale.

Keywords: international law – gender justice – victims – international jurisprudence – sexual and gender-based violence.

Parole Chiave: diritto internazionale – giustizia di genere – vittime – giurisprudenza internazionale – violenza sessuale e di genere.

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RIVISTA DI
DIRITTI COMPARATI

Rape and Sexual Violence in Conflict: From *Furundžija* to *Ongwen*[*]

Marina Castellaneta - Ignacio Tredici

1. Introduction

The commission of acts of sexual violence has been a tragic feature of armed conflicts throughout history. However, despite this dreadful prevalence since ancient times, the codification of sexual violence as an international crime is the result of a rather slow evolution that has had a definite boost by the work of the international criminal tribunals. The jurisprudence of both the *ad hoc* international criminal tribunals – the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) – and the International Criminal Court (ICC) has provided a more precise and a broader approach to the criminalization of the crimes that fall within the legal concept of sexual violence. Since the creation of the ICC, this concept includes crimes such as enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence of comparable gravity (as discussed *infra* we consider that forced pregnancy and forced sterilization are crimes against the reproductive autonomy of the victim, rather than her/his sexual freedom).

As we'll see in the pages that follow, a very important role in this evolution has been played by the adoption of the ICC Statute, which has taken important steps at crystalizing the definition of crimes[1].

[*] *Double-blind peer reviewed in accordance with the Journal guidelines*.

[1] See F. Pocar, *The Rome Statute of the International Criminal Court and Human Rights*, in M. Politi - G. Nesi (eds.), *The Rome Statute of the International Criminal Court*, Aldershot, 2001, p. 67 ff. See also G.

This paper aims at briefly describing the evolution of the criminalization of sexual crimes committed in the context of conflict, particularly during the period that goes from the creation of the *ad hoc* international criminal tribunals until the judgement issued by the ICC against Dominic Ongwen. This judgement is the first one to discuss the elements of crimes such as sexual slavery.

Among other improvements on the law on sexual violence, the ICC Statute finally drew a line between sexual crimes and «outrages against personal dignity». These two were closely related concepts in, for example, the IV Convention respecting the Laws and Customs of War on Land, sanctioned in The Hague (1907): adopting a rather patriarchal approach to defining the legally protected value in case of sexual violence, Regulation 46 of the Annex to the IV Convention reads, «Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected»[2].

In addition to being tragically ubiquitous in both internal and international conflicts, perpetrators of sexual violence have acted within every possible structure of power: state bodies, regular armies, rebel armies and even peacekeeping contingents. Acts of sexual violence have been committed against both women and men. Sexual violence has been perpetrated as both, the main objective of offenders, or as the by-product of ethnic or racial violence. It has been both: the consequence of violent circumstances (that allowed those crimes to go unpunished), as well as part of official policies dictated by perpetrators behind the men on the ground.

Depending on the specific elements and circumstances, rape and sexual violence committed in the context of conflict could be legally characterized as a crime against humanity (article 7.1(g) ICC Statute)[3], a war crime (arts. 8.2(b)(xxii) and 8.2(e)(vi) ICC Statute) or as genocide[4]. As it has been consistently held there is no hierarchy of international crimes: the commission of any of the three crimes can attract the same sentence[5]. As a matter of fact, the prosecution can decide, based on the availability of evidence and their trial strategy, whether to prosecute a fact as, for example, a crime against humanity (if they possess evidence of the attack against a civilian population) or a war crime (if evidence on the link between the crime and the conflict is clear and available). Furthermore, charging a set of facts, alternatively, as war crimes or crimes

Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, United Kigndom, 2015; P. Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, in *Boston College Law Review*, Symposium Issue, 2013, p. 2018 ff.

[2] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, regulation 46, in: *https://ihl-databases.icrc.org/ihl/INTRO/195*.

[3] A. Cassese, *Crimes against Humanity: Comments on Some Problematic Aspects, in The International Legal System in Quest of Equity and Universality. Liber Amicorum Abi-Saab*, in L. Boisson de Chazournes - V. Gowland-Debbas (eds.), *The Human Dimension of International Law*, London, 2001, p. 429 ff.; L. Sunga, *The Emerging System of International Criminal Law*, London and Boston, 1997.

[4] ICTR, *Karemera and Ngirumpatse* (Appeal Judgement), 24 September 2014, para. 611.

[5] ICTR, *Kayishema and Ruzindana* (Appeal Judgement), 1 June 2001, para. 367.

against humanity was and is still a common practice at the international criminal tribunals.

Besides rape, the crime of sexual violence can take the form of enforced prostitution, forced pregnancy, forced sterilisation and sexual slavery (whereby slavery is executed with the aim of subjecting the victim to sexual acts). For the latter type of crime, we recall the so-called "comfort camps" ran by the Japanese forces during the Second World War[6]. The most recent case of sexual slavery dealt with by international tribunals is the *Ongwen* case where the accused, a former commander of the Ugandan Lord's Resistance Army, led by Joseph Kony, was charged with subjecting young girls to sexual slavery[7].

In addition to incorporating sexual slavery, forced pregnancy, and enforced sterilization, the ICC Statute adopted a residual category that criminalizes other acts of sexual violence, not described in article 7.1(g), of a gravity comparable to the other crimes therein mentioned.

Alongside the role played by international criminal law instruments (statutes, covenants, etc.) in defining sexual violence as a crime, the United Nations Security Council (UNSC) has also addressed sexual violence in conflict: UNSC Resolution 1820 (2008) stresses that the commission of sexual violence as a tactic of war significantly exacerbates conflicts, jeopardizing the restoration of international peace and security. The Resolution emphasises the need to exclude crimes of sexual violence from amnesty provisions in conflict resolution processes. Moreover, it calls on all State Members to comply with their obligations to prosecute perpetrators, and on to the United Nations Secretary General (UNSG) to continue implementing the policy of zero tolerance of sexual exploitation and abuse in United Nations peacekeeping operations[8].

Furthermore, a year later, through Resolution 1888 (2009), the UNSC called upon the UNSG, United Nations agencies and Member States to adopt a series of measures to prevent or to prosecute the commission of sexual violence. It further urged States to adopt all legal and judicial reforms to bring perpetrators of these crimes before courts as well as to ensure the protection of victims. The same Resolution requested the UNSG to appoint a Special Representative on Sexual Violence in Conflict Situations to lead, through the programme "UN Action Against Sexual Violence in Conflict", the bodies engaged in the fight against the abuse of women and to coordinate their efforts through the development of systematic strategies.

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[6] G.J. McDougall, *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, United Nations Special Rapporteur on systematic rape, sexual slavery, and slavery-like practices in armed conflict, in *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/128/81/PDF/G9812881.pdf*, p. 38 ff.

[7] ICC, *The Prosecutor v. Dominic Ongwen* (Trial Chamber Judgement; case no. ICC-02/04-01/15), 4 February 2021, paras. 212 ff.

[8] In *https://www.un.org/ruleoflaw/blog/document/security-council-resolution-1820-2008-on-women-and-peace-and-security*, paras. 1 ff.

In addition to the measures described above, through Resolution 1888 the UNSC created, within the Secretariat, the so-called Team of experts on sexual violence, a group of rapidly deployable professionals able to assist countries and UN peacekeeping operations in preventing, investigating, and prosecuting sexual violence in conflict. The Team of experts deploys alone or jointly with the Justice and Corrections Standing Capacity that sits in Brindisi, Italy. Both units work for the consolidation of the rule of law in post-conflict settings, within the Office of Rule of Law and Security Institutions, Department of Peace Operations (former DPKO).

Today, it can be affirmed that there is a large body of law consisting of international humanitarian law, international criminal law, human rights treaties, and resolutions issued by bodies such as the UNSC that aim at preventing or minimizing the occurrence of sexual violence in conflict. In addition to this large body of norms a very important exegetical role has been played by the jurisprudence of the international criminal tribunals[9].

2. The Rules on the Prosecution of Wartime Sexual Violence in International Law

Moving on to a brief analysis of the laws that criminalize sexual violence in conflict[10], the first efforts at codifying this crime in recent times (as said, with a rather patriarchal approach though) were made in the IV Convention on the Laws and Customs of War on Land and its annex, adopted in The Hague (1907). Regulation 46 states that, during the occupation of foreign territories, the signatory States are obliged to respect «Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice». Despite that no specific mention of sexual violence is made, the reference to "family honour" was provided to address the commission of crimes of sexual nature: committing the heinous crime of rape was considered more a matter of attacking the honour of the woman's family rather than her sexual autonomy.

Neither the Charter of the International Military Tribunal (Nuremberg, 1945) nor that one of the International Military Tribunal for the Far East (Tokyo, 1945), included any specific rule criminalizing either rape or sexual violence. However, despite this omission, perpetrators of any of these two crimes could be prosecuted based on the characterization of their conducts as «other inhumane acts» as «crimes against humanity», a residual category that allowed the Tribunal, under certain circumstances, to prosecute the commission of crimes not specifically defined in the Charters but of a gravity comparable to other crimes against humanity[11].

[9] See C. O'Rourke, *Women's Rights in Armed Conflict under International Law,* Cambridge, 2020, p. 34 ff.

[10] See D. Nadj, *International Criminal Law and Sexual Violence Against Women*, Routledge, London, and New York, 2018, p. 40 ff.

[11] See article 6. (c) of the Charter.

By contrast, the crime of rape was included in Control Council Law No. 10 that guided the work of a series of post-Nuremberg trials led by American magistrates (1945). Specifically, article 2 includes among crimes against humanity «Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated»[12]. However, rape was not included among the codified war crimes, remaining only a crime against humanity.

Despite the prevalence of rape during the II World War and the possibility to prosecute under article 2, no defendants were convicted for the commission of this crime by the tribunals set up under Control Council Law No. 10. As mentioned *infra*, a few doctors were convicted for the commission of "other inhuman acts" based on the conduct of sterilization experiments committed at both Auschwitz and Ravensbruck[13].

Four years later, the IV Geneva Convention concerning the Protection of Civilian Persons in Time of War[14] (1949), re-stablished the connection between "rape" and "honour", except that this time it referred to the woman's honour rather than the honour of the family as mentioned in the IV Convention of The Hague (1907) mentioned above. Article 27 of the IV Geneva Convention (1949), after stating that «Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs», specified that: «[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault».

Nonetheless, the Commentary to the IV Geneva Convention (1958) disassociated the two terms again when it stated that, considering the crimes committed during the II World War, women had to be treated with special consideration as they had been «…subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc». The Commentary clarifies that the provision is founded on the principles set forth in paragraph 1 on the notion of «respect for the person», «honour» and «family rights», making clear, however, that a woman should have an acknowledged right to special protection. The Commentary goes on saying: «The Conference listed as examples certain acts constituting an attack on women's honour, and expressly mentioned rape, enforced prostitution […] and any form of indecent assault. These acts are and remain

[12] In *https://avalon.law.yale.edu/imt/imt10.asp*.

[13] In *https://www.legal-tools.org/doc/595f3c/pdf*, p. 1.

[14] J.M. Henckaerts - L. Doswald-Beck, *Customary International Humanitarian Law,* vol. I, Rules, Cambridge, 2005, p. 115 ff. See also La Haye, *War Crimes in Internal Armed Conflicts,* Cambridge, 2008, p. 131 ff. ; J. Ancelle, *Les crimes de guerre dans les conflits armés non internationaux,* in L. Moreillon - A. Bichovsky - M. Massrouri (eds.), *Droit pénal humanitaire,* Bruxelles, 2009, p. 117 ff.

prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status, or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women»[15].

It should be noted that the provision refers exclusively to those who, during a conflict, find themselves captive in a State of which they are not citizens, *i.e.*, civilian populations under the control of an occupying power. Later, the 1977 Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I) extended this protection to all women in a conflict area. Article 76 provides that «[w]omen shall be the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault».

Article 4(1) of the 1977 Second Additional Protocol, on the Protection of Civilians in Internal Conflict establishes that «[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors», whereas subparagraph (e) of the second paragraph reaffirms the prohibition of «outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault».

As we see from the conventions and other international documents described above, the different drafters referred to attacks to the following legally protected values: "family honour", women's honour, "dignity as women".

It is only after the creation of the *ad hoc* international criminal tribunals that sexual autonomy of women is identified as the value to be legally protected. Articles 5 of the ICTY and 3 of the ICTR statutes, provide that the tribunals had the power to prosecute persons responsible for the commission of rape[16]. The UNSC, acting as the drafter of the statutes took a step forward by making no reference to the protection of either the family's honour, the victim's honour, or the dignity of the victim. It is recalled and, in this respect, we subscribed to the statement of the Special Rapporteur on Contemporary Forms of Slavery: «…international humanitarian law […] often contained provisions for the protection of women's 'honour', implying that the survivor of sexual violence is somehow 'dishonoured' in the attack. The present report

[15] In *https://ihl-databases.icrc.org/ihl/full/GCI-commentary*. See also L. Cameron - B. Demeyere - J.M. Henckaerts - E. La Haye - H. Niebergall-Lackner, *The Updated Commentary on the First Geneva Convention – A New Tool for Generating Respect for International Humanitarian Law*, in *Int. Rev. Red Cross*, 2016, p. 1209 ff.

[16] R. Cryer - D. Robinson - H. Friman - E. Wilmshurst, *An Introduction to International Criminal Law and Procedure,* IV ed., Cambridge, 2014. See also T. Meron, *International Criminalization of Internal Atrocities*, in *A.J.I.L.*, 1995, p. 554 ff.

maintains that such characterizations are incorrect, as the only party without honour in any rape or in any situation of sexual violence is the perpetrator»[17].

Article 7.1(g) of the ICC Statute provides for the criminalization of so-called sexual offences. Article 7.1(g) is reproduced, almost identically, but this time as a war crime, in arts. 8.2(b)(xxii) and 8.2(e)(vi): «Article 7. Crimes against humanity 1. For this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […] (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity».

«Article 8. War crimes […] 2. For the purpose of this Statute, 'war crimes' means: […] (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […] (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; […] (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: […] (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions».

Being precise at naming crimes based on the legal value that they protect, article 7.1(g) contains six offences that can be comfortably grouped into two distinct categories: on one hand, rape, sexual slavery, enforced prostitution and other forms of sexual violence, protect sexual autonomy in the context of conflict: meaning, the capacity to decide when, how or if a person wants to engage in acts of sexual nature. The crimes that target sexual autonomy are referred to as sexual violence. On the other hand, forced pregnancy and forced sterilization protect reproductive autonomy: meaning, when, how or if a person wishes to reproduce or not. These two crimes could be referred to as reproductive violence.

3. The Jurisprudence of the International ad hoc *Tribunals*

Despite the step forward of adopting rape as a crime, neither of the statutes of the ITCY or the ICTR, provide a definition of either rape or sexual violence in conflict. This omission has led to debates on the nature of both material and subjective elements of the crimes. The most controversial issue has been the definition of the mental

[17] G. McDougall, *Systematic rape, sexual slavery, and slavery-like practices during armed conflict: final report*, 1998, para. 16, in *https://www.refworld.org/docid/3b00f44114.html*.

element of sexual crimes. Particularly, the jurisprudence of the *ad hoc* international tribunals has swung between adopting concepts of "force", "coercion", or "lack of consent" as an element required for the legal characterization of rape.

3.1. The Akayesu Case

Turning to the main rulings of the *ad hoc* international tribunals, Akayesu was the first person to be convicted by the ICTR for the commission of both rape (under article 3(g), «crime against humanity») and sexual violence (under article 3(i), «other inhuman acts»). In respect of rape, the Trial Chamber of the ICTR noted in the trial judgement that, after having failed to find a commonly accepted definition in international law, they have adopted one that included the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual: a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.

Regarding sexual violence and citing the case of a victim that was forced to undress and to exercise naked in front of a crowd, the Trial Chamber defined it as any act of sexual nature, which may or may not involve penetration or even physical contact, committed on a person under circumstances that are coercive. The Trial Chamber further stated that sexual violence, can be qualified either as a crime against humanity (article 3(i), «other inhuman acts»), as a war crime (article 4(e), «outrages upon personal dignity») or as genocide (article 2(2)(b), in that it cause «bodily or mental harm» in the victim that, under specific circumstances like the ones that prevailed in Rwanda in 1994, can tantamount to genocide)[18].

Coercion, the Trial Chamber in *Akayesu* explained, maybe the result of direct force, threats and other forms of duress, or inherent to certain circumstances such as armed conflict or the presence of violent militiamen. One of the most important contributions of this definition is the recognition that coercion, and hence lack of consent, can be derived (and, most importantly for the prosecution: established) from the coercive circumstances that surrounded the commission of the acts of sexual violence.

Another important step taken by the ICTR is that the broad formulation of the definition of rape adopted in *Akayesu* is gender neutral: «a physical invasion of a sexual nature, committed on a person under circumstances that are coercive» which allows for the prosecution of a case where a male is the victim or a female the perpetrator.

[18] ICTR, *Prosecutor v. Jean-Paul Akayesu* (Trial Chamber Judgement; case no. ICTR-96-4-T), 2 September 1998, paras. 686-688, in *https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSC15217R0000619817.PDF*.

3.2. The Furundžija *Case*

Regarding the *Furundžija* case, a milestone for the definition of rape under the ICTY Statute, it is worth mentioning a few facts and background before analysing the legal aspects.

Anto Furundžija was a commander of a special unit of the Croatian Defence Council (HVO), known as the "Jokers", that operated in the Vitez municipality in central Bosnia and Herzegovina. This unit had constantly engaged in hostilities against the Muslim community in the Lašva Valley area, including an attack on the village of Ahmići. Furundžija was accused of participating in the commission of both torture and rape during his interrogation of a Muslim woman while she was being raped and subjected to sexual violence by a fellow commander of another unit of the HVO. Furundžija was found guilty of torture as a co-perpetrator as well as of rape as an aider and abettor, in both cases, as violations of the laws and customs of war (article 3 of the ICTY Statute, Violations of the laws and customs of war).

To be able to apply article 3 of the ICTY Statute, which does not make any specific mention of either rape or sexual violence, the Trial Chamber went on to analyse the evolution of these two concepts in international law. The Chamber quoted norms on the prohibition and criminalization of rape found in the Lieber Code (1863)[19], the Geneva Conventions (1949)[20], in Additional Protocol I to the 1949 Geneva Conventions (1977)[21], in Additional Protocol II (1977)[22], as well as in other documents and decisions already mentioned *supra*. Upon its analysis, the Trial Chamber concluded that it was indisputable that rape and sexual violence in conflict entailed the individual criminal liability of perpetrators.

Having noted that no clear definition of rape could be drawn from either international norms or the practice of international criminal tribunals, the Trial Chamber affirmed the need to draw it upon the general concepts and legal institutions of the main legal systems of the world, through the identification of common denominators to pinpoint the basic notions they share. In so doing the Trial Chamber construed a rather large definition of rape that included any type of sexual penetration of the annus or the vagina of the victim, or the penetration of the mouth of the victim by the penis of the perpetrator.

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[19] See article 44, in *https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=B1CE1E21A4237EE6C12563CD00514C6C*.

[20] Article 27 of Geneva Convention IV.

[21] Article 76(1).

[22] Article 4(2)(e).

More importantly, the judges established that coercion, or force, or threat of force are constitutive elements of the crime[23]. They went even a step further by sanctioning that criminally relevant coercion could derive from force or threats exercised against a third person (for example, someone closely related to the victim)[24].

The *Furundžija* case was received with disappointment by prosecutors and scholars as it put a burden on the shoulders of the prosecution: apparently they were required to prove the existence of coercion exercised against the victim as lack of consent alleged by the victim seemed insufficient to successfully prosecute the case. Some sort of relief though was provided by the fact that the Chamber had decided that any form of captivity vitiates consent[25].

A couple of weeks before the delivery of the *Furundžija* case, another Trial Chamber from the ICTY in *Delalic*, had agreed with the *dictum* in *Akayesu* and defined rape as the physical invasion of a sexual nature, committed on a person under circumstances that are coercive[26].

3.3. The Kunarac *Case*

The *Furundžija* judgment served as an invaluable precedent in other rulings, and the jurisprudence that followed clarified and built upon it, particularly in respect to whether and how coercion had to be proved by the prosecution. The *Kunarac* case is worth mentioning in this evolution.

Dragoljub Kunarac was the leader of a reconnaissance unit of the Bosnian Serb Army (VRS) which formed part of the local Foča tactical group. He was convicted for the commission of rape (as both: crimes against humanity and violations of the laws and customs of war) against three victims, for aiding and abetting the acts of rape committed by his soldiers (again, as a crime against humanity as well as a violation of the laws and customs of war) and for raping and threatening to kill a witness.

The Trial Chamber adopted, *verbatim*, the first part of the *Furundžija* definition of rape[27]. Nonetheless, in respect to the second part, it considered necessary to conduct further research into the solutions found in common legal systems. Upon that research,

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[23] See ICTR, *Prosecutor v. Anto Furundzija* (Trial Chamber Judgement; case no. IT-95-17/1-T), 10 December 1998, para. 185, in *https://www.icty.org/x/cases/furundzija/tjug/en/*.

[24] *Ivi*, para. 174.

[25] *Ivi*, para. 271.

[26] See ICTY, *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* (Trial Chamber Judgement; case no. IT-96-21-T), 16 November 1998, para. 479, in *https://www.icty.org/x/cases/mucic/tjug/en/*.

[27] Rape includes sexual penetration of the annus or the vagina of the victim, or the penetration of the mouth of the victim by the penis of the perpetrator. See ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Chamber Judgment; case no. IT-96-23-T & IT-96-23/1-T), 22 February 2001, para. 437 *et seq.* in *https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf*.

they concluded that the common denominator that unified the different systems is the penalization of the violation of sexual autonomy: absence of consent or voluntary participation of the victim in the sexual act[28]. The judges identified three approaches to defining this element: a) some jurisdictions require that the sexual act occurs by force or threat of force[29]; b) a number of jurisdictions provide that rape should occur either by force or by circumstances that put the victim in a state of vulnerability or that rendered him/her incapable to resist the sexual attack[30]; c) in most common law systems, it is the absence of the victim's free and genuine consent to sexual penetration which is the defining feature of rape[31]. On that basis, the Trial Chamber defined rape as the sexual penetration of the annus or the vagina of the victim, or the penetration of the mouth by the penis of the perpetrator, where it occurs without the consent of the victim. The judges further qualified consent as the one given voluntarily, because of the victim's free will, assessed in the context of the surrounding circumstances[32].

During trial the prosecution had unsuccessfully submitted that, based on rule 96 of the ICTY Rules of Procedure and Evidence[33], lack of consent from the victim could not be considered an element of the crime that required to be proved (beyond the testimony of the victim). Rule 96 ICTY RPE states that consent shall not be allowed as a defence if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression.

3.4. The Gacumbitsi *Case*

The lack of normative clarity resulting in the jurisprudential debate on the subjective elements of rape was somehow resolved by the ICTR Appeals Chamber in *Gacumbitsi*. The debate described above saw, on one hand, the Chambers holding that lack of consent was an element of the crime of rape while, on the other hand, the prosecution insisted that lack of consent should not be considered an element of the crime.

Notwithstanding that the Appeals Chamber followed the reasoning of *Kunarac* (lack of consent is an element of the crime), they affirmed that, in practice, the matter was sorted because: «The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful

[28] *Ivi*, para. 440.
[29] *Ivi*, para. 443.
[30] *Ivi*, para. 446.
[31] *Ivi*, para. 453.
[32] *Ivi*, para. 460.
[33] See ICTY, *Rules of Procedure and Evidence*, 2015, in *https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf*.

consent is not possible»[34]. Moreover, the Appeals Chamber declared itself legally able to infer non-consent from background circumstances (for example, the prevailing violence, or the existence of a campaign of persecution against the victim's ethnic group).

Equally, said the Appeals Chamber, the Prosecution can prove knowledge by the perpetrator of the non-consensual nature of the rapport by establishing that the accused was aware of the prevalent coercive circumstances that undermined the possibility of genuine consent[35].

4. The ICC Statute and the Protection of Sexual and Reproductive Autonomy

4.1. The ICC Statute

The Statute of the ICC is much more precise regarding the definition of rape and sexual violence. Articles 7(g), 8.2(b)(xxii) and 8.2(e)(vi) of the ICC Statute criminalize rape, sexual slavery, enforced prostitution, forced pregnancy enforced sterilization and other forms of sexual violence of comparable gravity, when committed either as crimes against humanity (meaning in the context of a widespread or systematic attack directed against a civilian population) or war crimes (meaning in the context of conflict, be it internal or international).

Besides the provisions on rape and sexual violence that protect sexual autonomy in conflict, the ICC Statute introduces rules criminalizing attacks against the exercise of reproductive autonomy: forced pregnancy and enforced sterilization. Both crimes have been committed and charged in the past as crimes against humanity, as war crimes or as part of genocidal campaigns to change the ethnic composition of given populations. Nazis committed forced sterilization against Jewish and Roma people. The *Medical* case, for example, adjudicated by the post-Nuremberg American Tribunal under Control Council Law No. 10, dealt with forced sterilization conducted by Nazi medical doctors.[36] Fourty years later, during the 90's, thousands of women were victims of forced pregnancy in both Rwanda and the Former Yugoslavia as part of centralized policies to commit such crimes[37]. Forced sterilization has also been a feature of

[34] ICTR, *Silvestre Gacumbitsi v. The Prosecutor* (Appeal Chamber Judgement; case no. ICTR-2001-64-A), 7 July 2006, para. 155, in *https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-64/appeals-chamber-judgements/en/060707.pdf*.

[35] *Ivi*, para. 157.

[36] See *United States of America v. Karl Brandt et al*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law*, 1949, in *https://www.legal-tools.org/doc/c18557/pdf*. See also an interesting summary of the conduct of the trial in *https://nuremberg.law.harvard.edu/nmt_1_intro#indictments*

[37] See R. Grey, *The ICC's First "Forced Pregnancy" Case in Historical Perspective*, in *Journal of International Criminal Justice*, 15, 5, 2017, p. 905 ff.

conflicts like the Colombian civil war, or the terrorist campaign conducted by the Islamic State[38].

4.2. The ICC Elements of the Crimes

The ICC Elements of the Crimes is a document containing the definitions of the different elements of the offences falling under the material jurisdictions of the Court[39]. Therein, the ICC legislator defines the objective element of rape as the penetration of the body of either the victim or 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. This rather large definition of the material element of the crime allows even for the prosecution of a perpetrator that forces the victim to penetrate him or her (with any object or any part of the body).

In respect to the jurisprudential debate described *supra* on whether coercion or lack of consent should be the element required to prove the commission of sexual violence, the ICC legislators dealt with this matter in the following way: «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».

The footnote to this article of reads as follows: «[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced, or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6»[40].

4.3. The ICC Rules of Procedure and Evidence

The elements of the crimes need to be read in conjunction with the applicable ICC Rules of Procedure and Evidence. Rule 70 (Principles of evidence in cases of sexual violence) states that: «In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion

[38] See A. International, *Scarred bodies, hidden crimes*, London, 2004, p. 28 in https://www.amnesty.org/en/documents/amr23/040/2004/en/. See also NY Times, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control*, 2016, in *https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html*

[39] In *https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.*

[40] In *https://cilrap-lexsitus.org/elements-crime-digest/7-1.*

or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness».

From the joint reading of the Elements and the Rules, it is possible to appreciate that the ICC legislator identified and sanctioned a relation of cause-and-effect between coercion or coercive circumstances or lack of capacity, and the resulting lack of genuine consent, whereby when a sexual crime is committed in a coercive context, consent cannot be inferred. Consent has to be proved by the defence.

5. Prosecution of Sexual Violence Before the ICC

5.1. Rape

The Trial Chamber judgement in *Ongwen*[41] is the most updated and comprehensive discussion of the ICC law on sexual violence. Rape, whether as a crime against humanity or as a war crime, is thereby defined as the penetration of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim. To be criminally relevant the penetration must be performed in a coercive manner, in a coercive context or against a person that is incapable of giving genuine consent. As held in *Katanga*[42], and later reaffirmed in *Ntaganda*[43], the Trial Chamber in *Ongwen* held that once proven the coercive nature of the context, it was not necessary for the prosecution to further prove the victim's lack of consent. The Trial Chamber discussed coercion as follows: «Coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation or is committed together with other crimes»[44].

5.2. Sexual Slavery

[41] ICC, *The Prosecutor v. Dominic Ongwen*, cit., para. 2708, in *https://www.icc-cpi.int/court-record/icc-02/04-01/15-1762-red.*

[42] ICC, *The Prosecutor v. Germain Katanga* (Trial Chamber Judgement; case no. ICC-01/04-01/07), 7 March 2014, para. 965, in *https://www.legal-tools.org/doc/f74b4f/pdf.*

[43] ICC, *The Prosecutor v. Bosco Ntaganda* (Trial Chamber Judgement; case no. ICC-01/04-02/06), 8 July 2019, para. 934, in *https://www.legal-tools.org/doc/80578a/pdf.*

[44] ICC, *The Prosecutor v. Dominic Ongwen,* cit., para. 2710.

Following settled jurisprudence[45], the Trial Chamber took a clear position in that it considered sexual slavery a *species* of the *genus slavery*: sexual slavery, whether as a crime against humanity or war crime, is committed when the material elements of enslavement (the exercise of the attributes of ownership over a person: use, enjoyment, disposition) is fulfilled, and the perpetrator also caused the victim to engage in non-consensual acts of a sexual nature.

In respect to the definition of acts of sexual nature the Trial Chamber held that it includes rape but are not limited to it: «Accordingly, they do not need involve penetration or even physical contact. The term 'sexual' may refer to acts carried out through sexual means or by targeting sexuality. Whether an act is sexual in nature must be determined on a case-by-case basis, depending on the specific facts and circumstances of a given case»[46].

Trial Chamber VI in *Ntaganda* further established that the prohibition of sexual slavery has the same status of the prohibition of slavery under international law, namely *jus cogens*. The Chamber noted «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»[47].

5.3. Forced Prostitution

Forced prostitution in the context of conflict (either as a war crime or a crime against humanity) is defined by the ICC Statute as the subjection of the victim to acts

[45] *Milch Case*, Control Council Law No. 10 Tribunals, Vol VII, Judgement, page 29; *Ministries Case*, Control Council Law No. 10 Tribunals, Judgement, page. 794; *Krupp Case*, Control Council Law No. 10 Tribunals, Judgement, page 145; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, cit., para. 539 *et seq*; Judgement, *Kaing Gueak Eav aka 'Duch'*, Khmer Rouge Tribunal Appeals Chamber (2007) para. 342; Judgement, *Sesay et al*, SCSL Trial Chamber (2009) para. 199.

[46] ICC, *The Prosecutor v. Dominic Ongwen,* cit., para. 2716.

[47] Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *Ntaganda,* ICC Trial Chamber VI (2017) para. 51 in *https://www.icc-cpi.int/court-record/icc-01/04-02/06-1707*. See also Judgement, *Brima et al*, SCSL Trial Chamber (2007) para. 705: "slavery for the purpose of sexual abuse is a jus cogens prohibition in the same manner as slavery for the purpose of physical labour"; See also, *Final report submitted by Special Rapporteur Gay J. McDougall, Contemporary Forms of Slavery - Systematic rape, sexual slavery and slavery like practices during armed conflict*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fiftieth session, (1998) *https://www.refworld.org/docid/3b00f44114.html*, para. 30, stating that «[i]n all respects and in all circumstances, sexual slavery is slavery, and its prohibition is a jus cogens norm».

of sexual nature by force, taking advantage of coercive circumstances or the lack of capacity to genuinely consent, with the aim of getting a profit.

Although it was not mentioned in the statutes of either the *ad hoc* or the hybrid tribunals, forced prostitution has long been part of international humanitarian law: as mentioned *supra*, it was explicitly prohibited by article 27 of the IV Geneva Convention, which states that «[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault», and in article 76 (1) of Additional Protocol I which states that «[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault».

Despite not having been explicitly listed as a grave breach in article 147 of the IV Geneva Convention, based on an interpretation of that norm by the International Committee of the Red Cross, forced prostitution can be subsumed in the definition of "inhuman treatment"[48]. In addition, forced prostitution, as well as rape and other forms of sexual abuse, including sexual slavery, should also be read into the prohibitions against "torture" and «wilfully causing great suffering or serious injury to body or health» - all of which are explicitly included as grave breaches.

5.4. Forced Pregnancy

Forced pregnancy in the context of conflict (either as a war crime or a crime against humanity) is defined by the Elements as the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

Ongwen is the first case of forced pregnancy dealt with by the ICC[49]. The Trial Chamber in *Ongwen* recalled that negotiations were driven by the memory of the atrocities of the war in the Former Yugoslavia, where Bosnian women were raped and then unlawfully detained with the intent of changing the ethnic composition of their group of origin by giving birth to half-Serb children[50].

Based on an analysis of the *travaux préparatoire* of the ICC Statute, the judges further defined forced pregnancy as the confinement of a forcibly pregnant woman to carry out grave violations of international law. They later affirmed that «[t]he crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy»[51]. The

[48] See Commentary of 1958 to article 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, in *https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063*

[49] R. Grey, *op.cit.*

[50] ICC, *The Prosecutor v. Dominic Ongwen*, cit., para. 2718.

[51] *Ivi*, para. 2729.

judges further held that the criminalization of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family (to plan a family rather, we should add)[52].

The Trial Chamber identified three elements of the crime: a) unlawful confinement (material or objective element); b) of a woman forcibly made pregnant (material element); c) with the intent to affect the ethnic composition of a population or to commit other grave violations of international law (subjective or mental element).

The confinement should not have been the consequence of a legitimate decision from a legal authority (or more than said decision)[53].

In respect to the coercive nature of the pregnancy, the term "forcibly" introduced by the provision should be interpreted in the sense seen above: the woman should have been made pregnant either by force, or in the context of coercive circumstances or because of her incapacity to understand, meaning, lacking ability to give genuine consent. Moreover, the Trial Chamber in *Ongwen* held that the forcible conception could have occurred prior to or during the unlawful confinement, and the perpetrator need not have personally made the victim pregnant.

Finally, the legislator required the specific *mens rea* element that the crime be committed with the intent of either «affecting the ethnic composition of any population or carrying out other grave violations of international law». Regarding the second part of the proposition, examples of other grave violations of international law could be trafficking of human beings or medical experiments conducted on human beings. As an example, we can recall the crimes described in the so-called "Medical Case", *United States of America vs. Karl Brandt et al.*[54], where a unit of Nazi German medical doctors were accused and convicted of having conducted a series of macabre tests on prisoners such as: high-altitude experiments; malaria experiments; sterilization experiments; freezing experiments; bone, muscle, and nerve regeneration, and bone transplant experiments; typhus and other vaccines experiments; poison experiments; etc. These tragic tests resulted in death or serious bodily or mental harm of adults, children, new-borns, and twins.

5.5. Forced Sterilization

Forced sterilization, as well as forced pregnancy, sanctions attacks against the legally protected value "reproductive autonomy" in the context of conflict. It is criminalized as both genocide, crime against humanity and war crime. Forced

[52] *Ivi*, para. 2717.

[53] International Covenant on Civil and Political Rights, arts. 9 and 10, in *https://www.legal-tools.org/doc/2838f3/pdf*.

[54] *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law* 10, Vol. I (US Government Printing Office, 1949), in *https://www.legal-tools.org/doc/c18557/pdf*. See also *https://nuremberg.law.harvard.edu/nmt_1_intro#indictments*.

sterilization occurs when the perpetrator deprived one or more persons, be them male or female, of biological reproductive capacity on a permanent basis, in circumstances which were neither justified by medical reasons, nor carried out with the genuine consent of the victim.

Forced sterilization has been a tragic feature in conflicts as seen in the Nazi Germany, in Rwanda, in the former Yugoslavia, as well as in other more recent conflicts. As referred above, the post-Nuremberg Medical Case, dealt with sterilization tests conducted on prisoners of war. From 1941 to 1945 a series of experiments were conducted at several concentration camps, with the aim of developing a method allowing the sterilization of millions of people, in the most effective way, in the shortest period. Nazi doctors used X-rays, surgery, and a number of different drugs, resulting in death, sterilization and serious bodily and mental harm[55].

5.6. Other Forms of Sexual Violence

The ICC legislator included a residual category that allows for the prosecution of other forms of sexual violence of gravity comparable to the rest of the crimes described in article 7.1(g).

The perpetrator is responsible for the commission of acts of sexual nature against the victim or, for engaging the victims in acts of sexual nature, by force, in the context of coercive circumstances or taking advantage of the incapacity of the victim to genuinely consent to the acts.

Trial Chambers have held that the sexual nature of a given act charged as "other form of sexual violence" has to be assessed on a case-by-case basis. The ICC Prosecutor in *Kenyatta* charged the accused with sexual violence as a crime against humanity committed against several men that had been subjected to forced circumcision or amputation of their penises. In one of the events under investigation «Luo men were 'rounded up and forcefully circumcised using pangas and broken bottles'»[56]. During the hearing on confirmation of charges the prosecution affirmed that «these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their societies and were designed to destroy their masculinities»[57]. On that basis, the Trial Chamber held that not every act of violence targeting parts of the body associated with sexual intercourse should be considered acts of sexual violence, that the sexual nature of the acts had to be assessed

[55] *Ibidem*.

[56] ICC, *The Prosecutor v. Francis Kirimi Muthaura Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Pre-Trial Chamber, Decision on the confirmation of charges pursuant to articles 61(7) (a) and (b) of the Rules of Procedure and Evidence; case no. ICC-01/09-02/11), 23 January 2012, para. 262, in *https://cilrap-lexsitus.org/case-law/7-1-g-6/4972c0*

[57] *Ivi*, para 264.

on a case-by-case basis, and that, in their opinion, the evidence showed that the acts were, rather, motivated by ethnic prejudice and, hence, they did not qualify as forms of sexual violence within the meaning of article 7.1(g) of the ICC Statute[58].

The provision requires a rather high threshold of gravity to criminalize the commission of acts of sexual violence. It is the same threshold used by the legislator in the case of article 7.1(k) of the ICC Statute, namely «[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health».

Whether a given set of attacks of sexual nature reach the threshold of gravity allowing a prosecution under 7.1(k) *in fine*, «any other form of sexual violence», is a question of fact that must be assessed on a case-by-case basis.

6. Conclusion

Despite the universal prevalence of sexual violence in conflict the criminalization of rape and acts of sexual violence was not a common and clear feature of the main legal sources of international criminal law (conventions and criminal statutes). It is rather recently, only after the creation of the *ad hoc* international criminal tribunals, that serious discussions took place on the material and subjective elements of sexual crimes at the international level.

Moreover, the nature of the legally protected value by the criminalization of sexual violence has transitioned: from the protection of the family honour (IV Convention respecting the Laws and Customs of War on Land, adopted in The Hague,1907), to the protection of sexual autonomy of the victim. In addition, the ICC Statute criminalized attacks against the legally protected value reproductive autonomy: forced pregnancy and forced sterilization.

The debates held by the chambers of the ICTY and the ICTR have been instrumental in defining both the material and the mental elements of rape and sexual violence and whether lack of consent is to be proved. These debates have led to the adoption of more precise standards by the ICC, particularly in respect to the need to prove the coercive nature of the criminal act and how the prosecution can address that requirement.

As seen, Articles 7 and 8 of the ICC Statute, read in conjunction with the Elements of the Crimes and the applicable Rules of Procedure and Evidence, provide clarity and specificity in respect to other formulations adopted by the statutes of previous international tribunals and international conventions, highlighting crimes against women and men that are particularly heinous but had not always been considered in their true gravity.

[58] *Ivi*, para. 265.

Furthermore, the double configurability of sexual crimes as crimes against humanity or war crimes widens the possibilities to successfully prosecute perpetrators under the material jurisdiction of the Court. This is particularly relevant in, for example, the current conflict in Ukraine as, based on the last report by the Organization for Security and Cooperation in Europe, rape and other forms of sexual violence are being systematically perpetrated as both: crimes against humanity and war crimes[59].

As stated by the current UN Special Representative for Sexual Violence in Conflict, rape and sexual violence are increasing, tragic common features in every conflict around the world[60].

States should commit to the effective prevention of the commission of sexual violence by enforcing applicable rules of international humanitarian law as well as by building the capacity of their security forces and their military and civilian systems of administration of justice.

On the other hand, States as well as international criminal courts should employ all their available means to conduct effective investigations into sexual crimes. The jurisprudence of the international tribunals has provided clearer legal tools. They now need to be effectively used.

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Abstract: Sexual violence in conflict has been a tragic, regular, ubiquitous feature since the beginning of times. Despite this, the rather slow evolution of the codification of sexual violence crimes has only been given significant impulse by the jurisprudence of the *ad hoc* international tribunals. A very important role in this evolution has also been played by the adoption of the ICC Statute, which has taken steps at crystallizing and codifying the elements of the crimes. In addition, the ICC Statute has innovated by codifying crimes of reproductive violence: forced pregnancy and forced sterilization. This paper aims at briefly describing the evolution of the codification and description of the elements of sexual crimes committed in the context of conflict, particularly during the period that goes from the creation of the *ad hoc* international criminal tribunals until the judgement issued by the ICC against Dominic Ongwen.

Abstract: La violenza sessuale nei conflitti è una caratteristica tragica, ricorrente e presente da sempre, sin dall'antichità. Nonostante ciò, vi è stata un'evoluzione lenta

[59] W. Benedek - V. Bilková - M. Sassòli, *Report on violations of International Humanitarian and Human rights law, war crimes and crimes against humanity committed in Ukraine since 24 February 2022*, ODIHIR.GAL/26/22/Rev.1, 2022, in *https://www.osce.org/odihr/515868*

[60] See statement of Ms. Patten before the Security Council, dated 13 April 2022, on the occasion of the presentation of her report, in *https://reliefweb.int/report/world/statement-srsg-svc-pramila-patten-security-council-open-debate-conflict-related-1*

nella codificazione dei crimini di violenza sessuale che ha ricevuto un impulso significativo solo dalla giurisprudenza dei tribunali penali internazionali *ad hoc*. Un ruolo molto importante in questa evoluzione è stato svolto anche grazie all'adozione dello Statuto della Corte penale internazionale, che ha compiuto passi per cristallizzare e codificare gli elementi dei crimini. Inoltre, lo Statuto della Corte penale internazionale ha innovato codificando i crimini di violenza riproduttiva: gravidanza forzata e sterilizzazione forzata. Il presente lavoro si propone di descrivere brevemente l'evoluzione della codificazione e della descrizione degli elementi dei crimini sessuali commessi nel contesto di un conflitto, in particolare nel periodo che va dalla creazione dei tribunali penali internazionali *ad hoc* fino alla sentenza emessa dalla CPI contro Dominic Ongwen

Keywords: sexual violence – armed conflicts – lack of consent – coercive circumstances – International Criminal Court.

Parole Chiave: Violenza sessuale – conflitti armati – mancanza del consenso – circostanze coercitive – Corte penale internazionale.

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RIVISTA DI
DIRITTI COMPARATI

Unmasking Power Dynamics: The Role of Sound Legal Narratives in the *Case of Espinoza Gonzáles v. Perú* *

Graziella Romeo

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1. Sound Narratives and Bad Narratives

The war against Ukraine has again brought to the fore the systematic use of sexual violence against women in armed conflicts. It further exposes the depth of a subculture of ferocity that targets women's bodies to brutalise them and, through them, the entire society to which they belong.

Human rights law developed principles and doctrines to conceptualise violence against women in both armed conflict and context of generalized violence as a form of gender discrimination that deserves to be addressed and repaired with specific legal instruments. However, the path toward recognising gender violence as a legal and cultural problem is not straightforward and still needs to be completed. It is characterised by the confrontations of opposing stories about what exactly happens when, during armed conflicts, a state or its officials decide to target women. Therefore, story elements become crucial to understanding the root of violence, connecting it to the cultural context in which it takes place and finding the appropriate remedies. As for any other crime, in sexual violence cases, story elements are essential to building proof, questioning a given factual reconstruction and understanding the context of specific behaviours. Plaintiffs and defendants are engaged in translating their stories into the rhetorical forms authorised by law.[1] Their narrations play a role in the judges'

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[1] R.A. Posner, *Legal narratology*, in *University of Chicago Law Review,* 64, 1997, p. 737.

reasoning. Moreover, judges develop their narrative by elaborating on the parties' accounts of the case's circumstances.

Story elements can be isolated as facts only to clarify the circumstances to which a legal norm will be applied if the separation between fact and its juridical qualification (law) is the logical presupposition of legal interpretation.[2] Story elements then condition the selection of the applicable law and guide its interpretation to answer the problems raised by the case's particular circumstances. However, when one looks at courts' argumentation, story elements can also be understood as contributing to a *narrative* – that is, to a sequence of events unfolding in time that the narrator connects in such a way as to convey a coherent account. This article deals with story elements as parts of narratives contributing to the solution of a legal issue.

Legal narratives are not neutral. They are influenced by prejudices, biases, and emotions. At the same time, legal narratives can incorporate a deep understanding of the social and cultural contexts in which violence against women takes place. In that sense, legal narratives can contribute to unmasking biases, misunderstandings, and false representations of facts. In other words, "sound narratives", grounded in data and the ability to tune in to the victims' experience, can be opposed to "bad narratives" based on prejudices and subcultural conceptions.

Feminist theories have explored the relevance of cultural preconceptions in establishing and perpetuating discrimination.[3] They have equally pointed out the weight of cultural reactions to gender discrimination and subordination. What feminist theorists suggest is that our understanding of the world impacts our strategies of coupling with the complexity of the social, thus conditioning the way we interact, make decisions for ourselves and even conceptualise ourselves in the social space.[4] Gender stereotypes thus are the product of our understandings, which can be decisively influenced by "epistemic injustices" – that is, by misconceptions driven by a partial or manipulated access to the knowledge relevant to comprehending our social interactions.[5] If this is true, then legal narratives can expose the roots of gender stereotypes by incorporating a thick understanding of the social context in which sexual violence matures and is perpetrated.

Against this backdrop, the article shall argue that a judge's ability to unmask stereotypical narratives and develop sound ones is critical for the correctness of the argumentation in cases of sexual violence against women. The paper shall develop the argument by explaining in what sense story elements create legal narratives relevant for argumentation in cases of gender discrimination (para. 2). It will then highlight the use

[2] F. Modugno, *Interpretazione giuridica*, Padova, 2012, p. 84.

[3] C. Saas, *L'appréhension des violences sexuelles par le droit ou la reproduction des stéréotypes de genre par les acteurs pénaux*, in *La Revue des droits de l'homme*, 8, 2015, p. 1.

[4] M. Garcia, *La conversation des sexes*, Torino, 2022, p. 190.

[5] *Ivi*, p. 195.

of legal narratives in the pivotal judgment *Case of Espinoza Gonzáles v. Perú*[6] adopted by the Inter-American Court of Human Rights (IACtHR) in 2014 (para. 3). It will focus on the consequences of those legal narratives on the qualification of conducts and identification of remedies under international law (paras. 4 and 5) Finally, the paper will offer some conclusions on the relevance of narratives in legal argumentation concerning cases of sexual violence against women (para. 6).

2. Legal Narratives and Discriminations

Legal scholarship has explored the meaning and power of "legal narratives" at length.[7] Some scholars have doubted that narratives should play a role in legal argumentation, if they include biases or endanger the neutrality of the law.[8] According to such a view, neutrality commands a judicial approach grounded in an exercise of legal reason that separates facts and their human understanding from principled thinking.[9] In contrast, valuing facts and circumstances would lead to an interpretation of the law guided by social, emotional, or emphatic constructions rather than the rigorous logic of legal reasoning.

Critiques of legal narratology also come from a legal feminist perspective. Catherine MacKinnon argues that while it is true that narratives can break stereotypes, stereotypes are also embedded in narratives. In her view, the interpretation of the law should trust data more than narratives, avoiding subjective representation of facts because the latter always carries the risk of an unfaithful depiction of the political reality of a given problem.[10]

Marta Nussbaum has contributed to the debate by challenging the idea that narratives are inherently problematic. She argues that narratives can be sound when grounded in an empathic understanding of the experience of people. Nussbaum claims

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[6] IACtHR, *Case of Espinoza González v. Perú*, 20 November 2014, in *https://www.corteidh.or.cr/docs/casos/articulos/seriec_289_esp.pdf*.

[7] See U. Andersson - M. Edgren - L. Karlsson - G. Nilsson, *Rape Narratives in Motion*, Cham, 2019.

[8] P. Gewirtz, *Introduction*, in P. Brooks - P. Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law*, New Heaven, 1996, p. 6 ff. who challenge legal narratology for its lack of typicality, that is of a clear identification of factors and elements contributing to a specific development of facts. The author maintains that legal narratives cannot be used to assess the appropriateness of a given policy choice because they do not rely on accurate data analysis.

[9] See, for example, the classical work of H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Harvard Law Review*, 73, 1959, p. 1, who pioneered studies on neutrality in the Supreme Court's decision-making processes. Wechsler was especially targeting the Court and Chief Justice Earl Warren's activist jurisprudence, largely based on a factual analysis of the circumstances in which the law was being applied. See also G. Gee - G. Webber, *Rationalism, in Public Law*, in *Modern Law Review*, 76, 2013, p. 708.

[10] C. MacKinnon, *Law's Stories as Reality and Politics*, in P. Brooks - P. Gewirtz (eds.), *Law's Stories*, cit., p. 235.

that neutrality in practical reason does not require an emotional (subjective) distance from the materiality of the facts of life.

In fact, Nussbaum maintains that emotions, notably compassion, play an important role in practical reason by helping us identify ethical problems and articulate effective responses.[11] Such an approach is valuable in judicial reasoning concerning problems of justice and equality. By looking at case law on discrimination on the grounds of sex or race, Nussbaum concludes that judges' «determination to get close to the experience of people in positions of inequality»[12] is a decisive step in the «correct solution of the case».[13] In her view, far from suffering from epistemological inadequacies, legal narratives constitute an essential element of the correctness of practical reasoning in legal matters. Narratives expose asymmetries in the human meaning of situations regulated by law, thus clarifying the extent to which a given solution addresses equality and justice concerns.

Most importantly, empathic narratives put judges in the position of understanding human experience in its interaction with the law, uncovering the roots of inequalities that the law can redress. Nussbaum then compels judges to use their imagination to put themselves in empathic contact with the victim of discrimination. She provides an example to clarify how empathic approach matters in the outcome of a case.

In *Loving v. Virginia*, the US Supreme Court declared unconstitutional a Commonwealth of Virginia statute prohibiting interracial marriages[14]. The state argument insisted that the law impacted white and black people equally by providing the same sentence in cases of violation of the anti-miscegenation provision. The Court dismissed the state defence, rejecting the notion that the mere «equal application» of a statute containing racial classifications is enough to justify the discrimination it contains. Writing for the majority, Chief Justice Earl Warren maintained that: «The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures designed to maintain White Supremacy».[15]

While the law treated white and black individuals equally, it was motivated by an invidious logic, thus having a particularly hideous impact on the member of the couple belonging to a racial minority. The result had not been reached by seeking the neutrality of legal reasoning. Instead, the Court looked at the history of segregation and social stigma characterising the life of African Americans in the US. It linked anti-miscegenation laws to the white supremacy subculture, thus contextualising them in the concrete circumstances of the black population's life experience. Such

[11] M. Nussbaum, *Narratives of Hierarchy – Loving v. Virginia and the Literary Imagination*, in *Quinnipiac Law Review*, 17, 1997, p. 337.

[12] *Ivi*, p. 348.

[13] *Ibidem*.

[14] US Supreme Court, *Loving v. Virginia*, 388 US 1 (1967).

[15] *Ivi*, p. 12.

contextualisation exposed the discriminatory nature of a law formally directed at both races.

Nussbaum's analysis can be applied to a more recent case. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the US Supreme Court addressed the problem of pay discrimination based on gender.[16] Lilly Ledbetter was an employee at Goodyear. During her years at the factory as a salaried worker, raises were given and denied based partly on evaluations and recommendations regarding worker performance. From 1979 to 1981, Ledbetter received a series of negative evaluations, which she later claimed were discriminatory. Although her subsequent evaluations were good, she never reached the level of male employees.

In March 1998, Ledbetter filed a sexual discrimination suit against the Goodyear Tire Company, claiming a violation of Title VII Civil Rights Act 1964, which prohibits discrimination by employers based on race, colour, religion, sex, or national origin. The statute, however, includes a procedural barrier: a charge can be filed within 180 days after the alleged unlawful employment practice occurred. For these reasons, the Eleventh Circuit and later the Supreme Court dismissed Ledbetter's claim.

The confrontation of arguments in the Supreme Court's opinions is particularly interesting. The majority interpreted Title VII in the sense that it allows employees to sue their employers over race or gender pay discrimination when the actual intentional discrimination occurred within the time limit of 180 days. By following precedent, the Court also rejected Ledbetter's argument that each check was an act of discrimination because the proof had not been reached on the existence of discriminatory intent.

Justice Ginsburg's dissenting opinion offered a different narrative. In her dissent, she unmasked the formality of the majority's reasoning by arguing: «The Court's insistence on immediate contest overlooks common characteristics of pays discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen … particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves».[17]

In other words, the time limit inadequately addressed women's situation because the circumstances of gender pay discrimination are difficult to prove if one considers a small portion of the employer's life. Justice Ginsburg pointed to the facts to stress that the time limit rule substantially burdened people in a non-traditional environment, where discrimination can be concealed in multiple episodes, thus escaping the legislative scheme. Justice Ginsburg, however, added something even more relevant to

[16] US Supreme Court, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007).

[17] US Supreme Court, *Ledbetter v. Goodyear Tire & Rubber Co.*, above fn. 16, (Ginsburg, J., Dissenting).

her argument. By blindly applying the time limit rule, the majority of the Court erred in identifying the conduct (i.e. discretionary decisions on small raises of salary) and its legal qualification as an act of discrimination perpetrated over time.[18] The unlawful employment practice should have been identified with the last check received by Mrs Ledbetter, which resulted from a long series of discrete acts of discrimination.

The two cases exemplify that story elements can be translated into a narrative; they can be connected as they unfold in time to explain how the law interacts with the circumstances of individuals' lives. By doing so, judges weave facts so that the reader makes sense of the relation between the different elements of the story. In both cases, legal narratives form elements of the reasoning on the assumption that their inclusion in the argumentation is essential to the correctness of the legal solution offered by the judge.

3. The Use of Legal Narratives in the Case of Espinoza Gonzáles v. Perú *(IACtHR)*

The epistemological value of legal narratives can be appreciated in the leading case of *Espinoza Gonzáles v. Perú* concerning sexual violence against women in times of armed conflicts[19]. The IACtHR delivered the judgment in 2014, almost twenty years after what happened to Mrs Espinoza. To understand the decision, let us consider for a moment the context of the case.

During the 1990s, Peru faced an internal conflict characterised by a climate of generalised violence perpetrated by state officials. In this context, the practices of torture, sexual violence and rape were systematically used in the fight against subversion. Moreover, the anti-terrorist legislation adopted in 1992 affected the institutionalisation of those practices, thus favouring the impunity of perpetrators.[20]

In *Espinoza*, the IACtHR addressed the case of Gladys Espinoza Gonzáles, a Peruvian woman abducted with her partner by the Peruvian intelligence services (*División de Investigación de Secuestros*, DIVISE) in conjunction with the anti-terrorism division (*Dirección Nacional Contra el Terrorismo*, DINCOTE) in 1993 upon suspicion of being a member of a terrorist organisation During her captivity, Mrs Espinoza was

[18] Some scholars have criticised the judgment because of the detachment from the reality of workers' life that the majority's opinion shows. See G. Bindu, *Ledbetter v. Goodyear: A Court Out of Touch with the Realities of the American Workplace*, in *Temple Political & Civil Rights Law Review*, 18, 2008, p. 253, and P.A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, in *Journal of College and University Law*, 34, 2008, p. 557.

[19] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6.

[20] Legal scholars have discussed at length how sexual violence in armed conflicts (or in the context of generalised violence) has been perpetrated against women to treat them as properties and spoils of men, with a widespread sense of impunity: see N. Dynai-Mhango, *The Jus Cogens Nature of the Prohibition of Sexual Violence against Women in Armed Conflicts and State Responsibility*, in *Stellenbosch Law Review*, 27, 2016, p. 114.

tortured and repeatedly raped to obtain information on the activities of the alleged terrorist group and her partner.

After her abduction, Mrs Espinoza was detained illegally for some weeks until a trial was arranged under the rules of anti-terrorism legislation, sentencing her to life imprisonment. Ten years later, the Peruvian Supreme Court declared the judgment vacated because of several violations of fair trial guarantees. At the same time, another criminal proceeding was initiated following new rules of procedure as the political situation in Peru changed, and the state of emergency ended. Mrs Espinoza was sentenced again, and a long series of judicial appeals at different stages of detention in state prisons followed.

The case finally reached the IACtHR after about ten years of criminal proceedings against Mrs Espinoza and numerous reports of violations of her human rights. She claimed the violation of several rights, protected by both the American Convention of Human Rights (ACHR) and the C*onvención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer (Convención de Belém do Pará)*. The list of violations included the right to personal freedom (article 7 ACHR), personal integrity (article 5.1 ACHR), protection of honour and dignity (article 11 ACHR), the right not to be subjected to torture (article 5.2 ACHR), the right not to suffer from sexual violence (articles 3 and 4 Convención de Belém do Pará) and the obligation not to discriminate against women (article 6 Convención de Belém do Pará).

The IACtHR meticulously reviewed each alleged infringement by interpreting the ACHR in conjunction with the Convención de Belém do Pará. Eventually, the Court found Peru responsible for all the contested violations by articulating a twofold argument. First, the rights whose violation had been claimed are absolute and belong to the *jus cogens*. Consequently, their infringement may constitute a crime against humanity, for which international law requires prosecution.[21] Second, a situation of emergency, such as the one declared in Peru at the time of the facts, cannot justify the limitation of those rights, whose absolute nature implies that neither derogation nor limitation of their essential content can be validated.[22]

The use of a harmonising interpretative technique, whereby the content of either Convention article is read considering the other, allowed the Court to address the issues of the case from a gender perspective. Such an approach was reflected in the analysis concerning the violation of the right not to be subjected to sexual violence and the obligation not to discriminate against women.

The Court started by examining the obligation not to discriminate stemming from the ACHR. It then moved to the corresponding obligation in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Court clarified that discrimination against women «includes violence based on sex, that is, violence directed against women [i] because is a woman or [ii] that affects her

[21] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6, para. 233.
[22] *Ivi*, para. 141.

disproportionately».[23] Finally, the Inter-American judges cited the preamble of the Convención de Belém do Pará, which states that gender violence is «*una manifestación de las relaciones de poder históricamente desiguales entre mujeres y hombres*».[24]

In the Court's view, sexual violence has a discriminatory purpose because rape is perpetrated against women to affirm men's position of power and domination over their free will. Power dynamics of this kind may occur even in the context of generalised violence, where rape is systematic as an instrument of aggression directed against men and women. Even in these circumstances, the crime is connotated with a discriminatory aim against women, who are targeted because of their sex.

The proper qualification of the criminal conduct then is not sexual violence but gender-based sexual violence, which implies the violation of the right to personal integrity, honour and dignity, prohibition of torture, prohibition of sexual violence and prohibition of discrimination against women.

The decision methodically cited international legal instruments protecting the rights concerned and built a harmonising argument that logically derives the qualification of gender-based sexual violence from the existence of a discriminatory purpose. Nevertheless, when analysing the elements that support the existence of such a purpose, the Court's reasoning did not proceed with logical deductions. The Court needed to deflect attention from the law toward Peru's broader social and political context to understand how state officials perpetrated the practice of sexual violence against terrorist suspects and those who opposed the regime.

According to the Court, the practice of rape was systematic. It was a weapon to weaken, humiliate and inflict suffering on opponents with the final intention to "punish" them for their actions and reluctance to collaborate. Sexual assaults were intended to create an atmosphere of fear that would have discouraged other people from taking political action. The generalised and known practice of sexual violence not only inflicted individual harm but also weakened the state's social fabric. Indeed, the threat of rape, with its mental, physical and social consequences, was intended to keep women away from any political engagement.[25]

In that respect, the Court specified that rape is a particularly severe trauma for women. This experience is not alleviated by time passing and leaves permanent psychological and social consequences.[26] Moreover, the existence of an internal armed conflict between the state and allegedly subversive organisations does not provide state officials with any reason to use inflictive measures. Likewise, it does not imply that sexual violence can be interpreted as a predictable, though dreadful, side effect of the

[23] *Ibidem*.

[24] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6, para. 190.

[25] *Ivi*, paras. 225 and 226. See D.S. Medawatte, *Conflict-Related Sexual Violence: Patriarchy's Bugle Call*, in *Georgetown Journal of Gender & Law*, 21, 2020, pp. 671 and 688, who argues that «Identifying that structural, societal, and contextual discrimination against women is prevalent in society helps situate Conflict-Related Sexual Violence within the larger schema of patriarchal condescension against women».

[26] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6 para. 193.

emergency. On the contrary, the symbolic meaning of rapes is not only connected to the situation of conflicts *per se* but also magnifies deeper cultural oppression against women. The criminal actions of the Peruvian security apparatus were not isolated but perpetrated in a context characterised by historical inequality between men and women. Therefore, the repeated infliction of sexual violence on Mrs Espinoza should be framed as a manifestation of intentional aggression against a woman who dared to participate in political activities and, therefore, challenge men's place in society.

After describing the sociocultural context, the Court explained how it played out in the case of Mrs Espinoza. The Court mentioned that she was medically assisted with considerable delay when she was brought to a male doctor and asked to undress in front of agents, with no respect for her dignity, honour, and privacy. She was not assisted by specialised personnel in any detention and prosecution stages. Instead, she was confronted mainly by males unprepared to understand and manage the physical and mental trauma of repeated sexual violence. Moreover, when she was finally allowed to ask for *habeas corpus* and, later, challenge the grounds of her detention, Mrs Espinoza was not put in the condition to deliver her accounts of facts in a safe and protected manner.

In addition, the Court highlighted that on several occasions in the long history of Mrs Espinoza's trials, expert witnesses depicted her personality as histrionic and affected by dissociation.[27] Sometimes these testimonies were part of a strategy to challenge her reliability as a witness. More generally, they were an expression of a subcultural prejudice according to which women suspected of involvement in criminal activities must be manipulative, wicked, and untrustworthy.[28] The Court mentioned that court expert witnesses maintain that such a narrative is often offered in cases of women harassed while in custody to justify perpetrators and lift their responsibility by targeting the woman and her evil nature.[29] The IACtHR then read the reference to a histrionic and disturbed personality as an indicator of the endurance of narratives depicting women as unreliable, inclined to use seduction to obtain benefits and then deserving of punishment[30]

All those circumstances proved that rape was systematically perpetrated as a manifestation of a culture of oppression against women that aimed to marginalise their social and political existence. The targeting of women was also functional to send a

[27] *Ivi*, para. 271.
[28] *Ibidem*.
[29] *Ivi*, para. 272.
[30] The existence and endurance of such narrative is signalled by the so-called rape shield laws designed to correct the ingrained association of women's credibility and personality and sexual behaviour. Rape shield laws have been passed over the years in the US, preventing victims from having their testimony scrutinised and credibility as witnesses challenged: see K.C. Swiss, *Confined to a Narrative: Approaching Rape Shield Laws through Legal Narratology*, in *Washington University Jurisprudence Review*, 6, 2014, p. 397; p. 399.

message to the society since the symbolism of violence against women reverberated on the entire population thus weakening its potential civic reaction.

Ultimately, the Court's judgment offered a narrative of the facts that provided a sound justification for the final decision, namely Peru's responsibility for infringement of state obligations to prevent, prosecute and punish sexual violence. However, at a closer look, one finds that the narrative helped the judges identify and qualify the *kind* of violation perpetrated by state officials as gender based. The description of the circumstances of the repeated rapes was not separated from the contextualisation of actions, words, and practices in the broader picture of a male-dominated environment driven by a culture of oppression against women. In doing so, the Court chose the victim's point of view.

Two elements can further clarify the relevance of such a narrative to develop the Court's argumentation. First, the judges recognised that male Peruvian agents perpetrated sexual violence against men as a form of torture designed to obtain information and create an atmosphere of generalised fear. Second, they clarified that Mrs Espinoza's testimony highlighted that the personal experience in a situation of violence is one of being a target for aggression first and foremost *because* of her sex. Therefore, even if the security forces' practice of sexual violence in Peru was widespread for torturing both male and female opponents, such practice was aimed at women. Oppressing them was a way to restore the unequal balance of power that women challenged by engaging in political action.[31]

4. Un-Stereotyping Sexual Violence Against Women

Espinoza is an example of legal narratives used to unmask gender discrimination in the practice of systematic sexual violence against women in the context of internal armed conflict. By elaborating a narrative whereby rapes are symbolic means to humiliate and punish women for their opinions or political actions, the Court exposed the logic of oppression by looking at the historical power dynamics constituting the root of sexual violence. The Court then pinpointed the subculture of those who perpetrated the violence by subjugating women's personal sphere of autonomy and choice.

This is a far cry from those approaches that looked at the women who suffered from sexual violence as casualties of war or armed conflicts, doomed to a destiny of social stigma.[32] In contrast to such approaches, the reasoning in *Espinoza* removes

[31] Some scholars argue that empirical evidence shows that women are affected by armed conflicts in ways that men are not: see H. Charlesworth, *Feminist Methods in International Law*, in *American Journal of International Law*, 93, 1999, p. 379; p. 385.

[32] C. Chinkin, *Rape and Sexual Abuse of Women in International Law*, in *European Journal of International Law*, 5, 1994, p. 326; pp. 330 ff. See also G. Romeo, *La violenza di genere durante la liberazione come "questione sociale": una prospettiva costituzionale*, in B. Pezzini - A. Lorenzetti (eds.), *70 Anni dopo tra uguaglianza e*

stereotypes surrounding sexual violence against women perpetrated in the context of armed conflicts in two senses. First, systematic rapes are not considered *casually* connected to the emergency; instead, they are *causally* linked with conflicts. They are part of a strategy to humiliate and weaken women because of their sex. Second, women are pictured as unjustly wronged individuals with the right to adequate and timely remedies rather than powerless victims of male oppression.[33]

Espinoza is a turn in legal narratives concerning sexual aggressions against women in armed conflicts. Some recent examples clarify this point.

In the early 2000s, a significant number of Italian women victims of sexual violence during the Second World War requested access to the legislative scheme providing for pecuniary measures in favour of victims of war, including women who suffered sexual violence.[34] Some women requested compensation for the first time; the majority sought continuation or upgrading of an already existing pension treatment. The National Institute for Social Security (*Istituto Nazionale per la Previdenza Sociale*) had terminated several pensions' supply because proof of physical impairments no longer existed due to the time passed since the events occurred. Therefore, the National Institute denied or revoked the social welfare benefit on several occasions. At this point, the claimants appealed denials in front of the Court of Auditors (*Corte dei conti*) only to be confronted with the same argument: the right to claim damages must be grounded in the existence of a physical harm associated with the sexual aggression.[35]

The Court's interpretation is based on Italian legislation passed in the early 1950s to address the situation of the Italian population who faced personal, social, and economic consequences after the war. The law, however, connected social benefits to the proof of a physical injury directly linked to the rape. This legislation mirrors the

differenza, Torino, 2019, p. 406; and G. Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, in *International Review of the Red Cross*, 96, 2014, p. 503, who argues that for a long time both international humanitarian law and human rights law have been unprepared to address the problem of sexual violence against women during armed conflicts, thus leaving the victims with a deep sense of shame and helpless in the absence of effective remedies and vindication.

[33] See K. Engle, *Judging Sex in War*, in *Michigan Law Review*, 106, 2008, p. 941, who claims that the narrative of women as powerless victims of men's aggression has dominated the debate in international law, implicitly considering women who have been raped as doomed to a destiny of subjugation and social stigma. See also Vincent Bernard - H. Durham, *Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle*, in *International Review of the Red Cross*, 96, 2014, pp. 427 and 428, explaining that for a long time, cases of sexual violence against women in armed conflict were not reported out of shame or difficulties denouncing or prosecuting them.

[34] See article 10, Law no. 648 of 1950, which establishes pension treatments for those who have suffered physical injuries because of the armed conflict. The category includes both individuals who have been permanently harmed and those who suffered temporary consequences preventing them from working due to an action casually connected to the armed conflict. See also Law no. 313 of 1968 and decree the 23 of December 1978, no. 915.

[35] Dec. No. 336/2004, 142/2004, 143/2005 and 155/2005.

lack of awareness of the broader social and personal consequences of sexual violence in armed conflicts.

Interestingly, the constitutional precedent has not changed the situation. In 1986, the Italian Constitutional Court finally declared the law unconstitutional as it did not include the moral and existential damages of victims of sexual violence in the compensatory scheme. According to the Court, the consequences of such a hideous crime are long-lasting, irrespective of the concurrence of a physical injury.

In its decisions, however, the Court of Auditors has consistently ruled out the application of the constitutional judgments about already exhausted legal situations, thus barring women from seeking the restoration of a treatment terminated because of physical recovery from the injury. Similarly, upgrading such treatment to consider moral and existential damages has been denied. As a result, several women victims of sexual aggression during the Second World War are excluded from accessing a pecuniary remedy.[36]

By carefully reading the Court of Auditors' decisions, one realises they are based on a particular understanding of sexual violence in armed conflicts that significantly departs from the IACtHR's conclusions while mirroring the Italian legislative scheme. Sexual violence is viewed as an accident of war, which justifies most state reparatory measures, such as pensions. In that sense, a woman who has suffered rape receives the same legal treatment as someone who has been casually injured in the context of warfare.

In a different historical context, the Bosnian Constitutional Court, in a decision rendered in 2013, excluded the award of moral, biological, and existential damages to a woman who claimed a member of Serbian occupying forces had raped her during the conflict in former Yugoslavia.[37] The Constitutional Court maintained that a statute of limitations barred the prosecution of the crime. Consequently, any claim for non-pecuniary damages against legal entities filed after five years since the injured party learned about the damage and the identity of the person who caused it was time-barred. Domestic judges considered it irrelevant that it was challenging (if not impossible) for a victim of rape to claim her rights during the first post-war years when political instability and fear of reprisals from public institutions rendered the resort to judicial remedies substantially ineffective.

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[36] Some of the victims lodged a claim in front of the European Court of Human Rights (ECtHR) seeking damages for violation of article 6 (fair trial) and article 13 (effective remedy) of the European Convention of Human Rights. Although the ECtHR declared itself to be «sympathetic to the applicants for their experience and the perceived injustice they suffered», it dismissed the case as inadmissible and ill-founded because the claims were based on an internal conflict of jurisprudence to be solved by national authorities: *Sepe and others v. Italy*, 16 September 2014, application no. 36167/07. See G. Romeo, *op cit.*, p. 419.

[37] Constitutional Court of Bosnia and Herzegovina, Decision N. AP-3111/the 09 of December - the 23 of December 2013, *Hamza Rekic v. RS*.

International bodies seem keener to look at the situation of victims. The UN Human Rights Committee expressed concerns about the judicial interpretation adopted by the Bosnian Constitutional Court because it left victims of sexual violence in times of armed conflicts without any effective remedy.[38]

However, a turning point arrived six years after the Constitutional Court's decision. In 2019, the victim submitted a request for consideration to the UN Committee against Torture, the overseeing body established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Committee adopted a pivotal decision under article 22 that establishes its competence to consider state submission concerning violations of CAT. In an unprecedented move, it declared that Bosnia Herzegovina had violated article 1 for not providing effective remedies to the victim of sexual violence.[39] The statute of limitations cannot operate in cases of sexual violence because they deprive victims of redress, compensation, and rehabilitation.

Moreover, according to the Committee, rapes constitute torture and discrimination against women. It argued that, particularly in the context of armed conflicts, women become the target of violence with an intent to humiliate them because of their sex.[40] Consequently, the conduct of a state that does not recognise compensation for biological and moral damage in favour of the victim of sexual violence in a time of armed conflict constitutes a violation of article 1 read in conjunction with article 14 of the Convention.

The Committee's argument that sexual violence is causally connected to the armed conflict mirrored the IACtHR's statement about rape as a symbolic means to degrade and threaten women. Both international bodies contend that such practice determines permanent moral and existential damages that compel states to provide appropriate remedies, including prompt, fair and adequate compensation. In that sense, both the IACtHR and the UN Committee against torture remove stereotypes on gender violence by driving attention to the culture of oppression in which it is perpetrated and strengthening victims' claims of justice and compensation.

Comparing the approaches of international and domestic bodies reveals that the latter avoid stereotypical representations of women as defenceless and casual victims of sexual violence in armed conflicts. Rather, women are represented as targets, especially in those cultural contexts where masculinity is identified with a relationship of power that oppresses women because of their sex. Those international bodies

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[38] Human Rights Committee, *Concluding Observations Lale and Blagojevic v. Bosnia* (CCPR/C/119/D2206/2012), paras. 17-18.

[39] Committee Against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017* (CAT/C/67/D/854/2017). The Committee's reluctance to include sexual violence in the definition of torture is discussed by A. Edwards, *The Feminizing of Torture under International Human Rights Law*, in *Leiden Journal of International Law*, 19, 2006, pp. 349 and 370.

[40] Committee Against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017*, above fn. 39, p. 8 ff.

establish a narrative that identifies aggressors as individuals moved by discriminatory intents, point at the subcultural roots of their behaviour, and look for adequate remedies to compensate victims and prevent sexual violence from happening in the future. The legal narrative is functional to understand the facts and apply the proper remedy.

5. The Identification of State Obligations and Remedies

In the IACtHR's *Espinoza* judgment, legal narratives also play a role in identifying the most appropriate remedies states are required to put in place to fulfil their obligation to prevent and prosecute gender violence. The Court's reading of the circumstances of the case drives the interpretation of the relevant articles of the ACHR and the *Convención de Belém do Pará* to make those international legal instruments respond to the facts suffered by Mrs Espinoza.

In particular, the Court's reference to the existence of historical roots of power imbalances between men and women led the IACtHR to identify a twofold state obligation to provide for both individual and collective remedies. Indeed, the obligation to repair the damage for the person affected is coupled with a preliminary obligation to prevent gender violence. This conclusion was reached because the Court interpreted the use of state power to violate the rights of women in an internal conflict as the infliction of pain to the victim and having «the purpose of causing an effect on society through these violations and giving a message or lesson».[41] The IACtHR reiterated an argument it has used in previous cases.[42] For example, in the 2006 judgment *Miguel Castro Castro v. Perú*, the Court maintained that the systematic use of sexual violence against women represents a means to threaten society because it conveys the message that women will be punished to repress society's reaction against injustices.[43]

Therefore, developing a gender culture based on rejecting the stereotypical representation of either sex is decisive in preventing the societal effect. The Court further explained that the lack of such culture determines the state's unpreparedness to address cases of systematic sexual violence and ultimately afford justice to the victims.

An example of the legal consequences of judges' lack of gender-based awareness is the problem of proof. The IACtHR contended the state defence's argument,

[41] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6, para. 226.

[42] IACtHR, *Case of Miguel Castro Castro v. Perú*, 25 November 2006, para. 224 and *Case of Masacre de El Mozote y lugares aledaños v. Salvador*, 25 October 2012, para. 165. On the IACtHR's case law on gender violence as expression of discrimination see R. Rubio Marin - C. Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, in *Human Rights Quarterly*, 33, 2011, p. 1062.

[43] IACtHR, *Case of Miguel Castro Castro v. Perú*, above fn. 42, paras. 223 and 224.

according to which medical examinations did not show evidence of violence. According to the Court, the logic of the argument is substantially flawed. Check-ups were carried out significantly after the violence had occurred, thus reducing the chance of collecting evidence. Moreover, doctors were not trained to perform examinations or ask questions in cases of rape perpetrated in captivity with no access to medical assistance.

Against this backdrop, the victim's reluctance to talk and allow examination of her body must be understood as a sign of the trauma. If one considers these elements, the lack of evidence from the medical examination cannot be used, the Court contends, to question the victim's reliability. In contrast, judges must ponder whether the victim was treated with care and consideration of the particularly traumatic experience she had suffered.[44]

The legal consequence of the approach suggested by the Court is lowering the standard of proof required due to the nature of the crime of sexual violence. Even more so in the context of armed conflict. The absence of scientific proof is not considered an element that prevents judges from declaring that proof of the violence has been reached.[45]

The predictable incompleteness of the medical examination, in turn, highlights the importance of testimonial evidence, in open contrast with the state defence's argument, according to which Mrs Espinoza could not be fully trusted. Moreover, the Court underlined that testimonial evidence should be acquired with appropriate tools.[46] Inter-American judges reiterated that a woman's hesitancy to tell her story must be understood because of the painful and distressing memories the testimony brings back.[47] State obligations then include establishing procedures to collect the information a victim is willing to give as evidence to set out the facts of the rape.[48]

Ultimately, the IACtHR concluded that states cannot successfully claim the impossibility of finding proof of gender violence. When available and adequately collected, victims' statements must be treated as reliable, thus contributing to the proof, irrespective of a corresponding medical examination.[49] This argumentative move allows the Court to give back to the woman victim of violence and prejudice central importance in the development of the case. Her personal experience becomes as legally valuable as scientific, objectively observed evidence.

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[44] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6, paras. 256-258.

[45] *Ibidem.*

[46] *Ivi*, para. 259-260.

[47] See V. Bernard - E. Pothelet, *Through the eyes of a detention doctor: Interview with Raed Aburabi*, in *International Review of the Red Cross*, 96, 2014, p. 480, who describes with the help of field research victims' difficulties in reporting cases of sexual violence.

[48] These procedures include an appropriate medical examination to assist the victim of a rape. On the importance of health assistance see P. Bouvier, *Sexual violence, health, and humanitarian ethics: Towards a holistic, person-centred approach*, in *International Review of the Red Cross*, 96, 2014, p. 565.

[49] IACtHR, *Case of Espinoza Gonzáles v. Perú*, above fn. 6, para. 261.

The UN Committee against Torture argues along the same lines when it maintains that state obligations in cases of sexual violence perpetrated by state officials include ensuring free medical and psychological care immediately after the violence. Moreover, the state must apologise publicly for the suffering inflicted on the victims.[50] Those measures, taken together with the obligation to adequately compensate the victim, redress state wrongdoing because they address the hideous nature of the crime, motivated by an intent to subjugate, and humiliate women because of who they are.

Those cases are examples of legal narratives used as epistemological tools to understand better how to interpret the law in a way that effectively answers the circumstances of the case.

6. On Empathy and Reaction

In 2006, the UN Secretary-General maintained in his *In-depth Study on All Forms of Violence Against Women* that 'State inaction leaves in place discriminatory laws and policies that undermine women's human rights and disempowers women (...). It also functions as approval of the subordination of women that sustains violence and acquiescence in the violence itself'.[51] The reaction through legal instruments, especially when sexual violence is perpetrated systematically by state officials, is a critical element of the legal strategy of prevention and restoration.[52]

This approach is testified by the decisions discussed here. The IACtHR and the UN Committee identified a list of state obligations stemming from legal instruments such as the ACHR, CEDAW or UN CAT. In the last ten years, compensation in favour of victims of gender violence has been identified as an indispensable means to redress cases of sexual violence in international law. The approach is shared within the EU as the Directive requiring states to adopt a legislative scheme to compensate victims of violent crimes demonstrates[53]. Such an approach corresponds to the idea that state

[50] Committee Against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017*, above fn. 39, p. 14.

[51] UN Secretary-General, *UN Doc. A/61/122/Add. 1*, 2006, p. 34.

[52] R. Rubio Marin - C. Sandoval, *op cit.*, p. 1064.

[53] Council Directive 2004/80/CE, the 29 of April 2004, OJEU, the 06 of August 2004, L 261/15. It is interesting to notice that in 2016, the Italian Parliament adopted, in belated implementation of the directive, a law regulating the compensation of victims of violent crimes. The law expressly mentioned sexual abuse as a case in which the State grants compensation even in the absence of medical and welfare expenses. The law was passed only after the EU Court of Justice had declared Italy in violation of the duty to implement the directive. The Italian Parliament has finally fulfilled the obligation by introducing a series of conditions for recognising compensation not provided for in the directive's text, among which income limits coinciding with that set for admission to legal aid at the expense of the State. Court of Justice (Grand Chamber) the 11 of October 2016, C-601/14. See C. Amalfitano, *Indennizzo delle vittime di reati intenzionali violenti: nuova censura della Corte di Giustizia … sufficiente la risposta contenuta nella legge europea 2015-2016?*, in *Eurojus*, 12 October 2016.

intervention in cases of sexual violence has an emancipatory intent towards those women for whom sexual violence ends up being, for cultural and environmental reasons, a social stigma, and a *de facto* exclusion from effective participation in the political community's life.

If the reaction is the approach required from states to give justice in both the individual case and at the societal level, then the ability to tune in to the victims' experience works as an epistemological device, allowing judges to detect behind the episode of violence the universe of meanings that the act conveys to the victims and the perpetrators. The former perceives the ferocity of the act as affirming their subordinate role. The latter intends to assert their power through an action that testifies their domination. In that sense, judges can detect the cultural roots of violence and identify appropriate remedies.

The intellectual posture of standing in the victim's shoes consists of comprehending their personal experience as something that contributes to the knowledge of the circumstances of the fact and, ultimately, to the correctness of the reasoning. It is an intellectual attitude that rejects some rationalist assumptions according to which practical thinking originates from reason by universalised arguments that reveal «an inconsistency in egoistic exceptionalism».[54] For rationalists, the moral significance of emotions is irrelevant to determining a course of action because emotions carry biases that prevent the development of a legally correct solution. In contrast, the intellectual posture described here conceives personal experiences as elements that enter legal reasoning because they build a system of information that judges must ponder to reach a reasonable and sound decision.

Especially in *Espinoza*, such intellectual attitude is directed to understand both victims' experience and perpetrators' behaviour; interpret facts; identify motives, including discriminatory intent; and detect subcultural attitudes and beliefs. In that sense, it helped judges navigate reality and ultimately find solutions corresponding to the variety of problems brought about by the complexity of life experiences. The critical element of the judgment is the intellectual posture adopted by judges, who demonstrated that the law cannot easily dismiss individuals' emotions as subjective, biased, and unreliable depictions of reality.

[54] See J. Steinberg, *An Epistemic Case for Empathy*, in *Pacific Philosophical Quarterly*, 95, 2014, pp. 47 and 49.

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Abstract: Legal narratives are influenced by prejudices and emotions. At the same time, they often incorporate a deep understanding of socio-cultural contexts, thus contributing to unmasking biases. Feminist theories have suggested that gender stereotypes are the product of understandings that can be decisively influenced by "epistemic injustices". Legal narratives can then expose the roots of gender stereotypes by incorporating a thick understanding of the socio-cultural context of discrimination. Taking stock of this literature, the article argues that a judge's ability to unmask stereotypical narratives and develop sound ones is critical for the correctness of the argumentation in cases of sexual violence against women.

Abstract: Preconcetti ed emozioni influenzano il linguaggio giuridico-narrativo. Allo stesso tempo, le *legal narratives* includono, spesso, una profonda comprensione dei contesti socio-culturali, contribuendo così a smascherare pregiudizi. Le teorie femministe hanno chiarito che gli stereotipi di genere sono il prodotto di comprensioni che possono essere influenzate da tali "ingiustizie epistemiche". Le *legal narratives* possono dunque esporre le radici degli stereotipi di genere veicolando, per esempio, il contesto socio-culturale in cui la discriminazione di genere è perpetrata. Impiegando la letteratura giuridica in materia, l'articolo sostiene che la capacità di un giudice di smascherare narrative stereotipate e sviluppare "buone narrative" contribuisce alla correttezza dell'argomentazione nei casi di violenza sessuale contro le donne.

Keywords: Legal narratives – legal argumentation – gender violence – women – discrimination.

Parole Chiave: Linguaggio giuridico-narrativo – argomentazione giuridica – violenza di genere – donne – discriminazione.

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RIVISTA DI
DIRITTI COMPARATI

The *Aydin* Case of the ECtHR: An Emblematic Case of Violation of the Prohibition of Torture*

Elena Bindi

CONTENTS: 1. Introduction. – 2. The Facts. – 3. The Court's Ruling: The Prohibition of Torture as a Fundamental Principle of the Democratic Society. – 4. The Three Types of Conduct Prohibited under Article 3 ECHR. – 5. The Contextualisation of the Conduct. – 6. The Presumption of State Liability. – 7. The Violation of the Right to an Effective Remedy (Article 13 ECHR). – 8. Conclusions.

1. Introduction

Even after more than twenty years since its delivery, the judgment of the European Court of Human Rights (ECtHR) *Aydin v. Turkey* is worth being analysed once more. The decision relating to this case was delivered on 25 September 1997 and entailed an emblematic case of application of the prohibition of torture enshrined in article 3 of the European Convention on Human Rights (ECHR). In fact, the Court qualified the rape of a girl who was a minor at the time of the facts as torture. In fact, this particularly cruel conduct affecting both the physical and moral integrity of the victim, was aggravated by the fact that it was committed by a person exercising authority against someone that was more vulnerable because she was deprived of freedom.

The European Court therefore considered that sexual violence was particularly cruel and brutal in this case since it simultaneously violated the body and mind of the victim. Thus, this characteristic should be considered as sufficient to envisage a form of torture. Then, the Court considered other elements, such as the victim's young age, according to which the conduct should be undoubtedly qualified as torture instead of inhuman treatment.

The Court also emphasised the principle of contextualisation of the conduct, in the light of which, one must, first consider the aim pursued by those that have perpetrated the conduct entailing the crime of torture. In the present case, this aim

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consisted in the search for information. This purpose can be never considered as a justification, but rather as an aggravating circumstance. Secondly, The Court considered another aggravating circumstance: namely, the fact that the perpetrators of the conduct were representatives of the State and that they were acting against a person deprived of her liberty and entrusted to their custody. In light of the above, the Court recognised the particular vulnerability of the victim who should have been protected against the abuse of the officer, who can very easily carry out violent acts in the absence of witnesses and controlling authorities.

The additional analysis of the *Aydin* judgment thus provides an opportunity to review the development of the ECHR's case-law on the prohibition of torture, starting from the 1976 *Ireland v. United Kingdom* case[1]. Moreover, this jurisprudence has not so far developed in a linear manner. Nevertheless, it has undoubtedly adopted an expansive interpretation of the protection granted by article 3 ECHR. Retracing this case-law will allow us to identify the guidelines of the physiognomy of the prohibition of torture, which is defined by the Court as a fundamental principle of democratic societies.

The analysis of the *Aydin* judgment also represents an opportunity to consider the right to an effective remedy under article 13 ECHR, once more in the light of the interpretation that has been also provided by the European Court of Justice (ECJ). The ECJ has made it clear that, to make a remedy "effective", its exercise must be not unjustifiably hindered by acts or omissions of the authorities of the respondent State.

The Court is also aware of the close correlation between the guarantee of an effective remedy and the protection of the victim of the crime of torture. The very nature of the right guaranteed by article 3 of the Convention necessitates an «effective remedy» because only thorough and effective investigations can lead to identify and punish the responsible persons for acts of torture. The *Aydin* case is therefore exemplary in this regard, as it demonstrates how, in the case of rape, the way the investigation is conducted may or may not lead to the identification of the perpetrators and, therefore, influence the possibility for the victims to obtain protection.

Finally, the *Aydin* case is a sad example of how the investigation process can lead to a prolonged suffering. When the conduct of torture entails sexual acts, the interrogation and investigation of the victim is often a continuation of the torture, causing psychological damage that may discourage other victims from reporting the acts of torture, as it often happens in cases of sexual violence.

[1] See the ECtHR, *Ireland v. The United Kingdom* (Application no. 5310/71), 18 January 1978.

2. The Facts

It is therefore necessary to establish the facts in the cases of violation of the prohibition of torture to analyse this Court's decision.

To put the case in context, it is useful to recall that already in 1985, a harsh conflict between the security forces and members of the PKK (Kurdistan Workers' Party) was taking place in South-Eastern Turkey. In fact, almost all the Country's provinces had been placed under a state of emergency. According to the Government, this conflict would have continued to escalate until the mid-1990s. In 1997, it claimed the death of 4036 civilians and 3884 members of the security forces[2]. During these clashes, a group of police officers broke into the house of the applicant, who was seventeen years old at the time of the events[3], and violently tried to obtain information about the family's alleged relations with members of the rebel movement who, according to the gendarmes, had visited the family's house[4].

After being subjected to threats and insults, Şükran Aydın and her family were forcibly removed from their home and then taken to the village square where other villagers had also been taken. Once there, Şükran, her father and her sister-in-law were singled out from the rest of the villagers, blindfolded, and driven away to Derik gendarmerie headquarters[5].

Şükran was separated from her family. For more than three days she was severely beaten, stripped, sprayed with cold water from high-pressure jets after being placed inside a tyre. She was then taken blindfolded to an interrogation room, where a man

[2] See the ECtHR, *Aydin v. Turkey* (Application no. 23178/94), 25 September 1997, para. 14: «The situation in the south-east of Turkey. Since approximately 1985, serious disturbances have raged in the South-East of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces. At the time of the Court's consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule».

[3] See ECtHR, *Aydin v. Turkey*, cit., para. 13: «Mrs. Şükran Aydın, is a Turkish citizen of Kurdish origin. She was born in 1976. At the time of the events in issue she was 17 years old and living with her parents in the village of Tasit, which is about ten kilometres from the town of Derik where the district gendarmerie headquarters are located. The applicant had never travelled outside her village before the events which led to her application to the Commission».

[4] See ECtHR, *Aydin v. Turkey*, cit., paras. 16-17: «According to the applicant, a group of people comprising village guards and a gendarme arrived in her village on 29 June 1993. Although the applicant put the time of their arrival at 5 p.m., the Commission, relying on the recollection of the applicant's father and sister-in-law, found that it was more likely that this occurred early in the morning of 29 June at around 6 a.m.

Four members of the group came to her parents' home and questioned her family about recent visits to the house by PKK members (see paragraph 14 above). Her family were threatened and subjected to insults. They were then taken to a village square where they were joined by other villagers who had also been forcibly taken from their homes».

[5] See ECtHR, *Aydin v. Turkey*, cit., para. 18: «The applicant, her father, Seydo Aydın, and her sister-in-law, Ferahdiba Aydın, were singled out from the rest of the villagers, blindfolded and driven away to Derik gendarmerie headquarters».

in military uniform stripped off her clothes, hit her in the back and raped her. When in severe pain and covered in blood, Şükran was then ordered to dress and go to another room. Before her release, she was thus taken back to the room where she had been raped, beaten for about an hour by several people, who threatened her not to tell anyone what they had done to her[6].

After returning to the village (about 2nd July 1993), Şükran, together with her father and her sister-in-law, went to the Derik public prosecutor's office to report what had happened (8th July 1993)[7]. The public prosecutor sent Şükran to Dr. Deniz Akkus to ascertain her virginity and to document any signs of physical violence or injury. In the report, it was stated that Şükran's hymen had been torn and that there were widespread bruises around her thighs, but that Dr. Akkus could not establish when the hymen had been torn. Moreover, Dr. Akkus had no previous experience in examining rape victims[8].

Following this report, the public prosecutor requested two more medical examinations of Şükran and asked the two doctors to determine whether and when she had lost her virginity. Nevertheless, the response of both doctors was that after

[6] See ECtHR, *Aydin v. Turkey*, cit., para. 20: «The applicant alleges that, on arrival at the gendarmerie headquarters, she was separated from her father and her sister-in-law. At some stage she was taken upstairs to a room which she later referred to as the 'torture room'. There she was stripped of her clothes, put into a car tire, and spun round and round. She was beaten and sprayed with cold water from high-pressure jets. At a later stage she was taken clothed but blindfolded to an interrogation room. With the door of the room locked, an individual in military clothing forcibly removed her clothes, laid her on her back and raped her. By the time he had finished she was in severe pain and covered in blood. She was ordered to get dressed and subsequently taken to another room. According to the applicant, she was later brought back to the room where she had been raped. She was beaten for about an hour by several persons who warned her not to report on what they had done to her».

[7] See ECtHR, *Aydin v. Turkey*, cit., para. 23: «On 8 July 1993 the applicant together with her father and her sister-in-law went to the office of the public prosecutor, Mr. Bekir Özenir, in Derik to lodge complaints about the treatment which they all alleged they had suffered while in detention. The public prosecutor took statements from each of them. The applicant reported that she had been tortured by being beaten and raped. Her father and sister-in-law both alleged that they had been tortured. According to the applicant, she confirmed her account of what happened to her in a statement given to the Diyarbakir Human Rights Association on 15 July 1993, which was submitted, undated, to the Commission along with her application».

[8] See ECtHR, *Aydin v. Turkey*, cit., para. 24: «All three were sent the same day to Dr Deniz Akkuş at Derik State Hospital. The public prosecutor had requested Dr. Akkuş to establish the blows and marks of physical violence, if any, in respect of Seydo and Ferahdiba. In respect of the applicant, he requested that she be examined to establish whether she was a virgin and the presence of any marks of physical violence or injury».

In his report on the applicant dated 8 July 1996, Dr Akkuş, who had not previously dealt with any rape cases, stated that the applicant's hymen was torn and that there was widespread bruising around the insides of her thighs. He could not date when the hymen had been torn since he was not qualified in this field; nor could he express any view on the reason for the bruising. In separate reports he noted that there were wounds on the bodies of the applicant's father and sister-in-law. ».

7/10 days it was no longer possible to determine when the loss of virginity had occurred[9].

Following the opening of the investigation, Şükran and her family were subjected to continuous harassment and intimidation to force them to withdraw their complaints.

According to police reports, she and the other members of her family had never been detained by the gendarmerie. In a letter of 14th July 1993, the police commander stated that these persons had never been taken into custody. Moreover, on 21st July, he provided a copy of the custody register of the year, in which only six names were listed; among these, their names did not appear[10].

In a report dated 13th May 1994, in response to a request for information dated 9th May 1994, the public prosecutor informed the Mardina public prosecutor's office that there was no basis for the applicant's allegations. Yet, the investigation was still ongoing.[11]

[9] See ECtHR, *Aydin v. Turkey*, cit., paras. 25-26: «On 9 July 1993 the public prosecutor sent the applicant to be examined at Mardin State Hospital with a request to establish whether she had lost her virginity and, if so, since when. She was examined by Dr. Ziya Çetin, a gynaecologist. According to the doctor's report, dated the same day, defloration had occurred more than a week prior to her examination. No swab was taken and neither the applicant's account of what had happened to her nor whether the results of the examination were consistent with that account were recorded in his report. Dr Çetin did not comment on the bruising on her inner thighs because of he was a specialist in obstetrics and gynecology. He did not frequently deal with rape victims.

On 12 August 1993 the public prosecutor took a further statement from the applicant who by that stage was married. On the same day he referred the applicant to Diyarbakir Maternity Hospital requesting that a medical examination be carried out to establish whether the applicant had lost her virginity and, if so, since when. The medical report dated 13 August 1993 confirmed Dr. Cetin's earlier findings (see paragraph 25 above) that the hymen had been torn but that after seven to ten days defloration could not be accurately dated». Similar situation arose in the case ECtHR, *Akkoç v. Turkey* (Applications nos. 22947/93 and 22948/93), 10 October 2000, where there have been inadequate forensic medical examinations, including a lack of examination by appropriately qualified medical professionals.

[10] See ECtHR, *Aydin v. Turkey*, cit., para. 27: «On 13 July 1993 the public prosecutor wrote to Derik gendarmerie headquarters enquiring as to whether the applicant, her father and her sister-in-law had been held in custody there and, if so, as to the dates and duration of the detention and the names of those who carried out the interrogations. By letter dated 14 July 1993, the commander of the gendarmerie headquarters, Mr. Musa Çitil, replied that they had not been taken into custody. On 21 July 1993, he supplied the public prosecutor with a copy of the entries for 1993. There were only six entries for that year».

[11] See ECtHR, *Aydin v. Turkey*, cit., paras. 30-31: «The public prosecutor wrote to the chief of security in Derik on 18 January and 17 February 1994 requesting that the applicant be brought to the office of the Attorney-General. In a follow-up letter of 18 April 1994, the public prosecutor referred to the fact that he had received no reply to his earlier letters. In a further letter dated 13 May 1994, the public prosecutor informed the chief of security at Derik that the applicant, her father, and her sister-in-law should attend at his office.

On 18th May 1994, the public prosecutor took two new statements from the applicant's father confirming his earlier version of the events of 29th June 1993. The father further stated that the applicant and her husband had left the district in March 1994 to look for work elsewhere and that he did not know their new address.[12]

3. The Court's Ruling: The Prohibition of Torture as a Fundamental Principle of the Democratic Society

Considering these facts, the Court upheld the claim, finding the violation of articles 3 and 13 ECHR. The Court noted that the rape of a 17-year-old detainee, who was also subjected to other forms of physical and mental suffering by a state official, is *an especially grave and abhorrent form of ill-treatment amounted to torture* (violating art. 3 ECHR). The failure of the authorities to conduct an effective investigation relating to her alleged suffering while in detention resulted in the denial of access to a court to seek reparation (contrary to art. 13 ECHR. The Court also held, by twenty votes to one, that it was not necessary to consider the applicant's complaint under article 6.1 of the Convention). Finally, the Court unanimously affirmed that there had been no violation of Article 25.1 of the Convention, recognising an insufficient factual basis to enable it to conclude that the authorities of the respondent State have intimidated or harassed either the applicant or the members of her family in circumstances which were calculated to induce her to withdraw or modify her complaint or otherwise interfere with the exercise of her right of individual petition.[13]

Already in the *Akdivar and Others v. Turkey judgment*[14], the Court «stresses that it is of the utmost importance for the effective operation of the system of individual petition instituted by article 25 of the Convention that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints».

By report dated 13 May 1994 in reply to a request for information of 9 May 1994, the public prosecutor informed the office of the Attorney-General in Mardin that there was no evidence to support the applicant's claims but that the investigation continued».

[12] See ECtHR, *Aydin v. Turkey*, cit., para. 32: «On 18 May 1994 the public prosecutor in Derik took two further statements from the applicant's father who confirmed his earlier account of the events of 29 June 1993. Her father also declared that the applicant and her husband had left the district in March 1994 to find work elsewhere and that he did not know of their whereabouts».

[13] See ECtHR, *Aydin v. Turkey*, cit., para. 117: «Against this background, the Court's evaluation of the evidence before it leads it to find that there is an insufficient factual basis to enable it to conclude that the authorities of the respondent State have intimidated or harassed either the applicant or members of her family in circumstances which were calculated to induce her to withdraw or modify her complaint or otherwise interfere with the exercise of her right of individual petition. […]».

[14] See the ECtHR, *Akdivar and others v. Turkey* (Application no. 21893/93), 16 September 1996 (Grand Chamber), para. 105.

However, in the present case (Aydin judgment) «neither the applicant nor her family have adduced any concrete and independent proof of acts of intimidation or harassment calculated to hinder the conduct by her of the proceedings which she brought before the Convention institutions»[15].

Accordingly, the Court can only conclude that «there has been no breach of article 25.1 of the Convention»[16]. Therefore, the ECtHR only envisaged the breach of article 3, as to the prohibition of torture, and article 13, about the right to an effective remedy. Article 3 states that no one shall be subjected to torture or to inhuman and degrading treatment, thus providing for the absolute and non-derogable prohibition of torture and inhuman and degrading treatment.

The prohibition laid down in article 3 ECHR is a constant element in all international human rights instruments and in most of the modern constitutions. As such, the Court has repeatedly reiterated the importance of the prohibition of torture as a «fundamental principle of a democratic society»[17].

This definition has been used by the Strasbourg judges for the first time in the 1989 *Soering v. The United Kingdom* judgment[18], concerning a case of extradition of a German national from the United Kingdom to the United States, where he would have been sentenced to death for an alleged murder. After affirming that the prohibition of torture is a fundamental principle of a democratic society, the Court stated that this prohibition also covers cases of extradition, expulsion, and removal from the territory of a signatory State. This statement entails the positive obligation of Member States to ensure that the removed persons do not risk being subjected to treatment contrary to article 3. Therefore, article 3 may also have an extraterritorial application; namely, the prohibition of inhuman treatment also affects conducts that may occur beyond the jurisdiction of any signatory State.

Moreover, it is noteworthy that this article is one of the most concise norms of the ECHR and that it does not provide for the exceptions or derogations laid down in article 15 of the ECHR[19]. The prohibition of torture is therefore absolute and

[15] See ECtHR, *Aydin v. Turkey*, cit., para. 116, where the Court also affirms that «The Commission has relied heavily on the failure of the authorities to provide more than a simple denial of the substance of her allegations that her house was raided, her husband beaten by police officers and that she and members of her family were repeatedly and without due justification contacted and questioned by the authorities about her application to the Commission. However, before the Court the Government reaffirmed that the allegations of intimidation and harassment had not been substantiated. They acknowledged that contacts and questioning did take place but have sought to justify these by referring to the needs of the criminal investigation being conducted into her complaints and to facilitate her attendance at the delegates' hearings».

[16] See ECtHR, *Aydin v. Turkey*, cit., para. 117.

[17] *Ivi*, para. 81: «As it has observed on many occasions, article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment […]».

[18] See the ECtHR, *Soering v.* The *United Kingdom (*Application no. 14038/88),*7 July 1989*.

[19] See the ECtHR, *Aksoy v. Turkey* (Application no. 21987/93), 18 December 1996, para. 62; ECtHR, *Aydin v. Turkey*, cit., para. 81: « […] article 3 admits of no exceptions to this fundamental value

mandatory and cannot be balanced against other rights nor it can be suspended. This prohibition remains fully valid even in the circumstances in which the very existence of a State may be at risk, such as in the cases of the threat of terrorism and national security (see *Tomasi v. France*, 1992)[20]. One could notice that the inflexibility of the prohibition of torture is only shared with the prohibition of slavery; on the other hand, rights that are considered inviolable - such as the right to life and the principle of legality in criminal matters - are not entirely excluded from being balanced with respect to the protection of other equally important interests.

4. The Three Types of Conduct Prohibited under Article 3 ECHR

Article 3 of the ECHR has always afforded a specific protection to the right of everyone not to suffer a violation of his or her physical or mental integrity because of torture or inhuman and degrading treatment or punishment.

One should ask how it is possible to identify the three conducts prohibited under article 3, namely torture, inhuman treatment, and degrading treatment. In fact, the broad and general purpose of article 3 is not followed by any indication on the meaning to be given to the prohibitions. While the lack of definition has given judges the possibility of adapting the content of the provision to the protection requirements demanded by society from time to time, the general terms used to indicate the prohibited conduct have needed to be clarified. Three different levels of *severity* of ill-treatment committed against persons deprived of their liberty have been identified.

The first attempt of categorisation of the three types of conduct under article 3 ECHR was done by the Human Rights Commission with reference to the so-called "Greek case", where it stated that each torture must necessary be also considered as an inhuman and degrading treatment, while each human treatment cannot but also be degrading[21].

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and no derogation from it is permissible under article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities».

[20] See the ECtHR, *Tomasi v. France* (Application no. 12850/87), 27 August 1992, paras. 115-116: «The Court cannot accept this argument. It does not consider that it must examine the system of police custody in France and the rules pertaining thereto, or, in this case, the length and the timing of the applicant's interrogations. It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr. Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly regarding terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals». In conclusion «[t]here has accordingly been a violation of article 3 (art. 3) ». See also the ECtHR, *Chahal v. the United Kingdom* (Reports 1996-V), 15 November 1996, p. 1855, para. 79.

[21] See the European Commission of Human Rights, *Denmark v. Greek, Norway v. Greek, Sweden v. Greek, Netherlands v. Greek* (Applications nos. 3321/67, 3322/6712, 3323/67, 3324/67), 1 December

Consequently, to define the three types of conducts prohibited by the Convention, it is necessary to consider the degree of severity of the action[22]. Torture consists in a particular form of ill-treatment specifically aimed at causing a cruel and very serious suffering, such as inhuman treatments that deliberately cause severe and cruel sufferings. This is the element that distinguishes torture from inhuman or degrading treatment or punishment. Torture constitutes the highest level of severity of the unlawful conduct, and it is characterised by the presence of a deliberate intention to inflict such suffering; it is precisely this definition that the Strasbourg judges referred to in the 1978 *Ireland v. The United Kingdom* case[23], which is the leading case in the analysis of prohibited conducts.

In that case, the Court had to decide in which of the types of conducts provided for in article 3 ECHR, it should have included the five sensory-deprivation techniques used to deprive the subject of his or her sensory capabilities to easier obtain relevant information techniques (consisting of hooding, standing for long periods of time, constant noise, sleep deprivation, water, and food deprivation).

Ireland had asked the Court to recognise the practices described above as techniques of torture.

The Court replied that torture constitutes an inhuman treatment that inflicts such a severe level of suffering on the victim that it requires a further definition with the aim of attaching a special stigma to deliberate inhuman treatment causing very serious and cruel suffering; torture constitutes the most serious form of aberration of a human being. According to the judges, the above-mentioned five techniques of sensory deprivation, while undoubtedly constituting an inhuman treatment, do not entail torture in their severity and violence.

In the same year, the Court had to decide a further episode of alleged violation of article 3, in the *Tyrer v. The United Kingdom* case[24].

The fact that gave rise to the sentence was the infliction of corporal punishment to a 15-year-old boy, namely three strokes of the birch, after being pleaded guilty before the local juvenile court for unlawful assault occasioning actual bodily harm to a senior pupil at his school.

The Court made it clear that an exception to the rule is not permissible, even when the punishment inflicted rests on very deep legal roots, constituting a normative tradition that identifies corporal punishment as an effective crime-prevention tool by recalling the mandatory nature of the rule.

1969. In this regard, see J. Becket, *The Greek Case Before the European Human Rights Commission*, in *Human Rights*, 1, 1, 1970, p. 91 ff.

[22] See A. Cassese, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in in R.St.J. Macdonald - F. Matscher - H. Petzold (eds.), *The European system for the protection of human rights*, Dordrecht and Boston, 1993, p. 241.

[23] See ECtHR, *Ireland v. The United Kingdom*, cit.

[24] See ECtHR, *Tyrer v. The United Kingdom* (Application no. 5856/72), 25 April 1978.

Moving from this definition, the Court held that the punishment imposed on Mr. Tyrer did not contain the severity required for torture and that the applicant's suffering was not such as to amount to inhuman treatment. The punishment was therefore qualified as degrading.

In the twenty years that have passed between these first steps and the Aydin decision, in the Strasbourg case-law there has been no lack of convictions for atrocious acts falling within the types of conducts sanctioned under article 3 of the European Convention on Human Rights; the list of cases would be long and since it is not possible here to reconstruct all the steps in the jurisprudential evolution, it can certainly be said that the Court's case-law, albeit with some fluctuations, has undoubtedly been characterised by an expansive trend. While in *Ireland v. The United Kingdom*, the Court initially set the threshold for torture extremely high, it was not until *Aksoy v. Turkey* in 1996 that the Court made its first finding of torture[25].

However, it is only with the *Aydin* judgment that the Court came to affirm that rape is sufficient to constitute an act of torture. As has been rightly pointed out, «[a] finding that the rape, in and of itself, was sufficient to constitute torture, marked a very clear departure from the previous approach of the European Commission in Cyprus v. Turkey which had dismissed the suggestion of torture despite evidence of mass rape by security forces. But the context had changed. Aydin v. Turkey was handed down at a time when public consciousness about the prevalence and egregious nature of rape in conflict zones had been heightened, especially in Europe with the conflict in the former Yugoslavia»[26].

Moreover, the *Aydin* judgment is an important case because the Court drew a definitive distinction between torture, inhuman treatment and degrading treatment, identifying, in the wake of its own precedents, the three conducts and enucleating a whole series of criteria developed in the light of concrete cases.

According to the case-law of the European Court of Human Rights, following a mainly empirical criterion, it emerges that *inhuman treatment* is the treatment which deliberately causes mental and physical suffering of a particular intensity, whereas *degrading treatment* is the treatment, less serious than the inhuman treatment, which is nevertheless capable of severely humiliating the individual before others and which can make him act even against his/her will or conscience[27].

Basically, to describe whether the treatment is degrading, it is necessary to consider whether the action is of such a nature as to create, in its victims, feelings of fear and anguish and a sense of inferiority, if it is capable of humiliating and annihilating their physical and moral resistance. Finally, *torture* cannot be defined

[25] See the ECtHR, *Aksoy v. Turkey*, cit., para. 62.

[26] See C. Mc Glynn, *Rape, torture, and the European convention on human rights*, in *International and Comparative Law Quarterly*, 58, 3, 2009, p. 568, citing the European Commission of Human Rights, *Cyprus v. Turkey* (Applications Nos. 6780/74 and 6950/75), 10 July 1976.

[27] See F. Fiorentin, *Il condannato. Il danno da esecuzione della pena detentiva*, in G. Spangher (ed.), *La vittima del processo: I danni da attività processuale penale*, Torino, 2017, p. 481.

independently of the two previous categories of treatments. Torture must be considered an aggravated form of inhuman treatment and therefore capable of causing a more intense suffering[28].

As it is emphasised by the Court, «rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim»[29].

It is then possible to range from the minimum threshold required for finding a violation of article 3 ECHR, as in the 2012 *P. and S. v. Poland* case[30], to more serious cases such as the *Aydin* or the *Maslova and Nalbandov v. Russia* of 2008 ones[31]. Also in the latter case, as in the *Aydin* case, the Court held that the rape of a detainee by an official of the State had to be considered as an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. The physical violence, especially the cruel acts of repeated rape, to which the applicant had been subjected, entailed torture, in violation of article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. Finally, it emerges from these definitions – and it cannot be otherwise – that the Court maintains a certain vagueness ensuring flexibility in the application of article 3[32], depending on «all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of

[28] See ECtHR, *Ireland v. The United Kingdom*, cit., para. 167; see also ECtHR, *Aydin v. Turkey*, cit., para. 82: «In order to determine whether any form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering».

[29] See ECtHR, *Aydin v. Turkey*, cit., para. 83, which goes on affirming that: «Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally».

[30] See the ECtHR, *P. and S. v. Poland* (Application no. 57375/08), 30 October 2012. The applicants P. had been treated by the authorities in a deplorable manner and her suffering had reached the minimum threshold of severity under article 3.

[31] See the ECtHR, *Maslova and Nalbandov v. Russia* (Application no. 839/02), 24 January 2008. The applicant, who had been called in for questioning at her local police station, was coerced by police officers into confessing to involvement in a murder. One police officer put thumb cuffs on her, beat her, raped her, and then forced her to perform oral sex. Subsequently he and another officer repeatedly hit her in the stomach, put a gas mask over her face, blocking the air to suffocate her, and ran electricity through wires attached to her earrings. When allowed to go to the lavatory, she tried to cut the veins of her wrists. Three prosecution officers, after interrogating her at the police station, drank alcohol and continued to rape her.

[32] See the ECtHR, *Selmouni v. France* (Application no. 25803/94), 28 July 1999, para. 101.

health of the victim»[33], in view of clarifying that there can be rape even without resistance, as in the case of acquaintance rape. In fact, in the case of *MC v. Bulgaria*, the Court found that the victims of sexual abuse, especially young girls, often failed to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence[34].

In addition, in the 2019 *E.B. v. Romania* case[35], the Court held that there had been a violation of article 3 (prohibition of inhuman or degrading treatment) and of article 8 (right to respect for private life) of the Convention in the applicant's case. The Romanian authorities failed to adequately investigate a complaint of rape made by a woman who was raped while returning home by a man with a previous record for the same offence. The authorities essentially dismissed the case simply because the woman did not call for help and her body showed no signs of violence. The Court noted that the Romanian authorities had failed to carry out a proper investigation and had overly emphasised the fact that the applicant had not resisted her alleged attacker[36].

[33] See the ECtHR, *Moldovan and others v. Romania* (Applications nos. 41138/98 and 64320/01), 12 July 2005, para. 100.

[34] ECtHR, *M.C. v. Bulgaria* (Application no. 39272/98), 4 December 2003. The Court found a violation of article 3 (prohibition of degrading treatment) and article 8 (right to respect for private life) of the Convention, noting the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. The Court held that states are required to prosecute any non-consensual sexual act, even where the victim had not resisted physically. For these reasons, the Court found both the investigation in the case and Bulgaria law to be defective. See for example: I. Radacic, *Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations*, in *European Human Rights Law Review,* 2008, p. 357 ff.; C. Pitea, *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v Bulgaria*, in *Journal of International Criminal Justice*, 3, 2, 2005, p. 447 ff.; P. Londono, *Positive Obligations, Criminal Procedure and Rape Cases*, in *European Human Rights Law Review*, 2007, p. 158 ff.

[35] See the ECtHR, *E.B. v. Romania* (Application no. 49089/10), 19 March 2019.

[36] But there have also been cases in which the Court has preferred to uphold the application only under article 8, such as in the *Valiuliene v. Lithuania* judgment [see ECtHR, *Valiuliene v. Lithuania* (Application no. 33234/07), 26 March 2013]. However, as is clear from the concurring opinion of Judge Pinto de Albuquerque: «All the available data shows worldwide that domestic violence is in most of the cases violence perpetrated by men against women, and violence by women against men accounts for a very small percentage of domestic violence. Hence, the full effect utile of the European Convention on Human Rights (the Convention) can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives. In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at belittling the dignity of the partner, conveying a message of humiliation and degradation. It is precisely this intrinsic element of humiliation that attracts the applicability of article 3 of the Convention. The imputation of an article 8 violation would fall short of the real and full meaning of violence in the domestic context and would thus fail to qualify as a "gendered understanding of violence».

5. The Contextualisation of the Conduct

In the Aydin case, even before the judgment of the Court, the Commission had already pointed out in its opinion that rape, a particularly cruel act, affecting the physical and moral integrity of the victim, was in those circumstances aggravated because it was committed by a person with authority against a person who was more vulnerable because as prisoner and, moreover, a minor[37].

The Court, accepting this approach, reiterated that the accumulation of acts of physical and mental violence, and in particular the cruelty of the rape, to which she had been subjected, were acts of torture; as to the purpose, the situation in the geographical region was such to push to police to elicit information, so that the suffering inflicted on the applicant must be regarded as underlying the same aims[38].

As above mentioned, the absolute and inderogable nature of this prohibition means that it does not tolerate compression even when national security is at stake. This last point is decisive because it finally identifies a generally applicable principle, which does not only require to ascertain the degree of the suffering inflicted and the act, which is already particularly serious and cruel, but that it also needs to assess the contextualisation of the conduct and the purpose to which it is subjected lead to it being undoubtedly classified as an act of torture. In the present case, the fact that the conduct was carried out by representatives of the State and that they acted against a person deprived of her liberty and entrusted to their custody, plays the role of an aggravating circumstance external to the offence[39].

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[37] See ECtHR, *Aydin v. Turkey*, cit., paras. 78-79, where it is stated: «The Commission concluded that the deliberate ill-treatment inflicted on her by being beaten, being placed in a tyre, and hosed with pressurised water, combined with the humiliation of being stripped naked, fell clearly within the scope of the prohibition of article 3. The Commission also found that rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim's physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering.

The Commission found that the applicant had been the victim of torture at the hands of officials in violation of article 3».

[38] See ECtHR, *Aydin v. Turkey*, cit., para. 85, where it is stated: «The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region […] and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes».

[39] See ECtHR, *Aydin v. Turkey*, cit., para. 84, where it is stated: «The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating

The status of a State official may in fact make the victim even more vulnerable, as the person appear "untouchable" to the victim who may weaken his/her resistance, leading him/her not to report the crime. As highlighted in the *Aksoy v. Turkey* case, the most immediate precedent of the *Aydin* case, the victim's severe ill-treatment at the hands of State officials « would have given him cause to feel vulnerable, powerless and apprehensive of the representatives of the State»[40].

In addition, the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that the «condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official»[41].

Much emphasis is placed by the ECtHR on the fact that the victim was young, which affects the vulnerability of the victim, both emotionally and physically.

The same emphasis is also placed on the location of the criminal events, since the «rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim»[42]. As it has been highlighted in the literature, «it is essential that the term 'detainee' in Aydin is not interpreted to mean a particular physical place, such as a state detention facility, but should instead denote either a physical place, but not limited to a state facility and including therefore the home, or even better a psychological condition such that the individual considers that they have no means of escape»[43].

Finally, treatments that are prohibited under article 3 cannot be justified even if they entail the response to serious crimes or threats of terrorism, as affirmed in the 1992 *Tomasi v. France* judgment. In fact, this was the first case in which the Court stated that nothing can justify the infliction of treatments prohibited under article 3 even if

circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre».

[40] See ECtHR, *Aksoy v. Turkey*, cit., para. 56. See also C. Yeo, *Agents of the State: When is an Official of the State an Agent of the State?*, in *International Journal of Refugee Law*, 14, 4, 2002, p. 523.

[41] See International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, Judgment, IT-96-21-T, *Prosecutor v. Delalic*, para. 495.

[42] See ECtHR, *Aydin v. Turkey*, cit., para. 83, where it is stated: «The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre».

[43] See again C. Mc Glynn, *op. cit.*, p. 577-578, recalling how Deborah Blatt has stated, a «woman's home can become her torture chamber»: see D. Blatt, *Recognizing Rape as a Method of Torture*, in *New York University Review of Law and Social Change,* 19, 4, 1991-1992, p. 851.

the alleged offences of the person charged are particularly serious, such as serious organized crime and terrorism[44].

Therefore, one could be perplexed by the dissenting opinion of the Turkish judge of the ECtHR, Gölcüklü, who invokes the theory of the "social risk", according to which the State must ensure public order and welfare of the population. In the context of terrorist violence, the State may not be able to perform this primary function even if the security forces are granted exceptional powers under state of emergency legislation; if in such circumstances some people suffer violence, harm, loss, physical and material damage, they must be compensated even if they have been negligent or careless, and regardless of the identity of the perpetrator of such acts, whether unlawful or lawful. The only causal link to be established in these cases is the one concerning the alleged damage or cause. Conversely, it does not involve the link of the damage and the alleged perpetrator. This is the collective responsibility of the rule of law towards the individual who becomes a victim simply because of his/her belonging to the community[45].

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[44] See ECtHR, *Tomasi v. France*, cit., para. 115, where it is stated: « […] The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals».

[45] Individual Dissenting Opinion of Judge Gölcüklü, para. 9, where it is stated: «The following observations apply to all the judgments submitted for consideration, which reflect the same concerns as the judgments of the French administrative courts.

(a) In all the appended judgments, which are only non-exhaustive examples of administrative case-law, the courts ruled in the victims' favour.

(b) These judgments are based on very detailed operative provisions revealing a legal reasoning which is extremely sensitive to the rights and interests of those claiming compensation as the victims of various terrorist acts.

(c) The facts underlying these decisions are very varied and include violent death, shooting from aircraft (see A24), assault, wounding, and physical damage.

(d) In most cases the operative provisions of the judgments concerned refer to article 125 of the Constitution, which provides that all administrative decisions shall be subject to review by the courts.

(e) The decisions make no distinction between acts committed by the PKK (see, for example, A13), by the security forces (see A5) or by unidentified persons (see, for example, A3, A17 and A24) since they follow a more general approach going beyond determination of fault in the execution of one's duty (see A25) or even objective liability on the administrative authorities' part; the argument which underpins the reasoning of the administrative courts' judgments is based on the theory of 'social risk'.

(f) The theory of social risk as developed in the judgments submitted includes the following elements:

(i) the State must ensure public order and the well-being of the population.

(ii) in a context of terrorist violence, it sometimes happens that the State cannot perform this essential function, even when special powers have been conferred on the security forces under state of emergency legislation (see in particular A3, A13 and A14);

(iii) if, in such circumstances, some people suffer violence, civil wrongs, damage, bodily injury or physical damage, they must be compensated even where they have been guilty of negligence

The conclusions deriving from the social risk thesis could have very serious implications: there is the collective responsibility instead of the liability of the individual who commits acts of torture, from which it follows that the victim must only be compensated rather than being entitled to obtain justice through the condemnation of the perpetrators of the acts of torture.

Moreover, as it has been rightly affirmed, «[it] follows that compensation alone, in the absence of action being taken against perpetrators of violations of the Convention, would in effect permit a state, for example in the case of torture, to pay for the right to torture»[46].

6. The Presumption of State Liability

An important achievement for victims of torture offences is the reversal of the burden of proof in cases where the claimant suffers injuries while deprived of liberty. In these cases, there is thus a presumption of liability of the defendant State.

As stated by the ECtHR in the 1992 *Tomasi v. France* judgment, when an individual claims to have suffered injuries during detention, it is incumbent on the government to provide a full and sufficient explanation of the origin of such injuries. In essence, there is a presumption of liability with respect to the State that is based on the circumstances in which the events occurred[47].

Before the *Tomasi* judgment, the picture was very complex from the point of view of the applicants, because the Court required a strict demonstration of the fault of State authorities to establish the violation of article 3 ECHR. As a result, applications were very often found to be *inadmissible as manifestly unfounded.* Instituting proceedings in such circumstances may present difficulties that are often insurmountable, such as the possibility that the appellant is the only witness of the violation, which may have been perpetrated in "private" or in closed environments by persons representing public powers, and, as such, almost covered by the public authority benefiting from a presumption of innocence that is more extensive than the one that is usually granted with respect to private citizens.

Moreover, as we shall see, the State has a major stake in not exposing the fault of its officials, since the state itself is responsible for the violation of the rights protected under the ECHR. The State must also take all measures to sanction the

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or imprudence and irrespective of the identity of the person responsible for the acts concerned, whether these were criminal or lawful. The only causal connection to be established in these cases is that between the alleged damage and the act which caused that damage, not between the damage and the alleged perpetrator (see, for example, A17). The issue involved (particularly in A14) is the collective».

[46] See A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights*, 6 July 2003, p. 43 (in *http://www.supremecourt.ge/files/upload-file/pdf/article3eng.pdf*).

[47] See ECtHR, *Tomasi v. France*, cit., paras. 108-111.

violation of the prohibition of torture (art. 3) by its officials. Moreover, there is a growing pressure in international law with respect to States to be more proactive in ensuring the protection of human rights, given the many ways in which they can be violated.

The problem did not only arise in relation to acts carried out by public officials, but also about the conduct perpetrated by private persons[48]. The ECtHR has clarified that there is the violation of the prohibitions of article 3 of the ECHR in cases where private persons have been able to act "undisturbed" because the State has failed to fulfil its *positive obligations* to prevent victims from being subjected to acts of torture or inhuman or degrading treatments[49]. For example, in the *Z v. the UK* case, the failure by British authorities to provide children appropriate protection against serious, long-term neglect, and abuse amounted to inhuman and degrading treatments in breach of article 3 of the ECHR. The Court held that States are required «to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals»[50]. The Court noted that such measures should «include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge»[51].

In addition, in the 2014 *O'Keeffe v. Ireland* case, the Court found that there had been the violation of articles 3 (prohibition of inhuman and degrading treatment) and 13 (right to an effective remedy) of the Convention due to the Irish State's failure to

[48] It was then the Istanbul Convention that «crosses the public/private dichotomy, placing detailed positive obligations on States' behalf holding them (as well as private persons and non-States actors), responsible for committing acts of violence, and even for having omitted to prevent their occurrence». On this, see C. Nardocci, *Gender-based violence between the ECHR and the Istanbul Convention,* in M. D'Amico - C. Nardocci (eds.), *Gender-based violence between national and supranational responses. The way forward*, Napoli, 2021, p. 163, dwelling on the ECtHR's case-law before the 2011 Istanbul Convention and after the Istanbul Convention (p. 151 ff.).

[49] More broadly on the article 3 that imposes a State both a negative and a positive obligation, see S. Palmer, *A Wrong Turning: article 3 ECHR and Proportionality*, in *Cambridge Law Journal*, 65, 2, 2006, p. 438 ff. On this see also I. Pellizzone, *Positive obligations, due diligence of the States and outcomes of the Osman Test in matter of gender-based violence cases: first steps for a gender sensitive approach?*, in M. D'Amico - C. Nardocci (eds.), *op. cit.*, p. 165 ff.

[50] See *Z and others v. The United Kingdom* (Application no. 29392/95), 10 May 2001, para. 73.

[51] See *Z and others v. The United Kingdom*, cit., para. 115. As highlighted by C. Mc Glynn, *op. cit.*, p. 592, «While in both *Z v the UK* and *Kaya v Turkey* the State was held responsible for the ill-treatment, not torture, of the individuals involved, there is nothing to suggest that a similar finding could not be made in respect of torture. In *Z v the UK* the Court includes reference to torture when outlining its approach and in Kaya v. Turkey it considered the possibility of torture but rejected that claim only based on the medical evidence, not principle. The Court classifies these cases as ones involving 'state responsibility' where the «authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they know or ought to have known».

protect the applicant from sexual abuse and her inability to obtain recognition at the national level of this failure[52].

With specific reference to cases in which the applicant suffers injuries at the hands of public officials, the presumption of liability therefore becomes the only way for the victims of the crime of torture to obtain justice. If the Court does not consider it sufficient that the applicants' allegations are proved beyond reasonable doubt, it will become impossible to establish the violation of article 3 ECHR.

The *Aydin* judgment is emblematic in this respect and reveals how difficult it is to reconstruct the facts when a person is in custody or deprived of liberty and he/she is the only witness to the violation.

Therefore, «the Court considers that it should accept the facts as established by the Commission, having been satisfied on the basis of the evidence which it has examined that the Commission could properly reach the conclusion that the applicant's allegations were proved beyond reasonable doubt, it being recalled that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences»[53].

As it is highlighted by the Court, «it would also note in this regard that the Government have been unable to adduce any evidence collected in the course of the criminal investigation into the applicant's allegations[54], which would have served to contradict this conclusion and that the medical evidence which they rely on cannot be taken to rebut the applicant's assertion that she was raped while in custody»[55].

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[52] See ECtHR, *O'Keeffe v. Ireland* (Application no. 35810/2000), 28 January 2014 (Grand Chamber). This case concerned the question of the responsibility of the State for the sexual abuse of a schoolgirl, aged nine, by her school principal when attending primary school in the early 1970s.

[53] See ECtHR, *Aydin v. Turkey*, cit., para. 73, referring to the *Ireland v. The United Kingdom*, cit., para. 161.

[54] See ECtHR, *Aydin v. Turkey*, cit., para. 73, recalling para. 56, where it is stated: «In support of their assertion that the complaints should be declared inadmissible, the Government relied heavily on the fact that at the time the applicant lodged her application with the Commission a criminal investigation had been opened by the public prosecutor into her allegations. This investigation was in fact still being actively pursued. The decision of the Commission to declare the application admissible and its subsequent pronouncement on the merits completely disregarded the steps which were being taken under Turkish criminal procedural law (see paragraphs 42 and 43 above) to establish the veracity of the applicant's account of the events at the relevant time and were in contradiction to the principle of subsidiarity which underpinned the functioning of the Convention system».

[55] See ECtHR, *Aydin v. Turkey*, cit., para. 73, recalling para. 67, where it is stated: «As to the alleged rape and ill-treatment while in detention, the Government stressed that neither Dr Akkuş nor Dr Çetin had found any bruising or injury to the applicant's body which was consistent with rape or violent assault. The applicant maintained that she struggled during the alleged rape. However, there were no signs of bruising to her wrists or back or genitalia which would have suggested the use of violence to overcome her resistance. The bruising found on her inner thighs could be explained by factors other than the forcing a part of her legs to effect a sexual assault. In fact, the report drawn up by the Faculty of Medicine of the University of Hacettepe (see paragraph 39 above), which the Government had submitted to the Commission, indicated that the bruising could have been attributed to the fact that the applicant rode a donkey. While it was true that the medical examinations confirmed that her hymen had

This approach will be confirmed two years later with the 1999 *Selmouni v. Francia* judgment, in which the threshold of seriousness fixed for identifying a case of torture is even lowered than in *Aydin*[56].

Therefore, the dissenting opinion in the *Aydin* case, stating that the applicant's allegations have not been proved beyond reasonable doubt, are unconvincing. In fact, the investigation has not provided the necessary certainty as to the reality of the facts because of the lack of sufficient evidence, notably the lack of effective cooperation on behalf of the Government, as the dissenting Judge *Matscher* himself admits[57].

Even in the *partly concurring and partly dissenting opinion of Judge Pettiti*, the investigation did not provide the necessary certainty as to the reality of the facts, as usually required by the Court's case-aw; moreover, Judge Pettiti points out that the shortcomings of the investigation are attributable not only to the prosecution, but also to the appellant's negligence[58].

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been torn, this could not justify a conclusion that defloration had resulted from the alleged rape. It was in fact medically impossible to estimate the date of defloration after a lapse of seven days from the date of the initial tear of the hymen. Had the applicant not waited as long as she did before going to the public prosecutor the medical evidence may have yielded further results. However, her delay in so doing led to the loss of vital evidence and was fatal to any medical corroboration of her account».

[56] See ECtHR, *Selmouni v. France*, cit., paras. 100-105.

[57] See the Partly Dissenting Opinion of Judge Matscher, para. 2: «There can be no doubt that the matters alleged would, if proved, constitute an extremely serious violation of article 3 of the Convention.

But in my opinion that condition is far from satisfied even though I recognize that the delegates of the Commission who conducted the inquiry at the scene were faced with a difficult position in view of contradictory statements on both sides, the conflicting interests of those concerned and the lack of any effective cooperation by the respondent Government. However, where, as occurred here, contradictory statements are made, a 'criminal' inquiry must be conducted in much greater detail and more objectively and regard must be had to all relevant factors so that reliable conclusions are reached.

I shall not comment on the inconsistencies and errors of detail which appear in the depositions made by witnesses on both sides, save to say that there are aspects, which are referred to in the joint dissenting opinions (see below), that are puzzling and cast serious doubt on the truthfulness of the version of events put forward by the applicant with the support of the Diyarbakir Human Rights Association and accepted in substance by the Commission and the Court.

In these circumstances, and without being able to say what the 'truth' of the matter was in this case, I am far from convinced that the applicant's allegations have been proved beyond all reasonable doubt. I therefore conclude that no violation of article 3 of the Convention can be found, for want of sufficient proof of the facts relied upon».

[58] See the Partly Concurring, Partly Dissenting Opinion of Judge Pettiti, which states as to article 3 of the Convention: «I concur in the joint dissenting opinion as regards article 3 (see below). In common with my colleagues in the minority, I consider that the investigation did not provide the necessary certainty that the events alleged really took place, as customarily required by the Court's case-law. If the facts had been established with certainty, it is obvious that there would have been an extremely serious violation».

As to article 13 of the Convention: «The applicant had a remedy which she used (complaint to the prosecuting authorities), which gave rise to an investigation that has not been closed».

I agree with the observations made in the joint dissenting opinion concerning article 13 (see below) on the shortcomings of the investigation, the negligence of the prosecuting authorities and the

Such considerations seem to underestimate too much the obstacles encountered by a victim that is even more vulnerable because he/she is deprived of liberty and that must prove with certainty the reality of the facts. It is precisely on these difficulties that the Government concerned relies on the possibility of escaping a conviction for the violation of article 3, not to mention, in the present case, the blatant inconsistencies in the list in the custody register where only six names were recorded for the whole of 1993[59]. In the light of the facts established, one cannot but agree with the reversal of the burden of proof.

Even in the Joint Dissenting Opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev it is highlighted, with reference to the violation of art. 3 ECHR, «that no evidence has been adduced from an independent source in support of the allegations made by the applicant, her father, and her sister-in-law and that it has not been shown beyond reasonable doubt that the allegations were true. Proof of the detention, ill-treatment and, more particularly, rape has not been adduced with the degree of rigour that the Court must require. In a matter as serious as this, particularly in view of the background of conflict, an impression of 'credibility' such as that made on the Commission by the applicant and her father cannot suffice»[60].

The Government's defense is also astounding when it states that: «the applicant's claim that she was raped did not prevent her from marrying and conceiving a child shortly after the alleged event. In the view of the Government her decision to marry and her ability to be sexually active so soon after her claimed traumatic experience were scarcely consistent with the behaviour of a rape victim. It was equally surprising that, given the cultural context, her alleged loss of virginity did not create any obstacle to her marriage»[61].

Finally, the assertions of the Turkish government's defense are also echoed in some passages of the dissenting opinions, stating that «the applicant married her cousin Adidin Aydin only a few days after the alleged events at Derik gendarmerie headquarters […] – which is surprising in the cultural context of the region – and that,

mistakes and negligence of the complainant. Admittedly, the remedy has not been effective so far, but the responsibility for this lack of effectiveness is to some extent a shared one, so that the requirements for the application of article 13 have not been satisfied in this case».

[59] See ECtHR, *Aydin v. Turkey*, cit., para. 27: «On 13 July 1993 the public prosecutor wrote to Derik gendarmerie headquarters enquiring as to whether the applicant, her father and her sister-in-law had been held in custody there and, if so, as to the dates and duration of the detention and the names of those who carried out the interrogations. By letter dated 14 July 1993, the commander of the gendarmerie headquarters, Mr. Musa Çitil, replied that they had not been taken into custody. On 21 July 1993, he supplied the public prosecutor with a copy of the entries for 1993. There were only six entries for that year».

[60] Joint dissenting opinion of Mr. Gölcüklü, Mr. Matscher, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha, Mr. Makarczyk and Mr. Gotchev, para. 4, (as for the alleged violation of art. 3 ECHR).

[61] See ECtHR, *Aydin v. Turkey*, cit., para. 68.

secondly, she would appear to have had her first child very shortly after the marriage […]»[62].

Even if they are dissenting opinions, thus not majoritarian ones, it seems nonetheless impossible that the judges of the ECHR could use such arguments.

7. The Violation of the Right to an Effective Remedy (Article 13 ECHR)

The other issue addressed by the ECJ in the *Aydin* case is the infringement of the right to an effective remedy under article 13. As the Court correctly points out, «the remedy required by article 13 must be 'effective' in practice as well as in law, in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State»[63].

«Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure»[64].

The recognition of the breach of the prohibition of torture guaranteed in article 3 ECHR is closely related to the modalities of application of article 13 ECHR; «the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13». Indeed, the fundamental importance of the prohibition of torture and the particularly vulnerable situation of victims of torture impose an obligation on States to conduct a thorough and effective investigation of cases of torture, without prejudice to any other remedy available under domestic law[65].

The role of the prosecutor in the Aydin case was therefore crucial, not only in prosecuting those responsible, but also in enabling the applicant to use her other remedies to obtain compensation for the damage suffered. For these remedies to be effective, the prosecutor had to perform his functions properly, but he did not do so.

«The public prosecutor was content to conduct this part of the inquiry by correspondence with officials at the headquarters […]. He accepted too readily their

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[62] Cfr. joint dissenting opinion of Mr. Gölcüklü, Mr. Matscher, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha, Mr. Makarczyk and Mr. Gotchev, para. 3.

[63] See ECtHR, *Aydin v. Turkey*, cit., para. 103, referring to ECtHR, *Aksoy v. Turkey*, cit., para. 95.

[64] See ECtHR, *Aydin v. Turkey*, cit., para. 103.

[65] *Ibidem*, where it is stated: «Furthermore, the nature of the right safeguarded under article 3 of the Convention has implications for article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims […], article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture».

denial that the Aydın family had been detained and was prepared to accept at face value the reliability of the entries in the custody register»[66].

Moreover, «the focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint», and not trying to establish whether the applicant had lost her virginity at the time of the events reported (at the time of the alleged events)[67].

In fact, none of the doctors expressed an opinion on the presence of bruises, although this was an investigation of a rape case. In such cases, the victim should instead be examined by doctors with special expertise in this field[68].

«In the light of the above considerations, it must be concluded that no thorough and effective investigation was conducted into the applicant's allegations and that this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies, including the pursuit of compensation. In conclusion, there has been a violation of article 13 of the Convention»[69].

In addition, in this case, the joint dissenting opinion of Mr. Gölcüklü, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha and Mr. Gotchev on domestic remedies (article 13 of the Convention) gives ground for concerns when it dwells on the behaviour of the applicant and of the Diyarbakir Human Rights Association. Moreover, it highlights that «Firstly, the applicant only lodged a complaint some eight days after the alleged events had taken place, when it was no longer possible to determine with any precision the date of penetration. About the rape, she did not arrange to be examined by a qualified gynecologist as she did shortly afterwards in connection with the paternity of her eldest child. She disappeared from the region sometime after the alleged events […]»[70].

Furthermore, the Diyarbakir Human Rights Association «does not appear at any time to have considered bringing a civil or administrative action»[71].

In the light of this, the dissenting judges consider that «it is not possible in the present case to disregard the applicant's and, especially, her representatives' conduct.

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[66] See ECtHR, *Aydin v. Turkey*, cit., para. 106.

[67] *Ivi*, para. 107.

[68] See more the ECtHR, *Aydin v. Turkey*, cit., para. 107, where it is stated: «In this respect it is to be noted that neither Dr Akkuş nor Dr. Çetin had any experience of dealing with rape victims […]. No reference is made in either of the rather summary reports drawn up by these doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse […]. Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to those of a rape victim».

[69] See ECtHR, *Aydin v. Turkey*, cit., para. 109.

[70] See the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev (on Domestic Remedies (article 13 of the Convention), para. 3.

[71] See more the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev, para. 3.

It did not make the investigation any easier and was more a factor contributing to its failure»[72].

Considering how the investigation was conducted, this argument seems to be hardly tenable.

The *Aydin* case confirms what had already been stated a few months earlier in the *Aksoy v. Turkey* case[73], where the Court had already identified the requirements to consider an investigation as adequate: namely, it must lead to the identification and punishment of the responsible persons. Two years after the *Aydin* case, the Court specified that in addition to being thorough and effective, the investigation must be conducted with diligence (*Selmouni v. France*)[74]. And certainly, in the *Aydin* case it was not conducted diligently or even expeditiously.

In the *Aksoy v. Turkey* judgment, the Court had also highlighted «that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order»[75]. This approach had also been confirmed in the 2015 *I.P. v. the Republic of Moldova* judgment[76].

The Court then linked the right to a proper official enquiry directly to article 3, without the need to read it in conjunction with article 13: whenever a person complains of ill-treatment in custody, a thorough and effective enquiry must be carried out diligently and expeditiously. If it does not happen, the State could incur in a violation of article 3, as it happened for example in the *Labita v. Italy* case[77], concerning an alleged abuse in a prison.

Mr. Labita complained that he had suffered mistreatment of the right in question in the Pianosa prison, in violation of article 3 ECHR. In the light of evidence such as the criticisms made by the Livorno magistrate and by the Inspectorate of Prisons of

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[72] See more the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev, para. 4.

[73] See ECtHR, *Aksoy v. Turkey*, cit., paras. 95-96.

[74] See ECtHR, *Selmouni v. France*, cit., para. 115.

[75] See ECtHR, *Aksoy v. Turkey*, cit., para. 95, which then goes on highlighting «The effect of this article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the way they conform to their obligations under this provision (art. 13) […]. Nevertheless, the remedy required by article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State».

[76] See ECtHR, *I.P. v. the Republic of Moldova* (Application no. 33708/12), 28 April 2015. The Court noted that there had been a procedural violation of article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that the investigation of the applicant's case had fallen short of the requirements inherent in the State's positive obligations to effectively investigate and punish all forms of rape and sexual abuse. It also held that there had been a violation of article 13 (right to an effective remedy) of the Convention taken in conjunction with article 3 in so far as the applicant's complaint about the lack of civil remedies was concerned.

[77] See ECtHR, *Labita v. Italy* (Application no. 26772/95), 6 April 2000.

the Region of Tuscany, the Livorno Public Prosecutor's Office had opened a criminal proceeding against two prison guards. Nevertheless, the Florence Court of Appeal had dismissed the offence in a judgment handed down about eight years after the complaint was lodged[78].

The Strasbourg Court condemned Italy for failing to comply with European requirements, censuring the slowness of the proceedings and negligence in identifying the alleged perpetrators. However, in this case it is worth noting that while the Court was divided in rejecting the appeal from the point of view of ascertaining the ill-treatment[79], it unanimously recognised the violation of article 3 from the point of view of the effectiveness of the official investigation and reiterated that in order to make the prohibition of article 3 effective, an official investigation must be carried out and lead to the identification and punishment of the perpetrators[80].

On the violation of article 3, from the point of view of the effectiveness of diligent and speedy investigations, the Court has subsequently returned in more recent rulings, such as in the 2012 *P.M. v. Bulgaria* case[81]. The Court, finding that the investigation into the applicant's rape complaint had been ineffective even though the facts of the case and the identity of the offenders had been established, found that there had been the violation of article 3 (prohibition of inhuman and degrading treatment) of the Convention, under its procedural limb[82].

Not to mention the 2015 *M.A. v. Slovenia* case, in which the relevant criminal proceedings lasted almost 26 years[83].

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[78] See ECtHR, *Labita v. Italy*, cit., para. 27 ff.

[79] The evidently divided court (with 9 votes against and 8 in favour of infringement) affirmed that there had been no ill-treatment because the plaintiff had failed to provide proof against all reasonable doubt (in this case the reversal of the burden of proof was not triggered because there had been no injuries).

[80] See ECtHR, *Labita v. Italy*, cit., paras. 131-136.

[81] See EctHR, *P.M. v. Bulgaria* (Application no. 49669/07), 24 January 2012. This case concerned the applicant's complaint that, raped at the age of thirteen, the Bulgarian authorities took *more than fifteen years* to complete the ensuing investigation. The applicant was therefore unable to benefit from effective remedies due to the reluctance of the authorities to prosecute the perpetrators of the rape.

[82] In a similar sense, see ECtHR, *I.G. v. the Republic of Moldova* (Application no. 53519/07), 15 May 2012; *M. and others v. Italy and Bulgaria* (Application no. 40020/03), 31 July 2012; *W. v. Slovenia* (Application no. 24125/06), 23 January 2014; *E.B. v. Romania*, cit.; *S.Z. v. Bulgaria* (Application no. 29263/12), 3 March 2015; *B.V. v. Belgium* (Application no. 61030/08), 2 May 2017

[83] See the ECtHR, case *M.A. c. Slovenia* (Application no. 3400/07), 15 January 2015. In a same sense *N.D. c. Slovenia* (Application no. 16605/09), 15 January 2015, in which the related criminal proceedings lasted over nine years. In both cases the Court held that there had been a procedural violation (prohibition of inhuman and degrading treatment) of the Convention, finding that the criminal proceedings regarding the applicants' rape did not comply with the procedural requirements imposed by article 3.

8. Conclusions

The solution adopted by the Court is undoubtedly acceptable, both about the violation of the prohibition of torture (article 3) and the violation of the right to an effective remedy (article 13).

With reference to article 3, the Court, besides clearly defining the three types of conduct prohibited therein, but also indicating the act of rape as an undoubted case of torture, considered the contextualisation of the facts for the purpose of defining torture. Rape, which is a particularly cruel act, was in those circumstances aggravated because it was committed by a person in authority against a person who was more vulnerable because he or she was deprived of freedom.

Furthermore, the Court confirmed the reversal of the burden of proof if the claimant suffers injuries while in the custody of the public official.

The Court's interpretation of the right to an effective remedy, provided for in article 13, has undoubtedly contributed to strengthening the protection afforded by article 3 on the prohibition of torture. Without *thorough and effective investigations*, it is impossible to identify and punish the perpetrators of the crime of torture and to provide the victim with protection. The Court has therefore correctly stated that the general duty imposed on States to recognise the rights and freedoms of every person subject to their jurisdiction requires the existence of an adequate official investigation into the conduct complained of (confirmed most recently by the ECHR judgment of 2 February 2021, *X and others v. Bulgaria*)[84].

Considering the way in which the investigation was conducted in the Aydin case, one must therefore firmly reject both the arguments of the Turkish Government's defence and the assertions of certain dissenting judges that «it is not possible in the present case to disregard the applicant's and, especially, her representatives' conduct. It did not make the investigation any easier and was more a factor contributing to its failure»[85].

[84] See ECtHR, *X and others v. Bulgaria* (Application no. 22457/16), 2 February 2021 (Grand Chamber). In the present case, the Court held that there had been no violation of the substantive limb of article 3, finding, in particular, that it did not have sufficient information to conclude that the Bulgarian authorities knew or ought to have known of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to an obligation to take preventive operational measures to protect them against such a risk. The Court held, however, that there had been a violation of the procedural limb of article 3. In this respect, it considered that the investigating authorities, who had not made use of the available investigation and international cooperation mechanisms, had not taken all reasonable measures to shed light on the facts of the present case and had not undertaken a full and careful analysis of the evidence before them. In the Court's view, the omissions observed appeared sufficiently serious for it to be considered that the investigation carried out had not been effective for the purposes of article 3 of the Convention, interpreted in the light of the other applicable international instruments and the Council of Europe "Lanzarote Convention".

[85] See the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev (on Domestic Remedies (article 13 of the Convention), para. 4.

Lastly, a very important lesson to be learnt from the *Aydin* judgment is that the so-called *secondary victimization* must be combated and curbed. It is that phenomenon that affects women who have already been victims of violence and who become victims again when they report it to the police, before the courts, in the media and in the social context in which they live and work.

This happened for example in the 2015 *Y. v. Slovenia* judgment, concerning a young woman's complaint about the criminal proceedings brought against a family friend, whom she accused of repeatedly sexually assaulting her while she was a minor, alleging that the proceedings were excessively long and traumatic.

The Court held that there had been a violation of the State's procedural obligations under article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court also found that there had been the violation of article 8 (right to respect for private and family life) of the Convention, finding that the Slovene authorities had failed to protect the applicant's personal integrity during the criminal investigation and trial. They should have prevented the alleged assailant from using offensive and humiliating remarks while cross-examining her during the trial[86].

The considerations of the government's defense, also taken up in some dissenting opinions, in the *Aydin* judgment therefore leave one speechless when it states: «It was equally surprising that, given the cultural context, her alleged loss of virginity did not create any obstacle to her marriage»[87]. In view of these considerations, the solution must be found mainly in a cultural path. In other words, we need to set out on the road of adequate training to improve the gender sensitivity of the police apparatus and the judicial system towards women victims of violence. And above all, to strengthen the skills of the professional figures of the judicial police apparatus, who meet women victims of violence (one could for example think about the doctors involved in the investigation by the public prosecutor, who wrote in their reports that they did not have the specific skills to answer the questions put to them by the public prosecutor). This all contributes to a more effective implementation of national, European, and international legislation on violence against women, to foster a victim-centered approach to their rights.

This seems to be the path recently indicated by the ECtHR in the 2021 *J.L. v. Italy* case, another case of secondary victimization. The judgment states that «The Court is convinced that criminal prosecution and punishment play a crucial role in the institutional response to gender-based violence and in combating gender inequality. It is therefore essential that judicial authorities avoid reproducing gender stereotypes in court decisions, minimising gender-based violence and exposing women to secondary

[86] See the ECtHR, *Y. v. Slovenia* (Application no. 41107/10), 28 May 2015. As regards the nature of the cross-examination by the defendant himself, the Court held that, while the defense had to be allowed a certain leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses.

[87] See the ECtHR, *Aydin v. Turkey*, cit., para. 68.

victimisation using guilt-tripping and moralising language that discourages victims' confidence in the justice system»[88].

As it has been rightly said in literature, «this judgment has a historical and legal value of proportions never known in Europe and in the world because, beyond the case examined, it lays bare an unspoken hypocrisy: the judge, in the face of gender violence cannot be impartial and does not use impartial arguments, except when he makes the cultural effort to see first and then eradicate his own stereotypes on the female and male gender. But the judiciary, everywhere in the world, is not always aware of this limitation, which is why, on the one hand, it perpetuates the impunity of men perpetrators of violence and, on the other hand, blames the women who report them»[89].

In sum, the lesson that emerges from the *Aydin* case is still relevant after more than twenty years, as evidenced by the above-mentioned *J.L. v. Italy* judgment. Moreover, it shows us the way forward: the solution can only be the education of the people with whom the woman victim of violence must deal. To this end, it is necessary that, in addition to the indispensable repressive instruments, a profound cultural process is promoted, involving all institutional and social actors in the perception and solution of the problem of gender-based violence, to be able to affect behaviour closely related to the hegemonic role traditionally played by men in the family, society, institutions, economy, and politics.

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Abstract: The paper, which deals with the ECtHR' decision *Aydin v. Turkey* dating from 1997, dwells on the two parameters in the light of which the appeal was deemed admissible: articles 3 and 13 ECHR. With reference to art. 3 ECHR, the *Aydin v. Turkey* case provides to the European Court the occasion to evaluate the definition of the crime of torture, considering any particularly punitive inhuman treatment as an act of torture, having regard to the factual circumstances. This sentence also represents an emblematic case as for the evolution of the Strasbourg case law in terms of article

[88] See the ECtHR, *J.L. v. Italy* (Application no. 5671/16) 27 May 2021, para. 141: «*La Cour est convaincue que les poursuites et les sanctions pénales jouent un rôle crucial dans la réponse institutionnelle à la violence fondée sur le genre et dans la lutte contre l'inégalité entre les sexes. Il est dès lors essentiel que les autorités judiciaires évitent de reproduire des stéréotypes sexistes dans les décisions de justice, de minimiser les violences contre le genre et d'exposer les femmes à une victimisation secondaire en utilisant des propos culpabilisants et moralisateurs propres à décourager la confiance des victimes dans la justice*». Unofficial translation from French by the author.

[89] See P. Di Nicola Travaglini, *La Corte EDU alla ricerca dell'imparzialità dei giudici davanti alla vittima imperfetta*, in *Questione Giustizia*, 20 July 2021, p. 2 (in *https://www.questionegiustizia.it/articolo/la-corte-edu-alla-ricerca-dell-imparzialita-dei-giudici-davanti-alla-vittima-imperfetta*). The text has been translated from Italian by the author.

3 ECHR. The applicative path of this latter, although not always being coherent, has still being characterised by an extensive trend.

The other parameter put as basis of the decision is article 13 ECHR, ensuring the right to an effective remedy. In fact, to grant effectiveness to the prohibition of torture, an official investigation, conducted with diligence and rapidity and able to identify the perpetrators is needed. From this point of view too, the analysis of the case law is particularly useful, since it demonstrates that only an official investigation, conducted within an appropriate time, allows the victims of torture to obtain justice.

Abstract: Il presente testo, che ha ad oggetto la sentenza *Aydin c. Turchia* della Corte Edu del 1997, si sofferma sui due parametri alla luce dei quali è stato accolto il ricorso: gli articoli 3 e 13 Cedu. Con riferimento all'articolo 3 Cedu, il caso *Aydin c. Turchia* offre l'occasione alla Corte europea per fare il punto sulla definizione del reato di tortura, indicando come atto di tortura qualsiasi trattamento inumano particolarmente afflittivo, tenuto conto delle circostanze di fatto. Questa sentenza rappresenta altresì un caso emblematico dell'evoluzione della giurisprudenza di Strasburgo in tema di articolo 3 Cedu, le cui tappe applicative, pur non seguendo sempre linee coerenti, sono comunque caratterizzate da una tendenza espansiva. L'altro parametro, posto a fondamento della sentenza, è l'articolo 13, che sancisce il diritto ad un ricorso effettivo. Affinché il divieto di tortura non sia inefficace, occorre difatti un'indagine ufficiale, svolta con diligenza e rapidità, che deve potere condurre all'identificazione dei colpevoli. Anche sotto questo profilo, l'analisi dell'*excursus* giurisprudenziale è assai utile, perché dimostra che solo un'inchiesta ufficiale, condotta in tempi adeguati, permette alle vittime di atti di tortura di ottenere giustizia.

Keywords: ECtHR – *Aydin v. Turkey* – torture – Article 3 ECHR – Article 13 ECHR.

Parole chiave: Corte Edu – *Aydin c. Turchia* – tortura – art. 3 Cedu – art. 13 Cedu.

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Ten Years After the Decision in the *Case of González et al. ("Cotton Field") v. Mexico* [2009]*

Irene Spigno

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1. Introduction. The González et al. ("Cotton Field") v. Mexico *[2009] Decision*

On 16 November 2009, the Inter-American Court of Human Rights (henceforth "the Court" or "the IACtHR") delivered its judgment in *González et al. ("Cotton Field") v. Mexico*[1] declaring the Mexican State liable internationally for the disappearance and subsequent death of three young women in Ciudad Juarez (Chihuahua). According to the decision, Mexico violated several rights provided for in the American Convention on Human Rights (henceforth "the ACHR"); namely: the right to life (article 4.1), to humane treatment (article 5), and to personal liberty (article 7).

Even though it was not the first time that the Court had delivered a decision in which the gender perspective had been considered[2], surely the decision in the "*Cotton Field*" case represents several other "first times" for the Court. First, it was the "first time" that the IACtHR carried out a contextual analysis incorporating the gender perspective, highlighting the generalized discrimination and violence against women (as will be analyzed in para. II).

Second, the gender perspective was used for the "first time" by the IACtHR as an enriching element of the standard of due diligence, since it has a bearing on the extent to which States are responsible for the fulfillment of the obligations to respect and guarantee the rights and liberties set out in article 1 of the ACHR. The ACHR

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1 IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs).

2 IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006 (Merits, Reparations, and Costs).

provides the "due diligence standard" to determine, on the one hand, States' obligations for acts committed by individuals who have no relationship with the State and, on the other, States' responsibility for the violations of human rights committed against a minority or a historically discriminated group by the State itself (to be discussed in para. III).

Finally, the Court, for the "first time", applied the gender perspective when defining reparation measures, thereby starting the development of a rich case law on reparations with a gender perspective, which has strengthened the transforming vocation of the role of the Inter-American case law (under discussion in para. IV).

However, gender discrimination and violence against women is still an alarming problem in the region. Where do we stand ten years after the "*Cotton Field*" judgment? To find an answer to this question, some concluding reflections will be developed in the final section of this article (para. V).

2. Contextual Analysis and the Gender Perspective

The first great input made by the Court in the "*Cotton Field*" case refers to the implementation of a gender perspective in the contextual analysis, "abnormalizing" the much-normalized situation of violence and discrimination against women.

The facts of the case took place in the north of Mexico, in Ciudad Juárez (State of Chihuahua), a city that in the last few decades has been characterized by an increase in insecurity and violence, in particular violence against women. In this respect, since 1993, the number of disappearances and murders of women and girls in Ciudad Juárez has increased significantly[3], so much so that the number of murders of women had doubled in comparison to those committed against men.

This context of violence can be explained by taking into consideration some characteristics of Ciudad Juárez, a city with a population of almost a million and a half inhabitants (according to data from the 2015 census) located on the border with El Paso (Texas, United States of America). Ciudad Juarez has also experienced a very intense transit of migrants, both Mexican and foreigners. It is an industrial city, and one of the most developed economic activities relates to the *maquiladora* industry. The social inequalities are strong and have contributed to the development of different types of organized crime[4], which have increased the levels of insecurity and violence, especially against women.

[3] See IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit.: para. 114. This fact has turned Ciudad Juárez into the «[…] focus of both the national and international community due to the particularly critical situation of violence against women that has been prevailing since 1993 and the poor response from the State to these crimes».

[4] See IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit.: para. 113.

Set against this background and even though the situation of violence against women is an extremely severe issue in the entirety of Mexico[5], the panorama in Ciudad Juárez was – and still is – very alarming[6].

Mexican authorities have long been aware of this situation; however, they had failed to give it the necessary attention considering not just the alarming quantitative data, but also the type of violence that marked out a very serious cultural and structural pattern.

In fact, the crimes for which the women in Ciudad Juárez were victims displayed common elements. First, the profile of the victims: generally, they were very young women, between the ages of 15 and 25, students, migrants, and either *maquiladora* workers or from stores or other local companies. Some of them had only recently moved to Ciudad Juárez and, they had low-income.

Second, a sizable number of these femicides were accompanied by signs of sexual violence. Specifically: the women were kidnapped and, days, weeks, or months later, their bodies, sexually abused or raped, tortured, and mutilated, were found in vacant lots.

Third, another common element was represented by the lack of clarification, irregularities in investigations after the disappearances, as well as after the finding of their bodies, and the persistence of impunity. The behavior of the authorities was worsened by their discriminatory and slack attitude to dealing with the homicides against women in Ciudad Juárez, which demonstrated a strongly stereotyped perception of the victims as women. We are looking at behaviors that, in turn, reflect a generalized and even "normalized" culture of discrimination and violence against women, which according to the Court, had played a decisive role when it came to the motives and methods of the crimes, as well as the attitudes of the authorities.

In this context of generalized violence and impunity, between the 6 and 7 of November 2001, the bodies of 17-year-old Laura Berenice Ramos Monárrez, 20-year-old Claudia Ivette González, and 14-year-old Esmeralda Herrera Monreal, were found

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[5] See S.J. Vázquez Camacho, *El Caso "Campo algodonero" ante la Corte Interamericana de Derechos Humanos*, in *Anuario Mexicano de Derecho Internacional*, 2011, p. 520 ss.

[6] The violence rates in the area have reached even higher peaks in 2006 due to the so-called war on drugs led by then President Felipe Calderón Hinojosa against the criminal groups: see C.E. Zamora Valadez, *El Derecho penal del enemigo en la legislación mexicana. ¿Son proporcionales las restricciones de derechos de los acusados de delincuencia organizada?*, Master's Thesis in Law with emphasis in the Adversarial System, Autonomous University of Coahuila, 2017. During that period, gender-based crimes against women were committed by members of organized crime groups as well as private parties, but also by the police and members of the Mexican Army: see I. Spigno - C. Zamora Valadez, *Evolución de la desaparición forzada de personas en México. Análisis a la luz de la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in J.M. Ibáñez Rivas, *et al.* (eds.), *Desaparición forzada en el Sistema Interamericano de Derechos Humanos. Balance, impacto y desafíos*, Mexico, pp. 527-528.

lifeless, tortured, raped, and brutally mutilated in a cotton field in Ciudad Juárez, along with the remains of five other people. Given the ineptitude of the Mexican authorities, their families, with the support of different human rights organizations, took the case to the Inter-American system for the protection of human rights[7].

3. The IACtHR's Decision and Mexico's Responsibility for Acts Committed by Individuals

Article 1 of the ACHR, titled «Obligation to Respect Rights», establishes the obligation of States to "respect" the rights and freedoms recognized therein and to "ensure" their free and full exercise to every person who is subjected to their jurisdiction without discrimination. In fact, this provision establishes a double obligation: on one hand, to "respect" and, on the other, to "ensure" rights and freedoms. The first one entails an obligation of omission, i.e., not to violate the fundamental rights of people. In that sense, consequently, States must abstain from committing any type of action or act that interferes with the free and full exercise of human rights of people. The second one, however, implies a *quid pluris* which translates into the duty of States to take a positive approach to implementing specific measures and activating mechanisms to avoid the violation of rights by others.

Specifically, the obligation to "ensure", contemplated in article 1.1 of the ACHR also represents the States' duty to "prevent" the commission of wrongful acts by private parties with no link to the State. It is a principle that had already developed since the beginning of the contentious jurisdiction of the Court in cases related to the forced disappearance of persons in the framework of the so-called "Honduran block", which established the legal obligation of States to take reasonable steps to prevent violations of human rights[8].

Therefore, the commission of a wrongful act that leads to the violation of human rights by a private individual (or without it having been possible to identify the perpetrator) is able to lead to the international responsibility of the State by omission, that is, for not preventing the violation with sufficient due diligence in the terms provided by the ACHR. The international responsibility of States in this regard comes from the implementation of a due diligence standard[9], according to five criteria set by

[7] On the matter regarding the path that made it possible to take the case of Laura Berenice, Claudia Ivette and Esmeralda to the Court, see I. Spigno, González y otras ("Campo algodonero") vs. Estados Unidos Mexicanos *[2009]. La obligación de garantizar, respetar y reparar derechos y libertades con perspectiva de género y el (in)cumplimiento del Estado mexicano*, in L.E. Ríos Vega - I. Spigno (dirs.),*Vol. XIII. México ante la Corte Interamericana de Derechos Humanos: a 20 años de la aceptación de su competencia contenciosa*, México, 2021, p. 147 ss.

[8] See X. Soley, *La desaparición forzada de personas en la jurisprudencia de la Corte IDH*, in L.E. Ríos Vega - I. Spigno (dirs.), *Estudios de casos líderes interamericanos y europeos. Vol. I. Libertad religiosa/Libertad de expresión/Derechos económicos, sociales y culturales/Derechos de las personas desaparecidas*, Mexico, 2016, p. 187 ss.

[9] See S.J. Vázquez Camacho, *op cit.*: p. 536. This criterion was also applied in the IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, 31 January 2006 (Merits, Reparations and Costs), in which it was

the Inter-American Tribunal: first, the due diligence to prevent relates to the existence of a situation of real and immediate risk that endangers the rights and liberties recognized by the ACHR and that is caused by actions from private parties or people not identified as States parties; second, it must be possible to determine the persons or vulnerable groups; third, there must be reasonable opportunities to prevent or avoid the risk of violations of human rights; fourth, the State must know, be able to know or should have reasonably known the risk and the specific vulnerable situations and; finally, for the State to be able to reasonably prevent or avoid the materialization of the risk[10].

In the "*Cotton Field*" judgment, the Court added one more element to the due diligence standard: that is to say, the gender perspective, which entails the analysis of the specific case under a methodological tool whose objective consists of eradicating the power imbalances created by biological, social, and anatomical differences that exist between men and women. It is about a fundamental approach that allows the Inter-American Court to develop the standard of "strict" due diligence[11] which must be applied in every case in which the victim/victims belong to a historically discriminated and vulnerable group, as in the case of women, and that pushes towards a more onerous demand for States in the fulfillment of their obligations.

The standard of due diligence, developed in accordance with the application of the gender perspective, guides the Court in applying the gender perspective to the interpretation of the obligation to prevent and ensure recognized in article 1.1 from the ACHR, indicating the specific characteristics of this obligation with reference to three key points: 1) a duty of generalized and anticipated prevention which has to be carried out before the disappearance (in accordance with the awareness of the existence of a generalized pattern of gender-based violence; 2) a duty of specific and subsequent prevention which takes shape through the immediate search that has to be carried out from the moment the news of the disappearance is received; and 3) a duty to investigate, which means finding and punishing the person or persons presumed responsible.

In reference to the first of these key points, the implementation of the gender perspective in the obligation of prevention from the State is interpreted, in conformity with article 7, letter b) of the 1994 Inter-American Convention on the Prevention,

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recognized that the State was responsible for allowing and not preventing wrongful acts perpetrated by individuals (in this specific case they were paramilitaries that massacred and disappeared dozens of people).

[10] See V. Abramovich, *Responsabilidad estatal por violencia de género: comentarios sobre el caso "Campo algodonero" en la Corte Interamericana de Derechos Humanos*, in *Anuario de Derechos Humanos*, 6, 2010, p. 167 ss. In the *Case of the Puerto Bello Massacre v. Colombia*, the Court considered that these elements existed because the State knew the situation of real and imminent danger in which the victims were, as well as the reasonable opportunity to prevent and avoid such danger, developing what would be defined as the "doctrine of foreseeable and avoidable risk".

[11] S.J. Vázquez Camacho, *op. cit.*

Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), which forces State parties to use due diligence to prevent, investigate and impose penalties for violence against women[12], to undertake efficient measures and policies[13]. By virtue of that, Mexico was declared internationally responsible, as authorities of the State demonstrated willful misconduct by having observed the increase in violence against girls and women and not having been capable of facing, controlling or eliminating it. The States' obligation of prevention is established, therefore, as an obligation of means and not of results[14] which does not imply that a States is responsible for every violation of human rights committed by private individuals. Rather, it is about State obligations that become active once the State becomes aware of the existence of a situation of real and immediate danger for a specific individual or group of individuals, and it has reasonable opportunity to prevent or avoid that danger.

In the specific case, the Mexican State was aware of the context and generalized pattern of violence against women in Ciudad Juárez; however, this fact alone cannot be enough to lead to the unlimited responsibility of the State for every wrongful act committed against women.

The existence of a generalized context of violence against women causes the emergence of an international responsibility of the State in reference to the second key point outlined by the Court (namely, after they have been made aware of the disappearance and before the discovery of the bodies), for ignoring the existence of a real and immediate danger for the safety and life of the victims. It would be in this moment when the obligation of strict due diligence appears in cases of reports of missing women, which obligates State authorities to act immediately by carrying out a search in the first few hours. In this case, it is also about an obligation of means, albeit stricter than the previous one and which requires an exhaustive implementation of search actions. It is essential for police authorities, prosecutors, and judicial officials to take prompt and immediate action by ordering the measures necessary to determine the whereabouts of the victims or the place where they may have been detained. In this regard, there must be adequate procedures for reporting disappearances, which should result in an effective investigation in the first few hours. The authorities should presume that the disappeared person has been deprived of their liberty and is still alive until there is no longer any uncertainty about their fate.

In the "*Cotton Field*" case, the Court highlighted how the State had failed to demonstrate the implementation of reasonable and efficient measures aimed at finding

[12] In the same vein, the Committee on the Elimination of Discrimination Against Women (CEDAW) has pronounced itself stating that: «States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation […]» (CEDAW, *General recommendation No. 19: Violence against women* (A/47/38), 29 January 1992, para. 9).

[13] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 272.

[14] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 251.

the victims alive. It failed to act promptly once the news of the disappearance was received, did not perform specific search actions, and the authorities and officials who participated adopted an attitude that suggested it was not necessary to respond to the reports of the disappearances. From the reconstruction of the facts, the Court inferred that the State did not act with the required due diligence to prevent the death and abuse suffered by the victims and did not act, as could reasonably be expected, in accordance with the generalized context of violence of which the State was aware[15].

Finally, in reference to the third key point, the obligation to guarantee requires States to investigate the facts. Such investigations must be conducted diligently to prevent impunity, as such as state encourages the repetition of violations of human rights. The failure to promptly start a serious, effective, and adequate investigation allows and encourages the existence of an environment of impunity and the insufficiency of measures adopted by the Mexican State to resolve the matter.

4. How to Provide Reparation Using a Gender Perspective

In the "*Cotton Field*" decisions, the Court applied for the first time the gender perspective in the identification and definition of the appropriate measures of reparation, considering it as a fundamental guideline in the obligation to repair the damage, contemplated in article 63.1 of the ACHR. The obligation to respect and ensure the rights and liberties (article 1 ACHR) would be a dead letter without the obligation to repair the damage generated by the violations of human rights. It is about an integral reparation, which stems from the international responsibility attributable to the State. Consequently, the reparation is a right for those affected but also an obligation of the State[16]. In this regard, the measures of reparation must respect the following guidelines: 1) they must refer directly to the violations declared by the Tribunal; 2) they must repair proportionately the pecuniary and non-pecuniary damage; 3) they must not make the beneficiaries richer or poorer; 4) they must restore the victims to their situation prior to the violation; and, 5) they must design them in order to identify and eliminate the factors that cause discrimination.

The measures of reparation applied using a gender perspective are fundamental in a context of structural discrimination for its ability to offer a "transforming vocation": this means that the reparations not only have the effect of "restitution", but also a "remedial" one, focused on intervening in a context of discrimination and structural violence. This principle has been interpreted as applying in relation to the following specific measures[17]: first and foremost, the Court set out certain measures in

[15] *Ivi*, para. 284.

[16] See A.J. Rousset Siri, *El concepto de reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in *International Journal of Human Rights*, 1, 2011, p. 59 ss.

[17] These are the measures of satisfaction and guarantees of non-repetition that consider and apply the gender perspective; however, the Court also set out measures of rehabilitation consisting of

relation to the "obligation to investigate" the facts and identify, judge, and, where appropriate, sanction the people responsible for the violations[18], requiring the Mexican State to undertake specific lines of inquiry on sexual violence, which entails investigating patterns of discrimination and violence against women in the area.

Furthermore, the Court set out to the State the need for the investigations to be conducted following protocols and manuals which consider the gender perspective, and which instruct the State to provide the victims' families with updated information on the progress of investigations, as well as to guarantee full access to the case files. Finally, it set out that the investigations needed to be conducted by highly trained officials in similar cases and which dealt with victims of discrimination and gender-based violence[19]. Second, among the measures of satisfaction applying a gender-perspective[20], the Court asked the State to build a monument to commemorate the women who were victims of the femicide in Ciudad Juárez, as a way of dignifying them and as a memorial to the context of violence they suffered.

A fundamental role has been assumed by the gender perspective also in reference to the guarantees of non-repetition and to those that forced the State to reinforce its policies in order to effectively guarantee the prevention of gender-based violence against women, as well as to ensure that sufficient attention is paid to victims and the needs of an immediate search. In that sense, in its decision, the Court highlighted the need for the State to continue harmonizing all of its protocols, manuals, prosecutorial investigation criteria, expert services and provision of justice, used to investigate the crimes related to the disappearance, sexual abuse and murders of women, in accordance with the 1999 Manual on Effective Investigation and Documentation of

giving medical, psychological, and psychiatric attention, in an immediate, adequate and effective way, through the State's specialized medical institutions to every family member considered to be a victim (IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., paras. 544 et seq.) and of compensation (*ivi*: paras. 550 et seq.).

[18] Originally conceived as a measure of satisfaction and non-repetition, in 1998, with the decision in the *Case of Benavides-Cevallos v. Ecuador*, 19 June 1998 (Merits, Reparations and Costs), the Court stipulated as a specific and autonomous measure of reparation an obligation for the State to investigate the facts and guarantee justice.

[19] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., paras. 452-463.

[20] As measures of satisfaction, the Court ordered the State to do the following: 1) the publication of certain extracts of the judgment in the Federation's Official Gazette, in a daily newspaper with widespread national circulation, and a newspaper with widespread circulation in the state of Chihuahua, as well as on an official web page of the Federal State, and of the State of Chihuahua (*Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 468); and 2) the organization of a public act acknowledging international responsibility in which the state would have to refer to the human rights violations declared by the Court, and that would have to include the participation of the next of kin of the victims and the organizations that represented the next of kin before the national and international courts. In particular, the Court specified that: «The organization and other details of this public ceremony must be duly consulted previously with the three victims' next of kin. In case of disagreement between the victims' next of kin or between the next of kin and the State, the Court will decide» (IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 469).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the so called Istanbul Protocol), the 1991 Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, both from the United Nations, and the international standards to search for disappeared persons, using a gender perspective[21].

Furthermore, the Court applied the gender perspective in the guidelines for the immediate search indicating how all the activities that must be conducted in these cases (e.g., the implementation of searches *ex officio* and without any delay in cases of disappearance, or the coordination of the efforts of different security agencies to find the person, among others) should be even more urgent and rigorous when the victim is a girl or a woman[22].

Finally, the Court ordered the State to continue implementing permanent education and training programs and courses in human rights and gender aimed not only at the public servants involved in the preliminary investigations and judicial proceedings in relation to discrimination, abuse and murders of women based on their gender, but also to the Chihuahua population in general. The objective of this measure of reparation is to eliminate the stereotypes of women's role in society and to develop the capacity of the population to recognize the discrimination that women suffer in their daily life[23].

5. Where do we Stand Ten Years after the "Cotton Field" *Decision? Final Remarks*

[21] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 502.

[22] *Ivi*, paras. 509-512. In that regard, the Court requested that the State create, within six months of notification of the judgment, a web page that would be updated continually with the necessary personal information on all the women and girls who had disappeared in Chihuahua since 1993 and who remain missing. The objective of this web page is to allow any individual to communicate with the authorities by any means, including anonymously, to provide relevant information on the whereabouts of the disappeared women or girls or, if applicable, of their remains (*Ivi*, paras. 507-508). Also, the Court established that the State would have to create a database with the personal information available on the disappeared women and girls at the national level and including the necessary information, principally DNA and tissue samples, of those next of kin of the disappeared who consented – or where ordered by a judge – with the sole purpose of locating the person, and the genetic information and tissue samples from the body of any unidentified woman or girl deprived of life in the State of Chihuahua (*ivi*: paras. 509-512).

[23] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 531. On the matter regarding the measures of reparation established by the Court with a gender perspective, see I. Spigno - M.B. Hinojosa García, *Reparar con perspectiva de género a las mujeres víctimas de des-aparición forzada de personas:* González y otras ("Campo Algodo-nero") vs. México *[2009]*, in L.E. Ríos Vega - I. Spigno (dirs.), *Vol. X. Los derechos de las víctimas de desaparición forzada de personas en el sistema interamericano*, Mexico, 2020, p. 111 ss.

With the "*Cotton Field*" decision, the gender perspective was incorporated in the Inter-American case law, when it comes to the contextual analysis of the facts, as well as the definition of State obligations whose non-compliance generates international responsibility, and in the measures of reparation set out. Since then, more than ten years have passed and during that time the Court has made pronouncements in relation to 15 cases concerning gender-based violence[24], elaborating a rich case law with a profound transforming vocation[25].

Nevertheless, unfortunately, such vocation has not transformed itself into a tangible reality since discrimination and violence rates against women in Mexico and Latin America are still very high. In 2017, almost 3,000 women were murdered in the areas of Latin America and the Caribbean by their previous or current partner, with Brazil leading the list with 1,133 women murdered for reasons based on their gender[26].

In Mexico, the data on violence against women is concerning according to data provided by the Executive Secretariat of the National System of Public Security in

[24] This is up to date as far as 15 July 2020; it concerns the following IACtHR cases: *Case of the Miguel Castro-Castro Prison v. Peru*, *op cit.*; *González et al. ("Cotton Field")*, cit.; *Fernández Ortega et al. v. Mexico*, 30 August 2010 (Preliminary Objections, Merits, Reparations, and Costs); *Rosendo Cantú et al. v. Mexico*, 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs); *Véliz Franco et al. v. Guatemala*, 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs); *Espinoza Gonzáles v. Peru*, 23 June 2015 (Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs); *Velásquez Paiz et al. v. Guatemala*, 19 November 2015 (Preliminary Objections, Merits, Reparations and Costs); *Yarce et al. v. Colombia*, 22 November 2016 (Preliminary Objection, Merits, Reparations and Costs); *I.V. v. Bolivia*, 30 November 2016 (Preliminary Objections, Merits, Reparations and Costs); *Favela Nova Brasilia v. Brazil*, 16 February 2017 (Preliminary Objections, Merits, Reparations and Costs); *Gutiérrez Hernández et al. v. Guatemala*, 24 August 2017 (Preliminary Objections, Merits, Reparations and Costs); *V.R.P., V.P.C. et al. v. Nicaragua*, 8 March 2018 (Preliminary Objections, Merits, Reparations and Costs); *López Soto et al. v. Venezuela*, 26 September 2018 (Merits, Reparations and Costs); *Women Victims of Sexual Torture in Atenco v. Mexico*, 28 November 2018 (Preliminary Objections, Merits, Reparations and Costs); and *Azul Rojas Marín et al. v. Peru*, 12 March 2020 (Preliminary Objections, Merits, Reparations and Costs).

[25] On this point see F. Piovesan, *Sistema interamericano de derechos humanos y el constitucionalismo regional transformador en América Latina*, in L.E. Ríos Vega - I. Spigno (dirs.), F.G. Ruz Dueñas (coord.), *Estudios de casos líderes interamericanos. Vol. XX. La jurisprudencia interamericana más relevante de 2018 a debate*, Mexico, 2020, p. 3 ss.; and A. von Bogdandy, *Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador*, in *Revista Derecho del Estado*, 34, 2015, p. 3 ss.

[26] Nevertheless, if we compare the rate for every 100,000 women, the phenomenon has a reach in El Salvador that is not seen in any other place in the area: 10.2 femicides per 100,000 women. In 2016, Honduras registered 5.8 femicides per 100,000 women. Guatemala, Dominican Republic, and Bolivia also showed high rates in 2017, equal or superior to 2 cases per 100,000 women. In the region, only Panama, Peru and Venezuela have rates lower than 1.0. On this data, see I. Spigno, *Gender violence against low-income women in Mexico. Analysis of the Inter-American doctrine*, in *Rivista di Diritti Comparati*, Special Issue 1, 2019, p. 170.

2019, 983 presumed cases of femicide were registered and, so far in 2020 (January to May period), 375 cases have been counted for the same crime[27].

According to data produced by the National Institute of Statistics and Geography, out of the 46.5 million women aged 15 and over in the country, 66.1% (30.7 million) have suffered violence of some kind (physical 34%, emotional 49%, economic 29% or sexual 41.3%), by any perpetrator, throughout their life[28].

In light of this data, perhaps it would be worth reflecting on the meaning of the Inter-American system in the continent and on the responsibility that has been attributed to it —without at the same time endowing it with enforcement powers— in order to solve issues of structural power that perhaps should be the responsibility of States that, for their part, often fail to show themselves as being cooperative with the system. The status of the (non)compliance of the "*Cotton Field*" decision is clear proof of that[29].

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Abstract: On 16 November 2009, the Inter-American Court of Human Rights delivered the leading decision in the the *Case of González et al. ("Cotton Field") v. Mexico*, declaring the Mexican State liable internationally for the disappearance and subsequent death of three young women in Ciudad Juarez (Chihuahua). The paper analyses the *"Cotton Field"* judgment, underlining that this was the first time in which the IACtHR carried out a contextual analysis incorporating the gender perspective, highlighting the generalized discrimination and violence against women. Furthermore, the gender perspective was used for the first time by the IACtHR as an enriching element of the standard of due diligence and the gender perspective was applied when defining reparation measures.

[27] Executive Secretariat of the National System of Public Security, Information on violence against women (Crime incidence and 9-1-1 emergency calls), May 2020. In: *https://drive.google.com/file/d/1V3v-fzNLtIq7N4UwpIz-py1vodfll7tc/view* [Accessed on 15 July 2020].

[28] Additionally, it has been highlighted that 43.9% of the women in Mexico has faced attacks by a current partner or the previous one during their relationship and that 53.1% suffered violence by a perpetrator who was not their partner. Between 2014 and 2016, the Entities with the highest rates of femicides were: Baja California, Colima, Chihuahua, Guerrero, State of Mexico, Michoacán, Morelos, Oaxaca, Sinaloa, Tamaulipas, and Zacatecas. See the following documents: National Institute of Statistics and Geography (INEGI by its name in Spanish), *National Survey on the Dynamics of Household Relationships (ENDIREH by its name in Spanish)*, 2016; National Survey of Victimization and Perception of Public Security, 2018; and *Census of Social Assistance Accommodations*, 2015.

[29] See I. Spigno, González y otras ("Campo algodonero") vs. Estados Unidos Mexicanos *[2009]*. *La obligación de garantizar, respetar y reparar derechos y libertades con perspectiva de género y el (in)cumplimiento del Estado mexicano*, cit.

RIVISTA DI
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Abstract: Il 16 novembre 2009, la Corte interamericana dei diritti umani ha adottato la sentenza *González y otras ("Campo algodonero") c. Messico*, dichiarando lo Stato messicano responsabile a livello internazionale per la sparizione e successiva morte di tre giovani donne a Ciudad Juarez (Chihuahua). Il contributo analizza la sentenza, sottolineando che questa è stata la prima volta in cui la IACtHR ha svolto un'analisi contestuale incorporando la prospettiva di genere, evidenziando la discriminazione e la violenza generalizzate contro le donne. Inoltre, la prospettiva di genere è stata utilizzata per la prima volta dalla Corte interamericana come elemento nella definizione del principio di *due diligence* e la prospettiva di genere è stata applicata nella definizione delle misure di riparazione.

Keywords: Inter-American Court of Human Rights – gender perspective – reparation measures – women – Mexico.

Parole Chiave: Corte interamericana dei diritti umani – prospettiva di genere – misure di riparazione – donne – Messico.

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Sexual Violence and Torture: Lessons Learned and Open Challenges in the ICTR Judgement on the *Case of Akayesu*[*]

Alessandra Viviani

CONTENTS: 1. Introduction. – 2. The Case Against Jean Paul Akayesu before the International Criminal Tribunal for Rwanda. – 3. The Decision of the Trial Chamber. – 3.1. Definition of Rape. – 3.2. Rape as a Genocidal Act. – 3.3. Rape as a Crime Against Humanity and Torture. – 4. Rape and Sexual Violence as Torture in International Human Rights Law. – 5. The Difficulties of Prosecuting Sexual Violence. – 6. Conclusions.

1. Introduction

Over the past few decades, the international community has taken progressive steps to put an end to impunity for sexual and gender-based crimes[1]. This is true both within international human rights law as well as international criminal law.

The Statute of the International Criminal Court (henceforth, the ICC), following the developments in the case law of both the International Criminal Tribunal for the former Yugoslavia (henceforth, the ICTY) and the International Criminal Tribunal for Rwanda (henceforth, the ICTR), expressly includes various forms of sexual and gender-based crimes —including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence— as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts.

Such an important recognition indicates that the relevance of the issue is well perceived at international level. At the same time, the inclusion of those crimes within the ICC Statute cannot be considered *per se* as a sufficient guarantee, especially in terms of protection of the victims.

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[1] The relevance of the fight against sexual violence at international level is also demonstrated by the adoption by the Un Security Council Resolution 1325 (2000), on women and peace and security, with its follow-up resolutions, identifying sexual violence, including rape, as a threat to international peace and security.

With this paper we intend to examine sexual violence with the lens of the crime of torture and analyse whether a definition of rape and sexual violence as autonomous crimes under international law would better serve the purpose of fighting against discrimination and protecting the victims of these hideous acts.

To do so, we shall consider the decision of the ICTR adopted in 1998, in the case against Jean Paul Akayesu[2].

2. The Case Against Jean Paul Akayesu before the International Criminal Tribunal for Rwanda

The case against Akayesu is credited to be a leading one in international criminal law for several reasons. First, it has resulted in the first adversarial conviction for genocide under international law since Nuremberg. It also established relevant precedents with reference to the constitutive elements of the crime of genocide and the related concepts of inducement and complicity. Nevertheless, Akayesu is known and celebrated as the first case recognising the concept of genocidal rape[3].

The Rwandan genocide and massacres are among the cruellest ones in the recent history of mankind[4]. The numbers of the Rwandans massacred between April and July 1994 are still uncertain, but the United Nations (henceforth, the UN) estimates that nearly one million of them died during that short period[5].

The genocide in Rwanda has been labelled as the 100 days genocide. It started on the eve of April 6, when the President Habyarimana was killed. This assassination was taken as the occasion for extremist leaders of Rwanda's Hutu majority to start a campaign to erase the Tutsis from the country. In their action, they included political representatives of moderate Hutu who had supported the Arusha Agreement signed in 1990 at the end of Tutsi rebellion against Hutu power. Massacres took place in towns as well as in small villages, and barriers were created by the Rwandan Army as well as by the Hutu Militia to prevent the escape of thousands of Tutsi. Those savage attacks, often carried out with machetes, involved the overall Hutu population, which responded to the incitement to genocide by their leaders[6].

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[2] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgement (Trial Chamber), Case No. ICTR-96-4-T, 2 September 1998.

[3] S.L. Russell-Brown, *Rape as an Act of Genocide*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 350 ss., available at *http://scholarship.law.berkeley.edu/bjil/vol21/iss2/5*.

[4] B. Nowrojee, *Shattered Lives: Sexual Violence During the Rwanda Genocide and Its Aftermath*, in *Human Rights Watch (Africa Division)*, 1996, available at *http://www.hrw.org/reports/1996/Rwanda.htm*

[5] B. Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in *Santa Clara Law Digital Commons*, 2008, available at *http://digitalcommons.law.scu.edu/facpubs/629*.

[6] See the information available at *https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml*; D. Nikuze, *The Genocide against the Tutsi in Rwanda: Origins, causes, implementation, consequences, and the post-genocide era*, in *International Journal of Development and Sustainability*, 3, 2014, p. 1086-1098, available at *https://www.isdsnet.com/ijds-v3n5-13.pdf*. It is interesting to note that many authors

Rape and sexual violence were amongst the preferred tools of annihilation of the targeted group. «The rapes, most of them committed by many men in succession, were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation. So many women feared them that they often begged to be killed instead. Often the rapes were in fact a prelude to murder. But sometimes the victim was not killed but instead repeatedly violated and then left alive; the humiliation would then affect not only the victim but also those closest to her»[7].

During the Rwandan genocide, widespread sexual violence, mostly against Tutsi women, took place in all the territory. Women were raped on the streets, in the fields, in churches or in public buildings where they were often directed on purpose, with the excuse of offering shelter. They were attacked in their homes, and often used as sexual slaves[8].

From various sources and witnesses it has become clear that the real scope of "genocidal rape" in Rwanda was to kill Tutsi women. Rape was used as a method of destruction through the transmission of AIDS, or because of the number of times a woman was raped, or as a means of social exclusion and annihilation of the survivors.

In this context the story of Akayesu that emerged from the trial is a particularly vivid one. The facts are probably well known, but it is worth briefly recollecting them.

Jean Paul Akayesu was indicted for genocide, crimes against humanity, incitement to commit genocide, violations of common article 3 of the Geneva Conventions and of article 4(2)(e) of Additional Protocol II. The indictment against Akayesu was submitted by the Prosecutor Louise Arbour, on February 13, 1996. The Office of the Prosecutor amended it during the trial, in June 1997, to add three counts (13-15, Crimes Against Humanity based on the allegations of rape and sexual violence) and three paragraphs (10A, 12A and 12B) to include the allegations of rape and sexual violence. It is definitely worth mentioning that it took nearly one year to add those specific accounts and that this was probably done due to the pressure by women's rights activists and public opinion.

This addition at the last minute is quite surprising when considering the situation on the field and the magnitude of the use of rape and sexual violence in the Rwandan conflict. Rape largely occurred also in the Taba commune, which was under the control of its bourgmestre, Akayesu. Rwanda is divided into prefectures and sub-divided into

describe the Tutsi genocide as the clear consequence of the Belgian colonization of Rwanda. The colonizer transformed the already existing groups present in the territory into different and opposing ethnicities.

[7] P. Landesman, *A Woman's Work*, in *The New York Times*, 2002, available at *https://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html.*

[8] B. Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, United Nations Research Institute for Social Development Occasional Paper 10, 15 November 2005, p. 1 ss., available at *http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument.*

communes, which are placed under the authority of bourgmestres. The latter is the most powerful figure in the commune and has exclusive control over the communal police and is responsible for the execution of laws and regulations and the administration of justice. Akayesu was the bourgmestre of the Taba commune, prefecture of Gitarama, from April 1993 until June 1994[9].

Between April 7 and the end of June 1994, hundreds of civilians took refuge at the bureau communal of Taba, trying to escape the massacres taking place in the territory at the time. The ICTR established that at least 2000 Tutsi were killed in Taba during Akayesu's mandate and that the acts were carried out openly, so much that it is impossible to maintain that the bourgmestre did not know about them (paras 179-181).

According to various sources and witnesses during trial, Tutsi women were regularly subjected to rape and other forms of sexual violence on or near the bureau communal premises and the civilian population was frequently murdered and/or beaten on or nearby them. It is thus quite shocking that the Office of the Prosecutor at the beginning of its investigations decided not to include charges for these rapes on the basis that there was non-sufficient evidence against the accused[10].

In the Additional Indictment, finally, under paragraphs 12A and 12B, especially devoted to rape and sexual assault, Akayesu was again charged with genocide, complicity to commit genocide, crimes against humanity (extermination, rape, and other inhumane acts) and violations of article 3 common to the Geneva Conventions and of article 4(2)(e) of the Additional Protocol II with reference to those facts.

With respect to the acts of rape and sexual violence, the Indictment charged that Akayesu knew that acts of sexual violence, beatings, and murders were being committed in the premises of the bureau communal or nearby them and that he was at times present during their commission. The Indictment further charged that Akayesu facilitated the commission of sexual violence, beatings, and murders by allowing those acts to occur on or near the bureau communal premises, and that, by virtue of his presence during the commission and his failure to prevent these acts, Akayesu had in fact encouraged, aided, and abetted these activities.

It is interesting to note that Akeysu's defence against the charges of rape and sexual violence was particularly strong. The Defence, in fact, did not deny that acts of genocide had took place, but rather argued that Akayesu could not be held responsible

[9] During the trial it was affirmed by expert witnesses that burgomaster enjoyed a wide degree of both de jure and de facto powers, rendering the position an extremely relevant one, also in terms of the degree of control over police forces (paras. 72-73).

[10] It is reported that Major Brent Beardsley, the assistant to Major-General Dallaire, was once declared: « [W]hen they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas. …[G]irls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and they would have been killed in that position». Many women were held in sexual slavery or were rendered infertile or HIV-positive by this kind of destructive rapes. B. Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims*?, cit.

for those acts due to his impossibility to prevent the behaviours of the Interahamwe on whom he did not have any direct power at the time. Vice versa, the Defence maintained that no sexual violence had taken place in the commune and that witnesses were to be considered completely unreliable. According to the Defence those charges had been added to the Trial only due to "public pressure" on the Office of the Prosecutor, but they had in fact no real connection with Akayesu's case (paras. 31 and 42)[11].

3. The Decision of the Trial Chamber

As we said in the introduction, the judgment of the ICTR is extremely interesting on various aspects, including those related to leaders' individual criminal responsibility[12].

Nevertheless, we are going to focus our attention on the interpretation of substantial international criminal law adopted by the judges. In this context, the decision is relevant in terms of the definition of rape as an international crime, rape as genocidal act, rape, and sexual violence as acts of torture and crimes against humanity.

[11] As the Chamber noted (para. 47) these allegations were not followed by any actions against the witnesses by the defence. According to the judges, «Defence counsel's attempt in his closing arguments to tar all prosecution witnesses with the same broad brush of suspicion cannot be accepted by the Chamber. Thus, the credibility of each witness must be assessed on its merits, considering the witness's demeanour and the consistency and credibility or otherwise of the answers given by him or her under oath».

[12] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit. para. 691: «The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them», and para. 693: «The Tribunal finds, under article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place». The Tribunal decided not to uphold the responsibility of Akayesu under art.6(3) of its Statute, defining superior responsibility, considering that it was not demonstrated during trial that he had the control over the actions of the Interahamwe. This could be somehow challenged, but it stems from the diverse approach adopted between military and political leaders when it comes to superior responsibility. See A. Viviani, *Crimini internazionali e responsabilità dei leader politici e militari*, Milano, 2005.

3.1. Definition of Rape

The difficulties linked to the definition of rape as an international crime have emerged clearly since the first ICTY trial[13] in the *Tadić* case. As the first international war crimes trial since Nuremberg and Tokyo, *Tadić*[14] has been a leading case in international criminal law, considering that the accused was also charged with rape and sexual violence as crimes against humanity and war crimes. The case law of the ICTY has opened the door to the reconstruction of the *actus reus* and *mens rea* of rape as an international crime, but many questions remained uncertain[15].

It is therefore to be expected that the ICTR in the *Akayesu* judgment also felt the need to contribute to this definition.

According to the judges, rape can be considered «as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact… 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»[16].

The definition adopted in Akayesu's case is extremely broad and looks at the concept of "invasion" rather than "penetration", thus focusing more on the victim's perception of how his or her body has been violated. The judges also did not include the element of lack of consent which they considered probably largely proved through the situation of coercion and danger suffered by the victims as demonstrated during the trial. In the context of genocide, crimes against humanity and war crimes of this magnitude to investigate each single victim's lack of consent is not only redundant, but it also requires, during trial, for each person to reveal further and more painful details

[13] Rape was also prosecuted by the International Military Tribunal for the Far East, but without adopting a clear definition of the elements of crime. The actions of the Japanese Army during World War II were so serious that, even though the Statute did not explicitly mention rape, the Far East Tribunal held some defendants responsible for the crimes, including rape, committed by persons under their command. It must be noted, nevertheless, the crimes against the so called "comfort women" were not mentioned in the judgment. It was only under Control Council Law N° 10, that the Allied Powers included rape as a crime against humanity. Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946). In the 1949 Geneva Convention on the treatment of prisoners of war, rape was also included amongst war crimes

[14] ICTY, *The Prosecutor v. Duško Tadić*, Judgment (trial Chamber), Case No. IT-94-I-T, 14 July 1997.

[15] M. Ellis, *Breaking the Silence: Rape as an International Crime*, in *Case W. Res. J. Int'l L.*, 38, 2007, p. 225, available at *https://scholarlycommons.law.case.edu/jil/vol38/iss2/3*; K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, in *Berkeley J.Int'l L.*, 21, 2003, p. 288 e 318.

[16] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit., para. 688.

of their experiences[17]. Considering the acts of violence against Tutsi women, the judges stressed that «the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts»[18], because there is rather the need to understand the overall framework of the involved communities.

Such a broad approach to sexual violence identified as any act of a sexual nature clearly infringing upon the persona dignity of the victim, although upheld in other judgments such as *Celibici*[19] and later *Musema*[20], was not adopted in the case of *Furundžija*[21], when the ICTY chose a somehow more technical definition of rape which, to be defined as such, needs to include penetration[22].

Notwithstanding the differences existing in the decisions of both ICTY and ICTR in various cases, the influence of the Akayesu decision is remarkable looking at the final definition of rape adopted in the ICC Elements of crimes. Despite being closer to the technical approach adopted in Furundzija, the use of the term of "invasion" together with the reference to all parts of the body of the victim demonstrates that the Akayesu legacy had its effects in Rome[23].

3.2. Rape as a Genocidal Act

The second aspect worth mentioning, and according to many commentators possibly the most relevant one, is the fact that the ICTR found Akayesu guilty of

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[17] In this sense see also C.A. Mackinnon, *Defining Rape Internationally: A Comment on Akayesu*, in *Colum. J. Transnat'l L.*, 44, 2006, p. 940.

[18] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit., para. 597.

[19] ICTY, *Mucić et al.*, Case No. IT-96-21, Judgement 16 November 1998.

[20] ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement 6 May 1999.

[21] ICTY, The *Prosecutor v. Furundija*, Case No. IT-95-17/1-T, T 185, Judgment 10 December 1998.

[22] In *Furundžija*, the ICTY starting from the recognition that there was not a precise definition of rape under customary international law, argued that the actus reus of rape constitutes of: (i) 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; (ii) by coercion or force or threat of force against the victim or a third person. This decision is relevant because it upheld that coercion is present also when directed toward third parties and not only towards the victims. See also the ICC Elements of Crime: article 7 (1) (g)-1 Crime against humanity of rape: «1. The perpetrator invaded15 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». Available at *https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf*.

genocide under articles 2(2)(a) and (b) of the Statute, killing and inflicting serious bodily and mental harm on members of said group[24] in connection with the rapes occurred at the bureau communal premises. The judges affirmed: «With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act if they were 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 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» (para. 731).

The ICTR recognised that rape and sexual violence are acts of genocide because they aim at the destruction of the victims, but it also recognised that they might be considered as acts «imposing measures intended to prevent births within the group» with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

The judges were particularly discerning in the identification of the essential links existing between rape and intent in the context of the Rwandan genocide. They found that: «[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group» (para. 507).

In another significant passage, the ICTR in *Akayesu* found that the attempt to prevent births within a specific group can be both physical and mental. In fact, it is possible to recognize that when a woman, who has been raped, cannot begin a pregnancy because of the psychological harm suffered, the crime of genocide has been committed, for there is evidence of the causal link existing between the act of rape and impossibility of giving birth afterwards.

This is an important recognition of the multiple effects that rape, and sexual violence have both on the victims themselves as well as on their families and communities. Rape therefore can be seen as a genocidal act not only because it destroys the person, but also because it annuls the victim as member of a specific community. This approach adopted by the ICTR shows a profound understanding of the relevance

[24] J.M. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, in *Mich. J. Race & L.*, 8, 2003, p. 503 ss., available at *https://repository.law.umich.edu/mjrl/vol8/iss2/5*; S. Rogers, *Sexual Violence, or rape as a constituent act of genocide: lessons from the ad hoc Tribunals and a prescription to the ICC*, in *Geo. Wash. Int'l L. Rev.*, 48, 2016, p. 265 ss.

of the suffering caused by rape to women, as an act that infringes upon the core of their personal identity and dignity.

The relevance of the approach thus adopted by the ICTR in terms of genocidal rape produced an impact on the Rome negotiations on the Elements of Crimes for the Statute of the International Criminal Court. The decision was taken to include a specific reference linking sexual violence and torture to the crime of genocide, by means of a footnote specifying that acts of genocide «by causing serious bodily or mental harm […] may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment»[25].

3.3. Rape as a Crime Against Humanity and Torture

Finally, we need to look at the third interesting aspect of the Akayesu decision, which made clear and explicit the existing analogies between rape and torture as international crimes.

Together with the charges for genocide, the ICTR found Akayesu responsible under Article 3(g) of the ICTR Statute for the rape and sexual abuses against various Tutsi women, considering that such violent acts were committed as part of a widespread or systematic attack against the civilian population on ethnic grounds. Because Tutsi women were targeted based on their ethnicity, «the ICTR concluded that the rapes formed part of widespread and systematic attack on a civilian population ... and that the rape crimes in Akayesu were punishable as crimes against humanity»[26].

Once that the judges established that the attacks on Tutsi women were part of a such a qualified attack, the discussion proceeded to the definition of the nature of the crimes against humanity represented by rape and sexual violence. Considering the definition of rape adopted, «as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive», the judges further explained that «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» (paras. 687-688).

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[25] U.N. Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 6(b)3. See also: K.D. Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments* in *J. Int'l Crim. Just.*, 3, 2005, p. 1007 ss., p. 1009-1012 and V. Osteerved, *Gender Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, in *New Eng. J. Int'l & Comp. Law*, 12, 1, 2005, p. 120.

[26] A.-M. de Brouwer, *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR*, Tilburg, 2005.

The focus on coercion and the broad definition of rape accepted by the judges, give them the possibility to recognize the similarities existing with the crime of torture by referring to the Convention against torture and other cruel inhuman and degrading treatment or punishment, which does not «catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence» (para. 687).

The judges went on in their analogy with torture by affirming 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, and rape in fact constitutes torture when 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...» (para. 597).

This statement qualifies the level of harm and distress caused by rape and sexual violence among the most severe ones a human being can suffer, hence the reference to the crime of torture.

The chosen wording stresses that the situation of coercion, which is the essential element of rape, but also of torture, needs not to be proven by reference to a specific violent physical or psychological act, but rather it can be inferred by the overall circumstances of the case. Once again, the fact that the discussion on the "consent" of the victim is completely out of the picture for the judges in Akayesu's case when dealing with the rape of Tusti women, confirms the analogy with torture: in both cases the core of the violation rests on the coercion and torment suffered[27].

It can be argued that the vision of rape as torture based on the victims and the level of suffering which characterizes the Akayesu decision has, once again, had an influence in the ICC Elements of Crime. In the ICC's definition there is no requirement that there be a purpose to either obtain a confession from the victim or third party, to punish the person for an act, or to intimidate or coerce the victim or third party based on discrimination of any kind, for the act to be considered rape as a crime against humanity. What matters is that the intent to cause the victim severe physical or mental pain, is by itself a significant element of the crime.

[27] Unfortunately, once again the encompassing approach adopted in the Akayesu decision was not necessarily followed in other relevant cases. In particular, the role of consent has been dealt with the ICTY in the case of *Kunarac* where the Tribunal ruled that the «absence of consent» is the element of the crime. «It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is «subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression» or «reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear», any apparent consent which might be expressed by the victim is not freely given (22 February 2001, Case No. IT-96-23/I-T, *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, p. 464.

4. Rape and Sexual Violence as Torture in International Human Rights Law

As stated, the judges in Akayesu's case made clear that rape and torture are both international crimes and have core elements in common.

This attitude is shared by other international judicial organs, such as the European Court of Human Rights. Since 1997, in the case of *Aydin v. Turkey*[28] the Strasburg Court has consistently affirmed that rape can be considered as a violation of article 3 of the Convention, when the acts of both physical and mental violence through rape reach the threshold of suffering included in the definition of torture. It is important to note that the Court is not ready to admit that all rapes should *per se* be considered as acts of torture. The ECtHR has also repeatedly affirmed that the lack of consent of the victim is the essential element of the crime of rape, therefore national authorities must prosecute all cases of non-consensual sexual acts, even if the victim had not resisted physically[29]. It must be noted that the element of coercion in the case of single acts of rape cannot usually be inferred from the situation, which is why the Strasbourg judges maintain that the obligations for national authorities to investigate and prosecute need to cover all cases of lack of consent.

The consideration of rape as tantamount torture is shared by other international monitory bodies on human rights law, such as the UN Committee Against Torture and the UN Human Rights Committee[30].

Similarly, at regional level, first the Inter-American Commission on Human Rights included rape as torture under the InterAmerican Convention to Prevent and Punish Torture, and later affirmed the same under the American Convention on Human Rights. This has been followed by the Inter-American Court of Human Rights that in its case law considers sexual violence, committed either by State actors and by non-State actors, as torture[31].

Very recently the Special Rapporteur on violence against women, its causes, and consequences, Dubravka Šimonović, has affirmed that sexual violence, and in particular rape, is recognized as a human rights violation that could amount to torture and is characterized as a gender-based crime[32]. In the Report submitted to Human

[28] ECtHR, *Aydin v. Turkey*, 25 September 1997.

[29] ECtHR, *M.C. v. Bulgaria*, (Application no. 39272/98), 4 December 2003.

[30] Committee against Torture, General Comment No. 2, 2007; Human Rights Committee, General Comment No. 28, 2000. See also the decision of the Committee against Torture in the cases of *V.L. v. Switzerland* (CAT/C/37/D/262/2005) and *C.T. and K.M. v. Sweden* (CAT/C/37/D/279/2005), recognizing that rape can be defined as torture.

[31] See *Inter-American Commission on Human Rights, Martín de Mejía v. Peru*, Report No. 5/1996, Case No. 10.970, Merits, 1 March 1996; and *Ana, Beatriz and Celia González Pérez v. Mexico*, Report No. 53/2001, Case No. 11.565, Merits, 4 April 2001. See also Inter-American Court of Human Rights, *Case of Rosendo Cantú et al. v. Mexico*, 31 August 2010; and *Case of López Soto et al. v. Venezuela*, 26 September 2018.

[32] See also in 2019, the statement entitled *Absence of consent must become the global standard for definition of rape*, issued by the Platform of Independent Expert Mechanisms on Discrimination and Violence

Rights Council, she further affirms: «While all States reviewed in my report criminalize rape, the vast majority of them do it in a way that is not harmonized with human rights standards and international law… States must address widespread impunity for perpetrators of rape and lack of justice for victims, and must harmonize their criminal laws with international human rights, criminal and humanitarian law». Issues related to the definition of rape, full protection of the victims, lack of criminalization for marital rape, and lack of gender-sensitive prosecution are still far away from being solved[33]. It must be observed that criminal systems in most States still define rape only in cases where the use of force or threats of violence can be proved. Moreover, in some States, the age of sexual consent is extremely low, at 12 to 14 years old or even lower, which inevitably means less protection for especially vulnerable victims, and it is in contrast with the duty to protect persons under the age of 18 as established by the UN Convention on the Rights of the Child[34].

To conclude we would like to point out that the efforts done at international level by both international criminal tribunals and international human rights courts and monitoring bodies are producing a relevant impact at a national level. In this sense it is worth mentioning the decision of the Italian *Corte di Cassazione* on May 2021, in which the supreme judges have very acutely qualified rape by a former partner as an act of torture[35]. According to this decision torture determines a serious and prolonged physical and moral suffering of the human being, so that its peculiarity lies in the overt and terrible attitude that it possesses, that is to completely subjugate the person who, at the mercy of the will of others, is transformed from a human being into "res". The precise content of the criminally relevant offense lies in the lesion of "human dignity", and in the arbitrary denial of inviolable fundamental rights. In this case sexual violence is one of the acts against the victim that concur in reaching the threshold of the acute suffering which constitutes the core element of torture.

According to this approach, as we have seen for the ECtHR case law, not all rapes can be defined as torture, but there is the need for the acts of sexual violence to reach an additional degree of seriousness to be qualified as such. Bringing this line of

against Women, available at *https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E*

[33] Human Rights Council, 19 April 2021, A/HRC/42/26, *Rape as a grave, systematic and widespread human rights violation, a crime, and a manifestation of gender-based violence against women and girls, and its prevention*, Report of the Special Rapporteur on violence against women, its causes, and consequences, Dubravka Šimonović, available at https://undocs.org/en/A/HRC/47/26.

[34] According to the 2021 Report of the Special rapporteur Simonovic «(b) Criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible; for example, when the victim is in an institution such as a prison or detention centre, or is permanently or temporarily incapacitated owing to the use of alcohol and drugs;

(c) Legislation criminalizing rape should establish that consent of children below the age of 16 is immaterial, 60 and that any sexual intercourse with an individual below the age of consent is rape (statutory rape), where determination of lack of consent is not required» (p. 14).

[35] Sent. 38232/2020, May 25th, 2021, on file with the author.

reasoning to its extremes, it could be argued that rape does not represent *per se* a lesion of human dignity equal to torture, but there is the need for a particularly violent conduct to recognise the core elements of the crime. We would argue that such an approach does not necessarily take into sufficient consideration the gender element that characterises gender-based violence[36].

5. The Difficulties of Prosecuting Sexual Violence

The lack of gender sensitiveness is a serious issue when it comes to the prosecution crimes of sexual violence both at a national and international level. It has been observed that «speaking about conflict-related sexual violence, in and outside legal settings, has generally proven to be a difficult undertaking»[37]. Trials are especially difficult for the victims as they will experience stigmatisation, rejection from their families and communities, and will be discriminated against together with any child born out of a rape. Akayesu also demonstrates that prosecutors and judges were not particularly at ease dealing with such cases. Clearly the social attitude towards the discussion in public of sexual related violence, probably due to the still existing patriarchal view of men-women relations, generates problems.

These difficulties are clearly confirmed by the existing data. In the case of the ICTY, 78 out of 161 accused individuals (forty-eight percent) were charged of sexual violence; in the ICTR, 40 out of 87 and in the ICC, 18 out of 31 accused individuals faced charges of sexual violence[38]. Even with these relatively small numbers, acquittals for these charges have been relatively high. This again proves that persecuting sexual violence is not at the core of the actions of international criminal tribunals[39].

At the same time, we most note some positive steps undertaken by the international community such as the adoption of the ICC Policy Paper on Sexual and Gender-Based Crimes in 2014, in which the ICC recognized the challenges and obstacles to effective investigation and prosecution of sexual and gender-based crimes and elevated the issue to one of its key strategic goals in its Strategic Plan 2012– 2015.

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[36] In the past a similar view has been proposed by H. Charlesworth *et. al.*, *Feminist Approach to International Law,* 1991. The Author considered the definition of torture in international law incomplete because it does not include acts of brutality and sexual violence against women (627–29).

[37] A.-M. de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, in *Cornell International Law Journal*, 2015, p. 639, available at *http://scholarship.law.cornell.edu/cilj/vol48/iss3/4*.

[38] S. Sharratt, *Voices of Court Members: A Phenomenalogical Journey. The Prosecution of Rape and Sexual Violence of the ICTY and the BIH*, in A.-M. de Brouwer, *et al.* (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge, p. 353 ss.; see also B. Van Schaack, *Engendering Genocide*, cit., p. 27.

[39] R. Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, in *European Journal of International Law*, 13, 3, 2002, p. 697-719, affirms: «the potential to recognize the specific gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process».

Having said that, it is still the case that these crimes are underrepresented in the work of the ICC. In certain cases, despite strong evidence, the Office of the Prosecutor has not included those charges to the indictments. Until 2010 rape was even not included as genocidal act in the indictments. Very recently there have been some comforting steps. One could refer to the case of *Prosecutor v. Ntaganda*[40]. In the same year the ICC started the case against Al Hassan for crimes against humanity and war crimes committed during the conflict at Timbuktu (Mali). This is the first time that gender crimes have been included in the crime of persecution (crime against humanity). On February 21, 2021, the ICC Chamber found Dominic Ongwen guilty for crimes against humanity and war crimes committed in Northern Uganda, in particular rape, sexual slavery, forced marriage and forced pregnancy[41].

Notwithstanding these recent positive outcomes, the difficulties linked to the fair prosecution of gender-based crimes are present also at a national level, even in legal systems which are theoretically better equipped to persecute such crimes.

For example, we could recall that very recently the ECtHR has found Italy in violation of art. 3 of the Convention due to the wording of a judgment adopted by an Appeal criminal court in a case of acquittal for rape, where the victim had been subjected to the phenomenon of the so-called secondary victimization[42], due to the mistreatment she received on trial[43].

6. Conclusion

Considering the above-described situation the question of whether rape and sexual violence should be considered and persecuted as autonomous crimes seems relevant. We maintain that there is a reason to advocate the autonomous character of

[40] July 2019 - sentencing judgment in November 2019, para. 930 ss. describe the findings of the ICC for rape as crime against humanity and the final decision, now confirmed, found Ntaganda guilty of the charges of gender violence.

[41] ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15.

[42] The term has been also qualified by the Council of Europe Committee Of Ministers, Recommendation Rec 8 of the Committee of Ministers to member states on assistance to crime victims, Adopted by the Committee of Ministers on 14 June 2006.

[43] ECtHR, *J.L. vs Italy*, 27 May 2021, Application N° 5671/16, Judgment. See M. S. *Ilieva, J.L. v. Italy: A Survivor Of Trivictimisation – Naming A Court's Failure To Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation*, Strasbourg Observers, available at *https://strasbourgobservers.com/2021/09/06/j-l-v-italy-a-survivor-of-trivictimisation-naming-a-courts-failure-to-fully-recognize-and-acknowledge-judicial-gender-based-revictimisation/*. Even in this interesting judgement there are traces of the fact that judges are not fully prepared to accept the idea that the rule of consent should apply only to the single act of violence and that previous behaviour of the victim should not be taken into consideration. The Court considered that only some of the lawyers' personal questions should not have been asked, thus perpetrating the idea that inquiring on the intimate life of the victim is possible during such trials.

sexual violence as an international crime *per se* and not necessarily as a form of "torture".

So far, as we have seen rape has been included as a subset of crimes against humanity, genocide, or war crimes and has not always been prosecuted or recognised as the grave crime that it is. For a very long time, sexual violence and rape have been considered as "inherent" to armed conflicts and gross human rights violations. Doing so, on the one hand rape has been universally qualified as among the worst acts of human behaviour, but, on the other hand, rape often disappears among war crimes and crimes against humanity and loses its distinctive character as a gender-based human right violation.

Some commentators for example have argued that criminalizing rape only when part of genocide or of widespread and systematic attacks creates the danger of «rendering rape invisible once again» and obscures the gendered nature of these conducts. Moreover, there is the risk of assuming that certain victims of rape are more entitled to protection than others[44].

It thus appears to us that maintaining sexual violence as a crime and a human rights violation with an autonomous character, distinguished from the definition of torture would better guarantee the possibility for the victims to receive justice[45]. Rape, as it has been recognized by the international case law, infringes upon human dignity, and causes a high level of suffering both physically and mentally and can have a devastating impact on the lives of the victims and of their communities. The time has come to think of rape not as a sub-section of another international crime but rather as an autonomous crime, the prosecution of which requires the highest judicial standards and degree of attention and consideration for the position of the victims.

It seems that reaching this goal is still further ahead. One possible step to achieve increasing protection for gender-based crimes is to enhance the understanding of the multiple facets of sexual violence. In this regard States must fulfil their positive obligations to guarantee the respect of the prohibition of rape as it is expected for the prohibition of torture. International case law on states' positive obligation related to the prohibition of torture is extremely interesting and detailed, especially in terms of the duty to investigate and to give access to effective remedies for the victims. Such standards should be applied also in the case of rape and sexual violence. In terms of positive obligations international human rights monitoring bodies have often underlined the role of adequate training. Education is crucial, both for those dealing today with sexual violence in courts as well as for future law defenders. As the Special Rapporteur Šimonović has affirmed: «States must ensure the age-appropriate

[44] R. Copelon, *Gendered War Crimes: Reconceptualizing Rape in a Time of War*, in J. S. Peters – A. Wolper (eds.) *Women's Rights, Human Rights: International Feminist Perspectives*, 1995, p. 204.

[45] It must be noted that some commentators have also argued that prohibition of rape as such should be considered as a *ius cogens* norm at the same level as the prohibition of torture. See D.S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 2005, p. 219.

education of children and adolescents on sexual autonomy and human rights, including the importance of understanding lack of consent (the 'no means no' approach) and of promoting affirmative consent (the 'yes means yes' approach)» (para. 107).

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Abstract: The decision adopted by the International Criminal Tribunal for Rwanda in 1998 against Akayesu has been considered a landmark one when it comes to the definition of rape and sexual violence as international crimes. This paper, after revisiting the main points of the decision, aims at evaluating whether the definitions adopted more than 20 years ago by the ICTR still offer a sound legal basis for the prosecution of rape and sexual violence in international law. The time has come to discuss sexual gender-based violence as an autonomous crime under international law. Looking at the records of the International Criminal Tribunals, the International Criminal Court, and the European Court of Human rights, it seems that there is still a long road ahead to the full recognition of the women's right to be protected against sexual violence

Abstract: La decisione adottata dal Tribunale penale internazionale per il Ruanda nel 1998 contro Akayesu è stata considerata una pietra miliare quando si tratta di definire lo stupro e la violenza sessuale come crimini internazionali. Questo scritto, dopo aver rivisitato i punti principali della decisione, mira a valutare se le definizioni adottate più di 20 anni fa dall'ICTR offrano ancora una solida base giuridica per il perseguimento di stupri e violenze sessuali nel diritto internazionale. È giunto il momento di discutere la violenza sessuale di genere come un crimine autonomo ai sensi del diritto internazionale. Osservando gli atti dei Tribunali penali internazionali, della Corte penale internazionale e della Corte europea dei diritti dell'uomo, sembra che ci sia ancora molta strada da percorrere per il pieno riconoscimento del diritto delle donne a essere protette dalla violenza sessuale

Keywords: rape – sexual violence – women's rights – international law – International criminal tribunals

Parole chiave: stupro – violenza sessuale – diritti delle donne – diritto internazionale – tribunali penali internazionali

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RIVISTA DI
DIRITTI COMPARATI

Violence Against Women in the Inter-American System of Human Rights: The *Case of Women Victims of Sexual Torture in Atenco v. Mexico* and the Consolidation of a Gender Perspective*

Laura Cappuccio

CONTENTS: 1. The Progressive Emergence of a Gender Perspective in the Inter-American System of Protection of Human Rights. – 2. The *Case of Women Victims of Sexual Torture in Atenco v. Mexico*: Violence Against Women Who Participate in Political Life. – 3. Sexual Violence, Rape, and Torture in Inter-American Jurisprudence. – 4. The Relationship Between Sexual Violence and Torture in the Most Recent Cases: Towards a Strong Protection of Women's Rights. – 5. Measures of Reparation and Transformative International Justice: The Inter-American System and the Fight Against Gender Violence.

1. The Progressive Emergence of a Gender Perspective in the Inter-American System of Protection of Human Rights

Over time, the Inter-American Court has developed a remarkable case law regarding the defence of women's rights. The San José judges have been dealing with the violation of the most basic of women's rights in the context of armed conflict and in situations of democratic stability. This case law shows that the condition of structural discrimination that many women in Latin America experience is the perfect breeding ground for violence, especially against women in situations of greater vulnerability. Indeed, many of the cases analysed concern intersectional situations, those in which there is a combination of several discrimination factors (such as being a woman, young, native and poor).

In the framework of the Inter-American system, the fight to discrimination and violence against women is also a concern of the Commission[1]. The Inter-American

* *Double-blind peer reviewed in accordance with the Journal guidelines.*

[1] The work of the Inter-American Commission can be followed by reading the latest report on the topic: see Report on *Violence and Discrimination Against Women and Girls in Latin America and the Caribbean*, available at *https://www.oas.org/es/cidh/informes/pdfs/ViolenciaMujeresNNA.pdf*. Cfr. also CIDH, *Plan estratégico 2017-2021. Aprobado por la CIDH durante su 161° período de sesiones,* 2017. As early as 2007, in the Report on *Acceso a la Justicia para las Mujeres Víctimas de Violencia en las Américas* (available at

Commission states that women, young girls, and teenagers are often in a situation of structural discrimination. However, even though the Commission has produced many thematic reports, the doctrine has brought to light a certain reluctance to submit «individual applications concerning gender-related issues» to the Inter-American Court[2], at least until 2002[3]. There are cases in which women are victims of a violation of their rights, such as in the cases *Loayza Tamayo v. Peru* of 17 September 1997 or *Maritza Urrutia v. Guatemala* of 27 November 2003[4]. This case law, however, lacks a clear gender perspective in the examination of the cases[5]. In the early stages, the institutions of the American Convention on Human Rights display a rather cautious attitude[6]. In *Loayza Tamayo v. Peru*, for example, this attitude results in the Inter-American Court not recognising the rape carried out by State agents on the plaintiff, a university professor, who was being detained in the framework of counter-terrorism

https://www.cidh.oas.org/women/acceso07/cap1.htm) it had stressed that «the women's right to live free from violence and discrimination has been established as a priority challenge in the systems of human rights protection at the regional and international levels. The implementation of international instruments on human rights that protect women's right to live free from violence reflects a consensus and an acknowledgement by the States concerning the discriminatory treatment traditionally suffered by women in their societies».

[2] L. Clérico – C. Novelli, *La violencia contra las mujeres en las producciones de la comisión y la Corte Interamericana de Derechos Humanos*, in *Estudios Constitucionales*, 12, 1, 2014, p. 16, states precisely that «*sin embargo, el accionar activista de la CIDH no se condice con su reticencia en la remisión de demandas individuales referidas a cuestiones de género a la Corte IDH*».

[3] L. Clérico – C. Novelli, *op cit.*, p. 16, where it is stressed that «*hasta el año 2002 habría remitido sólo un caso entre todos los trabajados, los otros finalizaron en la Comisión como resultado de una solución amistosa o con la publicación de un informe final. Esto tuvo consecuencias múltiples. En lo inmediato, se le privó a la víctima la compensación que podría haber recibido de haber ganado el caso. Pero más allá de esto, la reticencia a remitir los casos a la Corte imposibilitó consolidar una jurisprudencia sobre los derechos de las mujeres, en especial, en casos de violencia de genero*».

[4] Two earlier advisory opinions should also be mentioned: the first one, *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84*, 19 January 1984, and the second one *Juridical Condition and Rights of Undocumented Migrants, OC-18/03*, 17 September 2003.

[5] We may recall the statement of judge García Ramírez in his Concurring Opinion in the *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006, para 6: «Up to today, the Inter-American Court had not received consultations or litigations whose main actor – or, at least one of its main actors, specifically–, was a woman. Obviously, the Court has dealt with matters in which the subject of equality of gender has been projected (such as Advisory Opinion OC-4/84, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, decided upon on January 19, 1984), and it has had before it cases regarding women as victims of violations to human rights or people in risk, whose situation required provisional measures of a precautionary and protective nature. However, in these cases the violation or risk did not, necessarily, put in evidence considerations linked directly and immediately with the victim's female condition». On this topic see P. Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, in *Texas Journal of Women and the Law*, 17, 2, 2008, p. 227 ss.

[6] L. Clérico – C. Novelli, *op cit.*, p. 17.

investigations, despite the number of testimonies provided[7]. As for the case *Maritza Urrutia v. Guatemala,* the physical and psychological violence suffered by the victim - an activist and member of the *Organización revolucionaria del Ejército Guerrillero de los Pobres* (EGP), and of the *Unidad Revolucionaria Nacional Guatemalteca* - are defined as torture, though with no particular concern for the «special impact»[8] that such acts of violence had on the plaintiff as a woman[9].

Gradually, greater attention has been paid to women victims of violence[10]. In 2006, namely from the *Case of the Miguel Castro-Castro Prison v. Peru*, a gender perspective has clearly appeared in Inter-American jurisprudence[11]. In *Miguel Castro-Castro Prison* the Court states that «when analyzing the facts and their consequences, the Court will take into account that women were affected by the acts of violence differently than men, that some acts of violence were directed specifically toward women and others affected them in greater proportion than the men»[12]. Hence, the gender perspective is finally introduced into the Court's reasoning and becomes one way in which the acts of violence suffered by women are classified. Today, this approach is an integral part of the way in which the San José judges operate[13].

2. The Case of Women Victims of Sexual Torture in Atenco v. Mexico*: Violence Against Women Who Participate in Political Life*

[7] IACtHR, *Case of Loayza-Tamayo v. Peru*, 17 September 1997, para. 58: «Although the Commission contended in its application that the victim was raped during her detention, after examination of the file and, given the nature of this fact, the accusation could not be substantiated».

[8] L. Clérico – C. Novelli, *op cit.*, p. 29.

[9] IACtHR, *Case of Maritza Urrutia v. Guatemala*, 27 November 2003, para 94: «In the case sub judice, it has been proved that Maritza Urrutia was subjected to acts of mental violence by being exposed intentionally to a context of intense suffering and anguish, according to the practice that prevailed at that time […]. The Court also considers that the acts alleged in this case were prepared and inflicted deliberately to obliterate the victim's personality and demoralize her, which constitutes a form of mental torture, in violation of article 5(1) and 5(2) of the Convention to the detriment of Maritza Urrutia».

[10] Therefore, as early as in the *Case of Plan de Sánchez v. Guatemala*, 29 April 2004, para. 49(19) the Court recalls the specific position of women in situations of internal armed conflictt: «women who were raped by the State agents on the day of the massacre, and who survived the massacre, still suffer from that attack. The rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town's common areas. Also, the continuing impunity of the events has prevented the women from taking part in the legal proceedings»

[11] Cfr. M. Feria-Tinta, *Primer caso internacional sobre violencia de género en la jurisprudencia de la Corte Interamericana de Derechos Humanos: el caso del penal Miguel Castro Castro, un hito histórico para Latinoamérica*, in *Revista CEJIL*, 3, 2007, p. 30 ss.

[12] IACtHR, *Case of Miguel Castro-Castro Prison v. Peru*, 25 November 2006, para. 223.

[13] Think, for example, in addition to the cases mentioned in the following paragraphs, of the case of the IACtHR, *Case of "Las Dos Erres" Massacre v. Guatemala*, 24 November 2009 .

A case in point in this branch of the Inter-American case law is the *Women Victims of Sexual Torture in Atenco v. Mexico*, in which a number of themes are combined: violence against women as the expression of a context of structural discrimination, the link between rape and torture, the duty to investigate and sanction the violation of women's rights, the fight against impunity, the 'transformative' reparations needed to prevent a reiteration of the violations[14].

Furthermore, the judgment in the case *Women Victims of Sexual Torture in Atenco v. Mexico* appears to be relevant, not only because it includes and expands much of the reasoning contained in the precedents on similar themes, but also due to the context in which the violations of the rights occurred. The case originates from the actions taken by the police to repress a protest in Atenco, Mexico, on 3 and 4 May 2006. On that occasion, the eleven women victims of the case were arrested. While detained, and while being transferred to a detention centre, they suffered various forms of violence including – according to the Court – being beaten, kicked, insulted, dragged by the hair, ill-treated, and threatened, undressed, touched violently in their private parts, and in some cases even raped.

One element that characterises this case and distinguishes it from the previous ones in which the Court had to deal with violence against women, still in Mexico, is the fact that the acts of violence were committed during a demonstration, a situation in which women are exercising their right to protest, when they take part in public life. Therefore, as the Inter-American Court highlighted, in this case the various forms of violence committed against the women become a way to silence social dissent as well as women's participation in political life: the women were attacked with the aim of humiliating them, of punishing them for taking part in a public demonstration.

This factor marks a major difference from other judgments, including well-known ones, in which the Court analysed situations of structural discrimination. In the case of *González et al. ("Cotton Field"),* still versus Mexico, for example, the violence concerns very young women, usually aged 15 to 25[15]. In *González et al.*, there is no explanation whatsoever for the deaths and acts of violence, there are no culprits, the victims are apparently not related to each other. The only thing they have in common is that they are women, young, and often in a precarious financial situation. In this case, the Court decides to use the phrase «gender-based murder», also known as

[14] See C. Cardinali, *The existing link between sexual violence and torture: some considerations on the "Mujeres Víctimas de Tortura Sexual en Atenco vs. Mexico" judgment*, in *DPCE on line,* 1, 2019, p. 921 ss.

[15] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, 16 November 2009, on which cfr. S.J. Vásquez Camacho, *El caso "Campo Algodonero" ante la Corte intermaericana de derechos humanos*, *in Anuario mexicano de derecho internacional*, XI, 2011, p. 515 ss.; Y. Palacio Valencia, *Género en el derecho constitucional transnacional: casos ante la Corte interamericana de derechos humanos*, in *Revista de la Facultad de Derecho y Ciencias Políticas*, 41, 114, 2011, p. 131 ss.; E. Tramontana, *Hacia la consolidación de la perspectiva de género en el Sistema interamericano: avances y desafíos a la luz de la reciente jurisprudència de la Corte de San José*, in *Revista IDH*, 53, 2011, p. 141 ss.

femicide[16]. By using this term, the Court wishes to describe the phenomenon of dead and missing women in Ciudad Juárez. Indeed, femicide is the expression of a form of violence against women that is rooted in a family, work and educational culture that justifies it and makes it unpunishable – a culture that uses words and images to legitimise femicide, implicitly[17]. The use of the term femicide expresses the will to provide a political explanation for the death of women in Ciudad Juárez, as well as to use an analytical category that brings individual cases into the common framework of gender-based violence against women.

The second element that characterises *Women Victims of Sexual Torture in Atenco* is the fact that the acts of violence against the women perpetrated by State agents were committed in a democratic setting[18]. It is, therefore, a very different situation from the cases of war, internal armed conflict, or national emergency. This is certainly a major police operation (the judgment speaks of 400 agents involved), but it is certainly not a war or a major internal conflict. However, most of the people detained during these police operations reported some form of abuse by the police, most of the women reporting sexual abuse as well. Therefore, sexual assault was not an isolated event that only concerned the 11 victims, but it was the expression of a general context of violence against women, which viewed «women's bodies as instruments to transmit their message of repression and condemnation of the protest measures employed by the demonstrators»[19].

In the Inter-American case law, the systematic recourse to violence against women by State agents is usually part of a jurisprudence related to situations of crisis, such as internal armed conflicts[20]. In *Women Victims of Sexual Torture in Atenco*, instead,

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[16] On the topic, see L.P.A. Sosa, *Inter-American case law on femicide: Obscuring intersections*?, in *Netherlands Quarterly of Human Rights*, 2, 2017, p. 85 ss.

[17] The term femicide originates from the feminist culture and was used in J. Radford – D.E.H. Russell, *Femicide: The politics of woman killing*, New York, 1992; see also D.E.H. Russell – N. Van De Ven, *Crimes against woman: the proceeding of the international tribunal*, California, 1976. In Italy, see B. Spinelli, *Femminicidio. Dalla denuncia sociale al riconoscimento giuridico internazionale*, Milan, 2008.

[18] On violence against women committed by state agents in Mexico, see the UN Human Rights Committee on the Case of Lydia Cacho Ribeiro victim of physical and psychological violence by the Mexican police (CCPR/C/123/D/2767/2016). In this case, the Interamerican Commission of Human Rights granted provisional measures (August 2009) after appeal by the victim.

[19] IACtHR, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, cit., para. 204: «the police agents used the detained women's bodies as instruments to transmit their message of repression and condemnation of the protest measures employed by the demonstrators. They objectified the women to humiliate, dominate and instill fear in the voices of dissent against their powers of command. Sexual violence was used as just one more weapon in the repression of the protest, as if, together with the tear gas and the anti-riot gear, it was merely an additional tactic to achieve the purpose of dispersing the protest and ensuring that the State's authority was not challenged again».

[20] See, for example, IACtHR, *Case of Espinoza Gonzáles v. Peru*, 20 November 2014, para.62, in which the Court reminds that «during the conflict in Peru numerous acts of sexual violence were perpetrated against women by State agents and members of subversive groups and, although there were cases of sexual violence against men, it was mostly women who were victims of such acts, which 'allows

the Court analyses a situation of violence perpetrated by State agents in a democratic context. Interestingly, the Inter-American Court stressed that violence against women, despite being remarkably more brutal in conflicts and rooted in a context of structural discrimination, persists even after the resolution of these conflicts, unless appropriate policies are put in place.

In this perspective, some recent cases against Guatemala can be mentioned. In these judgments, the Court remarks that, even after the end of armed conflict, violence against women is still present within the society at very high levels, as it was stated in the key cases *Veliz Franco v. Guatemala* and *Velásquez Paiz. v. Guatemala*[21]. The first case, *Veliz Franco*, concerns the death of a 15-year-old girl who one day left her home to go to work never to come back; the second case is about the death of a 19-year-old university student who went to a party and was later found dead. The Court highlights the context of violence in which the death of these two young women occurred. Suffice to think that in 2012 Guatemala ranked third in the world for the violent deaths of women[22]. In many cases, this violence against women is characterised by brutality: rape is followed by the mutilation of their bodies. Similarly to *González et al. ("Cotton Field")*, here too the victims are mostly young women living in contexts of poverty and, just like in *Campo González et al. ("Cotton Field")*, there are no culprits. Impunity is an element that all these phenomena of enormous violence have in common, impunity being the other side of discrimination, which ends up feeding the violence.

Therefore, in situations of major internal conflict as well as democratic contexts like the Mexican one, assaults on women by State agents are related to structural discrimination, without which no acts of violence like those described in *Women Victims of Sexual Torture in Atenco* could be perpetrated, namely violent acts carried out in public, in the presence of numerous witnesses, as if they were a «macabre and intimidating spectacle»[23]. About this, the Court recalls that also the African Commission on Human

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[the Truth and Reconciliation Commission, CVR] to speak of 'gender-based violence' during the armed conflict in Peru, because the sexual violence affected women merely because they were women'». Over the period from 1980 to 2000: « that generalized context of sexual violence was inserted in a broader context of discrimination against women, who were considered vulnerable and whose body was used by the perpetrator without any apparent reason or strict relationship to the conflicte»: *ivi*, para. 67b.

[21] For example, in IACtHR, *Case of Velásquez Paiz et al. v. Guatemala*, 19 November 2015, para 45: «The report '*Guatemala: Memoria del Silencio*' of the Commission for Historical Clarification (hereinafter CEH) stated that '[w]omen were victims of all forms of human rights violations during the armed conflict, but they also suffered from specific forms of gender-based violence'. The CEH reached the conviction that the devaluation of women was absolute and allowed members of the Army to attack them with total impunity, and it concluded that, during the internal armed conflict, the courts of justice revealed themselves to be incapable of investigating, processing, prosecuting, and punishing those responsible». Moreover, the Court stresses that « this situation had persisted following the end of the armed conflict and that it was reflected in a culture of violence that had continued over the years and that included a substructure of violence that especially affected women ».

[22] IACtHR, *Case of Velásquez Paiz et al. v. Guatemala*, cit., para.46.

[23] IACtHR, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, cit., para. -202.

and Peoples' Rights, in the case of the rape of women during the 2005 demonstrations in Egypt, had stressed that rape can also be used in contexts where there is no armed conflict, as an instrument of repression [24].

In *Women Victims of Sexual Torture in Atenco* the Inter-American Court often cites other Courts and international organisations. This is a frequent occurrence in the Inter-American setting, which displays a remarkable tendency to refer to extra-systemic references. There are several reasons behind this comparative attitude. The San José judges certainly felt the need to legitimise their work in a context that was long characterised by authoritarian regimes. In other words, they have looked outside the continent to find the models and standards for the protection of rights that they could not have found locally. This element marks a major difference from the Court of Strasbourg, which has made very limited use of the Inter-American Court's case law in favour of the well-established legal traditions of European[25].

The most recent studies comparing both case laws – European and Inter-American – on the topic of sexual abuse, identify this asymmetry. Nonetheless, sexual violence is one of the very few cases in which the ECHR cites the Inter-American Court. Think of the case *Gjini v. Serbia*, 15th January 2019, in which a dissenting opinion (of judges Pastor Vilanova and Serghides) uses the Inter-American case law in a decision concerning the violence suffered by the plaintiff while detained in prison. The ECHR does not recognise rape due to the lack of sufficient evidence such as a medical certificate. Judges Pastor Vilanova and Serghides, on the contrary, on this specific element, claim that «it is true that the applicant did not produce a medical certificate concerning possible rape. Nevertheless, we consider that this omission does not suffice to automatically cast doubt on her allegations. This is the approach taken by the Inter-American Court of Human Rights […], and with which we agree»[26]. In more general

[24] African Commission on Human and Peoples' Rights, *Case of the Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, 12 December 2011, para. 166: « it is clear that the sexual assaults against the Victims which occurred on 25 May 2005 were acts of gender-based violence, perpetrated by state actors, and non-state actors under the control of state actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of the Respondent State which in turn, failed in its inescapable responsibility to take action against the perpetrators ».

[25] Cfr. T. Groppi – A. M. Lecis Cocco-Ortu, *Le citazioni reciproche tra la Corte europea e la Corte interamericana dei diritti dell'uomo: dall'influenza al dialogo?,* in *Federalismi*, 19, 2013. Also, on the dialogue between both Human Rights Courts see F.J. Ansuátegui Roig, *Human Rights and Judicial Dialogue between America and Europe: Toward A New Model Of Law?*, in *The Age of Human Rights Journal*, 6, 2016, p. 24 ss.; O. Parra Vera, *Algunos aspectos procesales y sustantivos de los diálogos recientes entre la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos*, in P. Santolaya – I. Wences (eds.), *La América de los Derechos*, Madrid, 2016, p. 565 ss.

[26] This partial dissenting opinion continues stating: «We cannot overlook the existence of several factors which, in combination, justify this omission: (1) the fear of reprisals, (2) the shortage of doctors in the prison […], (3) the failure of the prison authorities to act when injuries to prisoners were recorded […], and (4) the fact that rape does not necessarily leave physical traces, especially after some time has elapsed», partly dissenting opinion of judges Pastor Vilanova and Serghides, para. 7.

terms, following the doctrine on the topic, both regional Courts on human rights (namely, the European and Inter-American ones) agree on matters of violence against women, so much so that one may speak of the «*existencia de un diálogo interregional, tanto expreso como subliminal, en relación a la vulneración de los derechos humanos protegidos por el Convenio de Roma y la Convención de San José por la comisión de actos de violencia sexual*»[27], which is especially evident in «*soluciones cada vez más convergentes, tanto en términos sustantivos como procesales*»[28].

3. Sexual Violence, Rape, and Torture in Inter-American Jurisprudence

In *Women Victims of Sexual Torture in Atenco*, the Court examines mainly the disproportionate use of force by police agents during the protests. The Court uses its own precedents on the limits to the use of force, reaffirming a few well-known concepts, such as those stating that the use of force must respect the principles of legality, absolute necessity, and proportionality. On the contrary, during the protest in Atenco, the State puts in place an indiscriminate use of violence against anyone who was believed to be taking part in it. As a matter of fact, none of the victims was perpetrating violent acts. A few of the plaintiffs, for example, happened to be in the place where the protests were being carried out either because they were strolling with their family, or because they were on their way to work. The others, who had reached the area to study, to provide medical assistance, or as journalists, were not directly involved in the riots, or committing any violent acts. Consequently, the Court identifies a common element to all the violent acts committed, i.e., «an erroneous belief that the violence of some people justified the use of force against everyone»[29].

Further below, the judgment examines the violence suffered by the plaintiffs, using the notions of sexual violence, rape, and torture, which were already present in the Inter-American case law. In introducing its motivations, the Court recalls that

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[27] M.M. Martín – I. Lirola, *El diálogo jurisdiccional interregional en la investigación y sanción de la violencia sexual*, in *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones*, 40, 2018, p. 515 ss.

[28] M. M. Martín – I. Lirola, *op cit.*, p. 517. See ECtHR, *Mocanu et al. v. Romania*, 17September 2014, Concurring Opinion of judge Pinto de Albuquerque, joinded by judge Vučinić, in which it is stated: «In the European and American legal space, these soft-law instruments have been reinforced by judgments from regional international human-rights courts. Both the Court's judgments and those of the Inter-American Court of Human Rights have reiterated that criminal proceedings and sentencing in torture cases should not be time-barred». Remarkably, however, in the case of the European Court, most judgments concern domestic violence, on which, L. Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International. Legal Minimums of Protection*, in *Northwestern Journal of International Human Rights*, 2, 2010, p. 190 ss.

[29] IACtHR, *Case of Women Victims of Sexual Torture in Atenco*, cit., para. 170. In opening its reasoning, therefore, the Court acknowledges an excessive, indiscriminate, and illegitimate use of force by the Mexican State. Indeed, the way in which the police operations were carried out shows, according to the San José judges, the lack of appropriate rules, of agent training, of supervision of the operations.

torture and cruel, inhuman, or degrading treatment is forbidden under the international law of human rights. This prohibition, which falls within international *jus cogens*, has no exceptions whatsoever, as it must be respected even in situations of war, counter-terrorism actions, siege, state of emergency, conflict, etc.

In particular, the Court recalls its own precedents, and those of other international Courts (as the International Criminal Tribunal for the former Yugoslavia or the ECHR), to provide a wide-ranging definition of sexual violence, which includes several different instances. Indeed, following the case law of other Courts, it is stated that «sexual violence is constituted by actions of a sexual nature that are committed against an individual without their consent, and that in addition to including the physical invasion of the human body may include acts that do not involve penetration or even any physical contact». Thus, the Court distinguishes between sexual violence and rape. The latter «is any act of vaginal or anal penetration, without the victim's consent, using parts of the attacker's body or objects, as well as oral penetration by the penis. For an act to be considered rape, it is sufficient that penetration occurs, however superficial this may be»[30].

Based on the above definitions, the Court claims that all the violence perpetrated by the State agents against the women – including both physical and psychological violence – had a sexual connotation. Therefore, considering the testimonies and evidence gathered, the Court states that all the 11 plaintiffs were victims of sexual violence and 7 of them of rape as well. Having identified the type of violence suffered by the women, the Court goes on to tackle the issue of torture: can the sexual violence suffered be qualified as a form of torture as well?[31].

Unfortunately, torture makes a substantial part of the Inter-American Court's case law. However, the American Convention does not define torture itself. A definition of torture is provided in other treaties, such article 2 of the Inter-American Convention to prevent and punish torture (1984)[32].

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[30] IACtHR, *Case of Women Victims of Sexual Torture in Atenco*, cit., para. 181-182 ss. Here the Inter-American Court refers to the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, case No. IT-95-17/1-T, para. 185; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.*, Judgment of 22 February 2001, case No. IT-96-23-T and IT-96-23/1-T, paras. 437 and 438; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.*, Judgment on Appeal of 12 June 2002, case No. IT-96-23-T and IT-96-23/1-T, para. 127.

[31] The link between sexual violence and torture is already present in the reports of the Commission, which, as early as the case *Raquel Martin de Mejía v. Perú*, case 10.970 Informe No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 168 (1996), considers it appropriate to qualify sexual violence as torture. See D. M. Bustamante Arango, *La violencia sexual como tortura. Estudio jurisprudencial en la Corte Interamericana de Derechos Humanos*, in *Revista Facultad de derecho y ciencias políticas*, 44, 121, 2014, p. 461 ss.

[32] Art. 2, para 2: «for the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive

Hence, to interpret art. 5 of the CADH, the Court had recourse to art. 2 of the Inter-American Convention on Torture. This link between the two norms is already present in the Inter-American case law. In *Buenos Alves v. Argentina*, for example, the Inter-American Court devises a sort of test to find out whether an instance of torture is present or not. In particular, the Court states that we are faced with torture when the ill-treatment: a) is intentional; b) causes major physical or mental suffering, and c) is committed with a specific purpose.

Intentionality is understood as the circumstance whereby the acts were deliberate and not the result of negligence, accident, or force majeure[33]. As for the major suffering, the Court states that the specific circumstances of each case must be considered, considering both objective and subjective factors. Therefore, there is not an abstract criterion to define suffering, but the specific circumstances of each single case must be considered, including both the objective characteristics of the violence suffered - such as duration, method, physical, and mental consequences - and the victim's specific conditions – such as age, gender, and all other personal circumstances[34].

However, in 2010, with the *Fernández Ortega y Rosendo Cantú* cases, both versus Mexico, the Court further developed more deeply its reasoning on the relationship between torture and sexual violence[35]. These two judgements, that could be defined as the twin judgements on sexual torture within the Inter-American context, are indeed crucial to understand how the prohibition of torture is guaranteed and how it is intertwined with sexual violence.

Both victims, Fernández Ortega, and Rosendo Cantú, are two young indigenous women (Rosendo Cantú is even younger), who live in poverty. In both cases violence

measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish». See L. Galdámez, *La noción de tortura en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in *Revista CEJIL*, 2006, p. 89 ss.; C. Nash Rojas, *Alcance del concepto de tortura y otros tratos crueles, inhumanos y degradantes*, in *Anuario de derechos constitucional latinoamericano*, 2009, p. 585 ss.

[33] IACtHR, *Bueno-Alves v. Argentina*, 11 May 2007, para. 81.

[34] *Ivi*, para 83.

[35] Already in the *Case of the Miguel Castro-Castro Prison v. Peru*, cit., displays a combination of torture and sexual violence. In dealing with the issue of the vaginal "examination" which was undergone by one detained woman, the Court first qualifies it as rape following the case law of the other supranational Courts and then, «due to its effects», it states that it can be viewed as torture: «The Court acknowledges that the sexual rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent. Similarly, sexual rape is an extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim 'physically and emotionally humiliated', situation difficult to overcome with time, contrary to what happens with other traumatic experiences», para 311. Also on the seriousness of the consequences of rape, the Court highlights that «this Tribunal acknowledges that sexual violence against women has devastating physical, emotional, and psychological consequences for them, which are exacerbated in the cases of women who are imprisoned», para 313.

against the plaintiffs was perpetrated by some soldiers who were present in the State of Guerrero to suppress unlawful activities such as organised crime. The violence reported by the plaintiffs is not an isolated event. In both decisions, the Court recalls that rape perpetrated by members of the Army is indeed one of the various acts of violence affecting women in the State of Guerrero.

In the case of Fernández Ortega, the victim is an indigenous woman belonging to the Me'paa Community who, at the time of the events, was aged 25. Mrs Fernández Ortega was in her home located in a secluded mountain area when some soldiers entered her house without her consent. After turning their guns on her, they started asking some questions (asked her several times «where did your husband go to steal meat»[36]), that she didn't answer. Later she was raped by one of the soldiers. The case of Rosendo Cantù is, in some respects, quite similar[37]. Rosendo Cantú was a young 17-year-old woman, who belonged to the same indigenous Me'paa Community and lived in a very secluded mountain area. One afternoon, while standing near a stream to wash herself and some clothes, she was approached by eight soldiers who, after turning their guns on her, asked her some questions about a few individuals. Feeling very scared, Rosendo Cantú did not answer their questions, so she was beaten and raped.

Very important statements on rape and sexual violence can be found in these judgements. A first point to highlight is the victims' credibility, as the San José judges state that rape is a form of violence that normally has no witnesses, apart from the victim and the aggressors. Therefore, in the view of the Court, given the nature of this form of violence, the existence of «await graphic or documentary evidence» cannot be envisaged, hence the statement by the victim turns out to be a fundamental element[38]. In this perspective, the Court analyses the topic of the victim's credibility when some inconsistencies are found in the facts reported. Based on the judgement of the European Court in the case *Aydin v. Turkey*, the Court claims that this occurrence does not lessen the victim's credibility[39].

In the view of the Court, there are some significant pieces of data that, when combined, make the victims' statements truthful. For instance, it is pointed out that Mrs Fernández Ortega lived in an isolated mountain area, so she had to walk a long distance to lodge her complaint, and she finally had to discuss with local officers who did not speak her language. Furthermore, Mrs Fernández Ortega was perfectly aware not only of the possible negative consequences of her complaint on her own community, but also of the fact that the soldiers she had decided to sue were still

[36] IACtHR, *Fernández Ortega v. Mexico*, 30 August 2010, para 82.

[37] IACtHR, *Rosendo Cantú and other v. Mexico*, 31 August 2010.

[38] IACtHR, *Fernández Ortega v. Mexico*, cit., para 100: «First, the Court finds it evident that rape is a special type of violence, which is generally characterized as taking place in the absence of persons other than the victim and the aggressor or aggressors. In view of the nature of this type of violence, one cannot await graphic or documentary evidence, thus the victim's statement becomes the fundamental proof of that which occurred».

[39] Cfr. ECtHR, *Aydin v. Turkey*, 25 September 1997, paras. 72 and 73.

present in that area[40]. As regards this last point, it is worthwhile recalling the supervision measures adopted by the Court to protect Mrs Fernández Ortega's and her relatives' life and physical integrity, starting from the Resolution of the President of the Inter-American Court of 9th April 2009. The provisional measures first adopted toward Mrs Fernández Ortega, and then toward Rosendo Cantú, make us understand to what extent, in some specific contexts, reporting violence may expose to serious risks for one's safety[41].

Furthermore, according to the Court, the main facts reported by the plaintiff (her being at home and the presence of the soldiers in the area) have been established. In the light of the above elements, the Court finds that the victim's statements cannot be challenged on the ground that, for instance, Mrs Ortega had first reported to have been raped by three soldiers, while on another occasion only by one[42] (and that, in her first statements at the hospital, Rosendo Cantú did not report any sexual violence, stating that her abdominal pain was caused by an accident occurred earlier)[43]. According to the San José judges, and as also demonstrated by other Courts, this kind of inconsistencies is frequently found in rape cases, without being by itself sufficient to question the truthfulness of the facts[44].

Even more interesting is the fact that in *Fernández Ortega* there is no sign of physical coercion. In this regard, the San José judges are always in line with international case law. Indeed, according to them, rape can occur even without the use of force which «cannot be considered an essential element to punish non-consensual sexual acts». On the contrary, the circumstance where «there are coercive elements in the conduct» can be considered as a relevant element[45]. On that matter, the Inter-

[40] IACtHR, *Fernández Ortega v. Mexico*, cit., para. 107.

[41] Order of the Inter-American Court of Human Rights of 2 February 2010 Provisional Measures regarding Mexico Matter of Rosendo Cantú and other *et al.*

[42] IACtHR, *Fernández Ortega v. Mexico*, cit., para. 102.

[43] IACtHR, *Rosendo Cantú and other v. Mexico*, cit., para. 75: «On February 18, 2002, Mrs. Rosendo Cantú, accompanied by her husband, went to a health care clinic in the community of Caxitepec for treatment for the injuries she had received, but there is no indication that she told the doctor who treated her that she had been raped. The doctor gave her pain and anti-inflammatory medications. On February 26, 2002, they walked for eight hours to Ayutla de los Libres to consult a doctor at the hospital. There she was treated in the General Consultation Service for a trauma to her abdomen, and she reported that '10 days ago a piece of wood [had fallen] on [her] stomach, causing the pain [there],' without stating she had been raped».

[44] ECtHR, *Aydin v. Turkey*, cit., paras. 72 and 73.

[45] IACtHR, *Fernández Ortega v. Mexico*, cit., para. 115.

American Court cites both the Strasbourg judgement *M.C. v. Bulgaria*[46], and that of ICTY, *Case of Kunarac et al. "Foča"*[47].

Finally, in *Fernández Ortega* and *Rosendo Cantú*, it is also stated, and it will be always re-stated in the following judgements, that sexual violence implies the violation of article 11 of the ACHR, as the protection of private life also includes sexual life[48].

After ascertaining rape, the Court focuses on the violation of article 5 of the ACHR, that would allow to consider it also a form of torture. Always according to the definition of torture laid down in the Inter-American Convention aimed at preventing and punishing torture, as well as to the way it was applied in the case *Buenos Alves,* the Court considers that an act can be classified as torture in the presence of the following elements: a) intentionality; b) severe physical or psychological suffering, and c) a purpose[49].

The Court recalls that an act of torture can consist either of acts of physical violence or of acts causing severe mental or moral damage to the victim. And notably rape «is an extremely traumatic experience that can have severe consequences and cause significant physical and psychological damage that leaves the victim "physically and emotionally humiliated", a situation that is difficult to overcome with the passage of time, contrary to other traumatic experiences»[50] . Hence, in the view of the Court, even when there is no evidence of physical injuries, rape causes deep psychological suffering to the victim. As Jean Amery writes in *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities*, torture makes the tortured lose his confidence in the world, becoming thereby always a tortured person.

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[46] ECtHR, *M.C. v. Bulgaria*, 4 December 2003, para 166. The European Court of Human Rights analyses the rape case of a 14-year-old girl, whose rapists were not punished by the State on the ground that there was no proof of the young woman's physical resistance: «In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under articles 3 and 8 of the Convention must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim».

[47] ICTY, *Case of Kunarac et al. "Foča" (Prosecutor v. Kunarac, Kovac and Vukovic)*, 22 February 2001, paras. 452 and 464.

[48] IACtHR, *Case of Fernández Ortega v. Mexico*, cit., para. 129: «the concept of private life is a wide-ranging term, which cannot be defined exhaustively, but includes, among other protected forums, sexual life, and the right to establish and develop relationships with other human beings. The Court finds that the rape of Mrs. Fernández Ortega violated essential aspects and values of her private life, represented an intrusion in her sexual life, and annulled her right to decide freely with whom to have intimate relations, causing her to lose total control over these most personal and intimate decisions, and over her basic bodily functions».

[49] IACtHR, *Case of Buenos Alves v. Argentina*, cit., para 79.

[50] IACtHR, *Case of Fernández Ortega v. Mexico*, cit., para. 124 and *Case of Women Victims of Sexual Torture in Atenco*, cit., para. 196.

Moreover, according to the San José judges, the purpose of rape – like that of torture – is to intimidate, degrade, humiliate, punish, and control a person.[51]. The rape of Mrs. Fernández Ortega was committed after the soldiers had not obtained the required information; thus, the Court considers that the rape had the specific purpose of punishing the victim because she didn't provide it[52].

The reasoning and standards of judgment outlined in *Fernández Ortega* e *Rosendo Cantú* are applied in the case *Women Victims of Sexual Torture in Atenco.* The Court recalls that the agents intentionally acted against the women; that sexual violence and rape cause deep suffering to the victim even in the absence of physical injuries; that the purpose of the violent acts was that of humiliating and intimidating the women to prevent them from taking part in political life and from expressing their own dissent. Consequently, the State of Mexico was also condemned for violating article 5 of the ACHR.

4. The Relationship Between Sexual Violence and Torture in the Most Recent Cases: Towards a Strong Protection of Women's Rights

A recent case where the Court also applies these precedents is *Azul Rojas Marín et al. v. Peru*, which concerns the detention and subsequent sexual violence inflicted upon the plaintiff, who belonged to the LGTB community[53]. In this judgment, the Court still applies its own standards to the issue of rape and torture. In particular, the Court underlines that victims not always report the sexual assault they suffer due to the stigma associated with it. This would explain, according to the Court, that Mrs Rojas Marín did not mention the rape when she spoke to the police[54].

Later, once the occurrence of a rape had been established, the three elements required to classify the violence suffered as torture are indicated (intentionality, severe suffering, and purpose): ill-treatment was a deliberate choice, executed by State agents; the victim's suffering resulted from the fact that sexual violence is a highly traumatic experience (the consequences of rape on physical health are also demonstrated by medical evidence); rape, just like torture, pursues, among other things, the goal of

[51] IACtHR, *Case of Fernández Ortega v. Mexico*, cit., para 127.

[52] *Ibidem*. Moreover, the Court recalls that «this Court finds that rape may constitute torture even when it is based in a single fact alone and takes place outside State facilities, such as in the victim's home. This is so because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act, requisites that, in the present case, have been fulfilled»: *ivi*, para. 128.

[53] IACtHR, *Case of Azul Rojas Marín v. Peru*, 12 March 2020.

[54] *Ivi*, para. 148.

intimidating, humiliating, or controlling the person who is subject to it [55]. Moreover, in this case, it is underlined that the violent acts had a discriminatory purpose too, due to the plaintiff's homosexuality. Hence, this recent ruling further demonstrates that, so far at least, according to the Inter-American case law, rape constitutes torture, given the presence of the elements required for classifying as such the violence suffered by the victims.

The Inter-American case law went a little further in the case *López Soto et al v. Venezuela*. The violation of article 5 ACHR and the prohibition of torture resulting from the conduct of private individuals and not from State agents are acknowledged for the first time[56]. Indeed, in the case law discussed thus far, torture was acknowledged in those cases where sexual violence had been perpetrated by State agents. The Inter-American Court had already grappled with this issue in *González et al. ("Cotton Field") v. Mexico*, even though, in its view, the violence suffered by the victims could not be classified as torture. It is worthwhile recalling that in *González et al. ("Cotton Field"),* the common elements to the victims' deaths were not only the victims' gender and age, but also that they were abducted, kept in captivity, and their bodies found on empty lots, days or months later with signs of violence, rape, sexual abuse, torture, and mutilation[57]. Nevertheless, the Court considers that the violence suffered by the victims cannot be classified as torture. In this respect, it should be mentioned the concurring opinion of Judge Medina Quiroga, according to whom the fact that a conduct is imputable to a state agent is not one of the necessary requirements to classify the conduct as torture.

The problem of State responsibility for the behaviour of a third party is solved by the Interamerican Court using the notions of respect and guarantee found in article 1 of the Convention, which were considered since the first litigation, *Velasquez v. Honduras*, of 1988. As it is widely known, the notion of 'respect' is equal to a negative obligation: it limits the arbitrary use of force. Whereas that of 'guarantee' can be developed in different ways, depending on the violated right as well as the specific circumstances of the case, and can be defined as the obligation to guarantee the free and full exercise of fundamental rights (positive obligation). For instance, a guaranteed obligation encompasses the duty to set up the entire government apparatus and, more generally, all public powers in such a way that the full and free exercise of rights can be legally ensured[58].

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[55] *Ivi*, para. 163.

[56] IACtHR, *Case of López Soto et al v. Venezuela*, 26 September 2018. Cfr. D. Kravetz, *Holding States to Account for Gender-Based Violence: The Inter-American Court of Human Rights' decisions in López Soto vs. Venezuela and Women Victims of Sexual Torture in Atenco vs. Mexico*, in *EJIL:Talk!, Blog of the European Journal of International Law*, 2019.

[57] IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, cit., para. 125.

[58] For a reconstruction of State obligations in the inter-American case law, see C. Medina Quiroga, *Las obligaciones de los estados partes bajo la Convención Americana sobre derechos humanos*, in *La Corte interamericana de derechos humanos: un cuarto de siglo 1979-2004*, San José de Costa Rica, 2005, p. 209 ss.; E.

Cases related to the violation of the right to life provide a clear example of the guaranteed obligation and its function. The combined provisions of articles 1 and 4 of the Convention induce the Court to state that the duty of prevention includes all the legal, political, administrative, and cultural measures aimed at promoting the protection of human rights, while ensuring that their violation is really treated as an offence and therefore punished. One element repeatedly contemplated by the San José judges is the behaviour of public authorities. In particular, the Court verifies whether the death occurred in lack of preventive measures, or without any subsequent conviction.

The above case law highlights how failure to fulfil the duty of prevention is not only related to the violation of a right but stems from the knowledge of a situation of real and immediate risk, for an individual or group of individuals, combined with a reasonable possibility to prevent, or avoid that risk. In *González et al. ("Cotton Field"),* for example, the Court points out that two different phases should be analysed in more detail: the first one prior to the disappearance of the girls, and the second one when the members of their families decide to report it. In this second phase, the State is aware of the real and immediate risk of the girls being beaten and killed. From this moment, the action of the State must be subject to a more stringent scrutiny since the duty of protection becomes even more evident.

In *López Soto et al v. Venezuela*, the same kind of reasoning is applied to torture. The case is about the abduction as well as physical and psychological violence inflicted upon an 18-year-old woman by a private citizen, for about 4 months. First, the Court finds that, based on all international rules on torture, it cannot be inferred that the conduct has to be necessarily ascribed to a state agent. In fact, the State may be held liable even for «instigation, consent, acquiescence and failure to act to prevent such acts when this is possible»[59]. Hence, the fact that the State did not take immediate action or did not avoid the violence against the girl implies its responsibility for torture.

From this angle, the behaviour of public authorities is examined after the girl's family members have reported the facts and the State has become aware of the real risk the victim might run. In this case, significant information on the identity of the abductor and his telephone data were also available to the authorities. Therefore, the State could have taken concrete actions to stop the violence suffered by Linda López Soto. Hence, the Court holds the State guilty, when violence against women is perpetrated with tolerance and acquiescence on the part of the State, for not having deliberately avoided it[60]. Referring to the reasoning found in *Velásquez Rodríguez vs. Honduras*, the Court asserts that its task is to verify whether the violation of rights has occurred with the support, consent, or negligence of the State, i.e., because of the

Ferrer Mac-Gregor, *Art. 1*, in C. Steiner – M.-C. Fuchs (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotá, 2019, p. 31 ss.

[59] IACtHR, *Case of López Soto et al v. Venezuela*, cit., para 192.

[60] *Ivi*, para 197.

State's failure to respect and guarantee fundamental rights, as is required in the opening of the Convention[61].

All these judgements are steps of the long case law evolution characterized by the San José judges being committed to condemn the States in gender-based violence cases, through the joint interpretation of articles 5 and 1 of the ACHR. At least up to the present, the idea that rape constitutes torture has been gaining ground within the Inter-American case law. The three elements defined by the Court as necessary to conclude that there has been torture, are also those we find when the Court analyses cases of rape.

5. Measures of Reparation and Transformative International Justice: The Inter-American System and the Fight Against Gender Violence

Unlike the European Court of Human Rights, the Inter-American Court usually asks the State for a series of remedial measures that do not end with the claim for the damages suffered. Indeed, over time, the Inter-American Court has developed a vast arsenal of remedial measures, ranging from asking to disclose the judgement via the media; to officially acknowledging the State's international responsibility by inviting the plaintiffs and their families together with the highest representatives of the State to a special ceremony; from erecting a monument in the memory of the victims; to modifying constitutional or legislative standards as well as to implementing programs specifically intended for policemen, judges, military representatives and any other public officer, aimed at sustaining a culture of human rights[62].

Furthermore, the San José judges have developed a body of case law where the principle of *restitutio ad integrum* prevails over monetary compensation. Decisions on the re-opening of judicial proceedings, release of detainees and annulment of decisions on criminal matters, are in line with this logic[63]. Remedial measures reflect the "fragility" of the country, almost as if there was a kind of inverse relationship between the robust constitutional domestic systems for the protection of human rights and the invasiveness of reparation measures. These measures display another distinctive feature of the Inter-American system which – as pointed out by Burgorgue-Larsen – is on the one hand a "traditional" system of international protection of rights, being the result of an international agreement and establishing a regional jurisdiction for the

[61] IACtHR, *Case of Velásquez-Rodríguez v. Honduras*, 29 July 1988, para. 173.

[62] Cfr. F. Calderón Gamboa, *La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano*, México, 2013; J.S. Pinacho Espinosa, *El derecho a la reparación del daño en el Sistema Interamericano*, Mexico, 2019.

[63] See, among the others, the decisions IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, 30 May 1999; *Case of Loayza Tamayo v.* Peru, 17 September 1997; and *Case of Cantoral-Benavides v. Peru*, 3 December 2001.

protection of the freedoms recognized in the agreement; and on the other an "innovative" system as its «traditional nature gave rise to its impressive *originality*»[64].

About violence against women, according to the doctrine, it is only since the *Cotton Fields* case onwards that remedial measures have taken into due consideration «*los impactos diferenciados que la violencia causa en hombres y en mujeres*», as well as the need that reparation measures have «"*una vocación transformadora de dicha situación*", *es decir "un efecto no solo restitutorio sino también correctivo"*»[65] . Even in *Women Victims of Sexual Torture in Atenco* the Court asks the State to adopt different remedial measures. First, it asks to carry out adequate investigations leading to the prosecution and punishment of the offenders. In this case, the Court considers it necessary to extend the scope of the investigations to assess the possible involvement of high-ranking officials and all other officials whose conduct revictimized the plaintiffs. The State is asked to publish the judgement; to acknowledge publicly the State's responsibility; to provide physical, psychological, and mental care to the victims; as well as to offer scholarships to the three victims who were attending university courses and whose life projects had been interrupted by the events. It is also required to implement training programs intended for public officers aiming at making law enforcement fully aware of the safeguarding of human rights.

The last report on the execution of the judgement shows that many of the requests, such as the publication of the judgement and the provision of medical treatment, have been met; the victims are still considering different options of scholarships, but most of the payments have already been made[66]. On the contrary, as for the investigations on the events, the Court recalls that, despite the commencement of several proceedings, no State responsibility was determined upon the adoption of the Decision.

As a positive element, it should be noted that on 22 March 2019, the present Special Prosecutor's Office of the National Prosecutor's Office entrusted with the investigation of violent crimes against women and human trafficking has initiated a federal investigation on the torture suffered by the eleven victims. This initiative is particularly relevant since it is a crucial element for unifying the investigations[67]. However, the report underlines that the National Prosecutor's Office of the State of

[64] L. Burgorgue-Larsen, *El sistema interamericano de protección de los derechos humanos: entre lasicismo y creatividad*, in A. Von Bogdandy – C. Landa Arroyo – M. Morales Antoniazzi (eds.*) ¿Integración suramericana a través del derecho? Un análisis interdisciplinario y multifocal*, Madrid, 2009, p. 287.

[65] E. Tramontana, *Hacia la consolidación de la perspectiva de género en el Sistema Interamericano: avances y desafíos a la luz de la reciente jurisprudencia de la Corte de San José*, cit., p. 175.

[66] IACtHR, *Case of Women Victims of Sexual Torture in Atenco*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights, 19 November 2020.

[67] IACtHR, *Case of Women Victims of Sexual Torture in Atenco*, Monitoring Compliance with Judgment, cit., para. 7

Mexico was «hindering the investigations since the whole dossier had not been yet forwarded to the attorney general's office»[68].

Although not all the remedial measures were adopted, the transformative potential of the Inter-American case law should not be underestimated. Indeed, remedial measures often imply changes to national legislation. A positive example can be given by the events following the judgement of the *Rosendo Cantú* case[69]. The report on the execution of the 2020 decision states that, in compliance with what is set out in the judgement, Mexico has referred the case to the judges in ordinary courts, thereby allowing for the subsequent sentencing of a soldier and a corporal to nineteen years' imprisonment in June 2018. It was precisely the amendment to the code of military justice provided for by the Inter-American Court in the remedial measures that allowed for the intervention of the ordinary judges[70]. Through this amendment, in line with the Court's position on military justice, violations of human rights committed by soldiers against civilians shall be referred to ordinary criminal courts.

Furthermore, the Court recalls that the national judgement followed the standards adopted by the Inter-American system for rape cases, also from a gender perspective. It recalls that the victim's statements were credible even when the gynaecological tests undergone by Rosendo Cantú long after the violence she had suffered could not prove her rape[71].

The development of shared standards for the protection of women victims of violence is a step forward in the fight against gender-based violence. The conviction of the aggressors of Rosendo Cantú feeds the hope also for the eleven women in *Women Victims of Sexual Torture in Atenco*, who are still awaiting justice, thus showing that the synergy between national and supranational judges is crucial to combat gender-based discriminations.

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Abstract: The Inter-American Court of Human Rights declared Mexico responsible for acts of sexual violence, rape and torture suffered by 11 women in the *Case of Women Victims of Sexual Torture in Atenco v. Mexico* (28 November 2018). The importance of this decision lies in the fact that the Court considered that the acts of torture (including sexual torture) perpetrated by state agents against women during a public demonstration, were used as a method of social control, with the aim of

[68] *Ibidem*.

[69] See IACtHR, *Case of Rosendo Cantú and other v. Mexico*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights, 12 March 2020.

[70] On this point, see IACtHR, *Cases of Radilla Pacheco, Fernández Ortega and others, y Rosendo Cantú and other v. México*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights, 17 April 2015.

[71] IACtHR, *Case of Rosendo Cantú and other* , Monitoring Compliance with Judgment, cit., para 7.

intimidating and silencing the victims. This article analyzes the relationship between sexual violence and torture in the most recent cases, showing the tendency towards strong protection of women's rights in the InterAmerican system. Finally, the paper analyzes the measures of reparation and the transformative role of international justice.

Abstract: La Corte interamericana dei diritti umani ha dichiarato il Messico responsabile di atti di violenza sessuale, stupri e torture subiti da 11 donne nel caso di *Women Victims of Sexual Torture in Atenco v. Mexico* (28 novembre 2018). L'importanza di questa decisione risiede nel fatto che la Corte ha ritenuto che gli atti di tortura (compresa la tortura sessuale) perpetrati da agenti statali contro le donne durante una manifestazione pubblica, fossero usati come metodo di controllo sociale, con l'obiettivo di intimidire e mettere a tacere le vittime. Il presente articolo analizza il rapporto tra violenza sessuale e tortura nei casi più recenti, mostrando la tendenza a una forte tutela dei diritti delle donne nel sistema interamericano. Infine, il contributo analizza le misure di riparazione e il ruolo trasformativo della giustizia internazionale.

Keyword: Violence – gender – torture – Inter-American Court – human rights.

Parole chiave: Violenza – genere – tortura – Corte interamericana – diritti umani

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RIVISTA DI
DIRITTI COMPARATI

Scars on Women's Bodies: The State's International Responsibility from the Perspective of the Inter-American Court of Human Rights on Women Victims of Sexual Slavery and Torture [*]

Paolo Gambatesa

1. Introduction

More than two decades have passed since the events that triggered the decision of the Inter-American Court of Human Rights in the *López Soto et al. v. Venezuela* case[1], ruled on 26 September 2018. For the first time, the State of Venezuela was condemned for failing to adequately protect a woman from the violence of her abductor, who had been left *de facto* unpunished.

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[1] IACtHR, *Case of López Soto et al. v. Venezuela*, 26 September 2018. In-depth analysis of the *López Soto et al. v. Venezuela* case, see I. Spigno - F.G. Ruz Dueñas, *Evolución de la jurisprudencia interamericana en materia de tortura sexual contra las mujeres: López Soto y otros vs. Venezuela [2018] y Mujeres Víctimas de Tortura Sexual en Atenco vs. México [2018]*, in L.E. Ríos Vega - I. Spigno (eds.), *Estudios de casos líderes interamericanos. Vol. XX. La jurisprudencia interamericana más relevante de 2018 a debate*, México, 2021, p. 161 ff.; C. Chinkin - K. Yoshida - G. Fernández Rodríguez de Liévana, *Sexual Slavery: Linda Loaiza López Soto vs. Venezuela*, in *LSE Women, Peace and Security blog*, 29 January 2020; on the same blog, see also L. Gormley, *Gender based violence as torture: the case of Linda Loaiza López Soto*, in *LSE Women, Peace and Security blog*, 5 December 2019; D. Romero - G. Morano, *La esclavitud sexual: algunas consideraciones a partir del caso Linda Loaiza López Soto desde una perspectiva de género*, in *Lecciones y Ensayos*, 108, 2018, p. 151 ff.

The judgment was delivered after the submission by the Inter-American Commission on Human Rights[2], which in its report highlighted several critical aspects related to the behavior of the Venezuelan State in dealing with the case of Ms. López Soto. Among these are the alleged violations in protecting the woman's liberty, ensuring the absolute prohibition of torture and cruelty, inhumane and degrading treatment. In addition to this situation of "acquiescence" of the Venezuelan authorities, the Commission also stresses that they did not grant equal access to justice due to the unreasonable length of the national trial. In this respect, it states that «the egregious acts of violence she suffered had been investigated under a discriminatory legal framework»[3].

The Inter-American Court of Human Rights[4] is called upon to decide on many and various aspects, and with this in mind we will attempt to retrace the reasoning of the Court of San José which unanimously holds the defendant State responsible for all the violations proposed.

More precisely, after the description of the facts of the case (Section 2), the paper will be devoted to the explanation of the issue related to the State's obligation in the case of the violation of women's fundamental rights (Section 3). The analysis will then focus on the duties that lie with the State to prohibit sexual slavery and torture (Section 4). Lastly, the investigation will examine the consequences of inadequate legislation on violence against women in the case at hand (Section 5), and the remedies adopted by the IACtHR to remedy the violations assessed (Section 6).

2. The Circumstances of the Case

Linda Loaiza López Soto was eighteen years old when her abductor, Luis Antonio Carrera Almoina, took her from the place where she lived in Caracas[5]. He is

[2] In particular, the petition was lodged on 12 November 2007 by Linda Loaiza López Soto and her lawyer Juan Bernardo Delgado Linares. The Inter-American Commission firstly expressed the admissibility of the case in Report No. 154 of 2010, and later, on 29 July 2016, it adopted the Merit report (No. 33/16). In this last decision, the Commission preliminarily assessed the fact reported by the petitioners and pointed out several recommendations addressed to the State of Venezuela, which did not reply to the Commission. Finally, on 2 November 2016, the Commission submitted the case to the Inter-American Court of Human Rights through the Letter of submission to the Executive Secretary of the Court.

[3] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 1.

[4] Hereinafter also "the Inter-American Court" or "the IACtHR" or "the Court of San José".

[5] For an in-depth look at the facts, see the book authored by the protagonist of this tragic story, L. Kislinger - L. Loaiza, *Doble Crimen: Tortura, esclavitud sexual e impunidad en la historia de Linda Loaiza*, Caracas, 2021. In addition, the case sparked media outcry in Venezuela, as shown by some press articles, above all, see P. Destacado, *Linda Loaiza consiguió primera condena por violencia de género contra Venezuela*, in *Acceso a la Justicia*, 29 November 2018; J. Ross, *After 17 Years, Venezuelan Survivor Finally Wins Justice,* in

the son of Gustavo Luis Carrera, who was the former Rector of a public university in Venezuela.

She was deprived of her freedom in March 2001 for roughly four months and was subjected to innumerable acts of harm to her dignity during that time. More precisely, she was continually subjected to all sorts of abuse and torture, such as physical, verbal, psychological and sexual maltreatment. In addition, she was forced to take narcotics, watch pornographic films, and remain naked for long periods of time.

Quoting the words of the victim, the abuser «penetrated [her] anus and vagina with a whisky bottle, he enjoyed this, he laughed, he was very pleased with everything he did; […] he put out cigarettes on [her] face, burned [her] with the embers, and beat [her] constantly»[6].

All this cruelty and torture was inflicted by the abductor who always had a gun with him and threatened to kill her and her family. Whenever he went out, she remained in his apartment handcuffed to stop her from escaping.

Moreover, to prevent neighbors becoming suspicious of her continuous screaming, he told them they were engaged and were going through a crisis that they were resolving.

After her abduction, her family immediately started looking for her and a few days later they received a call from an unknown person who said that Linda Loaiza López Soto would never come back. After discovering that the number was Luis Antonio Carrera Almoina's, her sister (Ana Secilia López Soto) went to the police several times to report her disappearance and the name of the abductor.

As will be explained in more detail in the next section, the police initially refused to accept the complaint because they believed it was a private matter for the couple. This was the reason for the considerable delay in the intervention of the public authorities.

The unlawful violation of the individual freedom of Linda Loaiza López Soto ended on 19 July 2001, when she was left alone in the house and managed to ask for help from the neighbors who called the police. The authorities arrived very quickly and broke into the apartment and released the girl.

In the years following her release, she was subjected to numerous reconstructive surgeries on her injured body parts (*i.e.,* lips, nose, ear, genital organs) which, among other things, prevented her from testifying during the first period of the investigations. She also suffered from post-traumatic stress syndrome.

After her rescue, a criminal investigation was initiated, which saw the abductor charged with the crimes of deprivation of liberty, aggravated attempted murder and rape. To these charges were added the offenses of impeding and obstructing the

WOMEN'S eNews, 28 nov 2018; J. Piñero, *"Yo también fui víctima de Luis Carrera Almoina"*, in *El Estímulo*, 12 March 2021.

[6] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 64.

execution of the judicial proceeding by fraud, due to the attempt to escape when the court issued his preventive detention.

The proceeding at first instance lasted several years and its excessive duration was the result of repeated postponements (almost twenty-nine times). It ended on 5 November 2004, with the judgment[7] of acquittal of all charges. The Court recognized that Linda Loaiza López Soto underwent all acts of physical and psychological violence, but the evidence was insufficient to demonstrate Carrera Almoina's responsibility.

The acquittal verdict was partially reversed by the Seventh Chamber of the Appellate Court of Caracas[8], which convicted the defendant of the crimes of deprivation of liberty and grievous bodily harm but acquitted him of the crime of rape. The victim appealed this acquittal, but the appeal was dismissed[9]. In May 2008, the sentence was pronounced served[10].

Lastly, in 2016 the Constitutional Chamber of the Supreme Court of Justice[11] issued a review of the proceedings regarding the crime of rape, which is still pending.

As has already been mentioned, after the appeal ruling, in November 2007 the claimant proposed a petition to the Inter-American Commission of Human Rights, which first declared the petition admissible and produced a report on the merits of the alleged violations carried out by the Venezuelan State. Following the respondent State's failure to respond, on 2 November 2016 the Commission submitted the case to the Inter-American Court of Human Rights.

3. State Responsibility for Acts Committed by Private Individuals in Cases of Violence against Women

As is well known, only the State's responsibility falls within the IACtHR's jurisdiction[12]. It firstly means that the acts have been committed in the territory of the

[7] Twentieth Trial Court of the Caracas Metropolitan Area, judgment ruled on 5 November 2004. The decision was subject to many criticisms, and among the critical opinions there were the statements of the National Assembly of Venezuela that on 26 November 2004 publicly rejected the acquittal verdict. More details at para. 91 of the IACtHR's judgment in the *Case of López Soto et al. v. Venezuela*, cit.

[8] Seventh Trial Court of Caracas Metropolitan Area, judgment ruled on 22 May 2006.

[9] See the two decisions of inadmissibility delivered by the Sixth Chamber of the Appellate Court of the Caracas Metropolitan Area and then, the Contingent Criminal Cassation Chamber of the Supreme Court of the Bolivarian Republic of Venezuela on 11 May 2007.

[10] Cf. the decision of the Sixth Court for Execution of Judgments of the Caracas Metropolitan Area, adopted on 8 May 2008.

[11] Resolution of the Constitutional Chamber of the Supreme Court of the Bolivarian Republic of Venezuela on 15 December 2016.

[12] Cf. J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, New York, 2013, p. 117 ff.

State that belongs to the Inter-American system for the protection of human rights (IAHRS), and that it has accepted the jurisdiction of the Court.

In addition, a further prerequisite for triggering the international responsibility of a State is that the violations must be directly carried out by that State (*i.e.*, by a state power, body, or authority). Thus, in theory, the State is not responsible for acts by individuals who live in the territory of the State.

Exceptions to this general rule exist, and it is precisely on them that the Court rest in the first part of its reasoning. Specifically, it is devoted to the identification of the scope of its assessments, which could lead to the recognition of the international responsibility of Venezuela for the wrongful acts committed by private individuals.

The Court states that the first obligation that arises from the American Convention is the double duty «to *respect* the rights and freedoms recognized herein and to *ensure* to all persons subject to their jurisdiction […]» (article 1, emphasis added).

Respect and *protect* are the two sides of the same coin.

On the one hand, the State is required to refrain from conduct adversely affecting the rights and freedoms guaranteed by the Convention (negative obligation). On the other, there is the obligation, addressed to State authorities, to ensure the full enjoyment of such rights and freedoms (positive obligation).

As scholars have observed, the distinction between these two types of obligations also has an impact on the legal consequences produced by their violation. Indeed, a negative obligation corresponds to an international tort of a commissive nature, while a positive obligation leads to a responsibility for an omissive tort[13].

Alongside this distinction, article 2 of the American Convention holds particular significance in defining when a state can incur in international responsibility for failing to respect and ensure the human rights established in the Convention. It imposes on each State Party the duty to enact all legislative measures as may be necessary to fully grant the fundamental rights established in the Convention[14]. This means that the state must at the same time remove national rules that conflict with human rights and ensure that existing rules effectively protect those rights[15].

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[13] A. Bonfanti, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato*, Milan, 2012, p. 48.

[14] Specifically, according to Article 2, «[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms».

[15] In that sense, from the very beginning, the IACtHR, *Case of Velásquez-Rodríguez v. Honduras*, 29 July 1988, para. 166-167. On the case, see S.M. Witten, *Velásquez Rodríguez Case*, in *The American Journal of International Law*, 83, 2, 1989, p. 361 ff.

In the case in point the exception to the international irresponsibility, mentioned above, is strictly related to the State's omission[16] in avoiding and promptly prosecuting the violation. Hence, the field of positive obligation should be investigated in detail.

The combined provisions of Articles 1 and 2 supports the idea of promoting human rights and avoiding their violation through any legal, political, administrative, and cultural measures. Accordingly, for each tortious act, there is both a sanction and appropriate reparation for the victim[17].

In this way, according to the IACtHR «the obligation to *ensure* rights supposes the obligation of States to *prevent* human rights violations, even those committed by private third parties», consequently, this latter obligation «is one of means or conduct and [its] non-compliance is not proved by the mere fact that a right has been violated»[18].

Indeed, since in the case of *Velásquez-Rodríguez v. Honduras* (1989), « [a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention»[19].

Velásquez-Rodríguez v. Honduras represents a leading case and the legal principles set out therein will be confirmed even in subsequent cases. However, it is important to point out that certain facts are different from the present situation. The case concerned a phenomenon of enforced disappearances which were widespread in Honduras, and on which subject the IACtHR itself has repeatedly ruled[20]. As far as this is concerned, the Court considers that the disappearances were in the hands of members of the State Police, which prevents defining the kidnappers *sic et simpliciter* as private individuals. In those situations, the State is immediately responsible for the wrongful act perpetrated by its Armed Force. Nevertheless, the State was convicted for failing to prevent and rightly prosecute the perpetrators of the disappearances.

This distinction, which also bases profound differences on the responsibility of the State, designates the multiple situations in which the State can be held accountable for an omissive tort. Thus, the position of a public official and a private person is assimilated in the case of a breach of the Convention: The State should nevertheless stop the violation.

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[16] For an in-depth study of the issue of the State International Responsibility for omissive acts in IACtHR case law, see M. Barón Soto - A. Gómez Velásquez, *An approach to the state responsibility by an omission in The Inter- American Court of Human Rights Jurisprudence,* in *Revista CES Derecho*, 6, 1, 2015, p. 3 ff.

[17] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 129.

[18] *Ivi*, para. 130.

[19] IACtHR, *Case of Velásquez-Rodríguez v. Honduras*, cit., para. 172.

[20] See IACtHR, *Case of Godínez-Cruz v. Honduras*, 20 January 1989 and *Case of Fairén-Garbi and Solís-Corrales v. Honduras*, 15 March 1989.

Another example is worthy of mention. In the advisory opinion of 17 September 2003[21], requested by the United Mexican States on migrant workers, the Court restated that no difference can be established in ensuring and protecting labor rights of migrants whether their employment relationships are under public or private law. This means that the State must protect migrants in every case.

Another aspect to considered is the conduct related to the *due diligence* duty.

To better understand this, we could refer to the first UN Guiding Principles on Business and Human Rights[22], which declares similarly the *duty to protect* when the abuse of human rights carried out by third parties (in particular, business enterprises)[23]. The commentary on this principle specifies that in the case of obligation of means, «[s]tates are not *per se* responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish, and redress private actors' abuse».

Therefore, if a State does not adopt all the adequate measures to prevent the gross violation of human rights, it will be equally responsible when its private citizen concretely commits these infringements.

Basically, the Inter-American Court endorses the view of the *horizontal effect* of Treaties on human rights[24], according to which the international responsibility needs a wide scope of application, also covering the gross violation conducted by private individuals through the "lens" of the State's responsibility in avoiding it.

After this theoretical premise, and before ascertaining the violation of this obligation in concrete terms, the Court defines specifically the scope of the obligation of due diligence in the case of gender violence[25].

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[21] IACtHR Advisory Opinion OC-18/03, 17 September 2003, requested by The United Mexican States on the Juridical Condition and Rights of Undocumented Migrants.

[22] … according to which «States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication». To delve into issues surrounded the *duty to protect* see A. Bonfanti (eds.), *Business and Human Rights in Europe International Law Challenges*, New York and London, 2019, the essays included in the Part I of the book.

[23] Among the IACtHR's case-law in the field of Business and Human Rights, see *Case of the Workers of the Fireworks Factory in Santo Antônio De Jesus and their Families v. Brazil*, 15 July 2020. For an in-depth analysis of the case mentioned and on the other relevant case-law of the IACtHR on slavery, see N. Boschiero, *Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù. Una valutazione alla luce del diritto internazionale consuetudinario, del diritto internazionale privato europeo e dell'agenda delle Nazioni Unite 2030*, Turin, 2021, p. 147 ff.

[24] The literature on the *horizontal effect* of the international human rights law is particularly wide, among others, see P. Alston (eds.), *Non-State Actors and Human Rights*, Oxford, 2005.

[25] For detailed analysis of positive obligation on women's violence in the case-law of the ECtHR and IACtHR, see S. De Vido, *Violence against women's health in international law*, Manchester, 2020, p. 197 ff.

In this regard, it is interesting to note that the Court of San José adopts a *comprehensive notion* of the State's obligations, which firstly consist in the provision of an adequate legislative framework that establishes effective sanctions for those who commit such crimes against women. Secondly, State policies and practices must be effectively applied in prosecuting those accused of committing these violations, and as a result, reports are duly considered.

Thereby, "comprehensive strategy" implies, *a priori,* the enactment of a good system of laws aiming at preventing the phenomenon of violence, and, *a posteriori,* the proper functioning of this legal system when these events have taken place. Only in this way can the duty to protect be satisfied.

This dual perspective is underpinned by the idea that gender stereotypes are both the cause and the consequence of violence against women.

Furthermore, from a hermeneutical point of view it is important to underline that the Court establishes the content of this obligation through a joint reading of the more "general" articles of the American Convention (in particular, articles 4 and 5, the right to life and respect for physical integrity) and article 7 of the Convention of Belém do Pará, which instead places specific repressive obligations on the persisting phenomenon of violence against women.

Lastly, it is now necessary to understand when it is possible to invoke this State's responsibility for acts committed by private individuals. The Court applies the *Test* already experimented in the judgment *Pueblo Bello Massacre v. Colombia*[26], which recalls the so-called *Osman Test* laid down by the European Court of Human Rights[27], and applied in several cases, such as *Talpis*[28]. The *Pueblo Bello Massacre Test* consists of the verification of two elements:

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[26] IACtHR, *Case of Pueblo Bello Massacre v. Colombia,* 31 January 2006, where «[…] the Court acknowledges that a State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed, the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guaranteed obligations must consider» (para. 123).

[27] Interesting insights on the comparison between these two Courts are offered by R. Romboli - A. Ruggeri (eds.), *Corte europea dei diritti dell'uomo e Corte interamericana dei diritti umani: modelli ed esperienze a confronto,* Torino, 2019.

[28] In *Osman v. United Kingdom* (judgment ruled on 28 October 1998, No. 23452/94), the ECtHR (para. 116) on the assumption according to which «the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, [states that] such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities». Accordingly, it fixes the two conditions, which are: (1) «the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an

(i) the State authorities knew, or should have known, of the existence of a real and immediate risk to the life and/or personal integrity of a particular individual or group of individuals, and

(ii) those authorities failed to take the necessary steps within their powers that could reasonably be expected to prevent or avoid that risk.

The Court concludes the Test cited in affirmative terms, and in doing so by emphasizing the fact that the sister of the victim had repeatedly gone to the police (six times), even indicating the name and address of the abductor, but she was ignored by them, so much so that in one of the first depositions the police officer had told her that with her complaint «she was interfering in the life of the couple».

Hence, on this issue the Court concludes in the sense of the violation of the above-mentioned provisions of the American Convention and the Convention of Belém do Pará, considering the Venezuelan State not directly responsible for the atrocities suffered by Linda López Soto, but for the «insufficient and negligent reaction of its agents»[29].

4. State Duties for Sexual Slavery and Torture in the Context of Violence against Women

After having explored the State's responsibility in the case of the violation of women's fundamental rights perpetrated by a private individual, the Court then delves into the "specific" State's obligation to protect its women against sexual slavery and torture.

Despite the material conduct being largely the same for these two duties, the Court has decided to assess their hypothetical infringement separately.

Both the notions of torture and slavery have an autonomous field of application, which is wider than that one being investigated in this present judgement by the Court. In this view, it is relevant to highlight how these interweave with the more specific phenomenon of violence against women.

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identified individual or individuals from the criminal acts of a third party»; (2) «they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk». In *Talpis v. Italy* (judgment ruled on 2 November 2017, No. 41237/14) it is specified that «the risk of a real and immediate threat (…) must be assessed taking due account of the context of domestic violence. In such a situation it is not only a question of an obligation to afford general protection to society». On this topic, see I. Pellizzone, *Positive Obligation, Due Diligence of the State and Outcomes of the Osman Test in Matter of Gender-Based Violence Cases,* in M. D'Amico - C. Nardocci (eds.), *Gender-Based Violence between National & Supranational Responses: The Way Forward*, Napoli, 2021, p. 165 ff.; M. Buscemi, *La protezione delle vittime di violenza domestica davanti alla Corte europea dei diritti dell'uomo. Alcune osservazioni a margine del caso Talpis c. Italia*, in *Osservatorio sulle fonti*, 3, 2017; S. De Vido, *States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights*, in *ESIL Reflections*, 6, 6, 2017.

[29] See para. 169 of the IACtHR's judgment in the *Case of López Soto et al. v. Venezuela*, cit.

In other words, the main issue at stake deals with the peculiar character assumed by torture and slavery when the person who is subjected to them is a woman. What does it change?

4.1 Sexual Slavery

With special reference to slavery, the Court finds its relevance in the *sexual* perspective. Its prohibition is established in Article 6 of the American Convention, entitled «freedom from slavery», and its first paragraph states that: «[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women».

The provision generally expresses the prohibition of slavery and human trafficking. However, it does not specify a clear definition of slavery, not even when this is specifically intended as 'sexual'.

In the *Case of Hacienda Brasil Verde Workers v. Brasil*[30], the Court specified that for slavery to occur a subject (the enslaver) must exercise a power or control over another subject (the enslaved) such that the personality and freedom of the latter are completely compromised.

According to this definition, we can speak of the exercise of a *property right* on the part of the enslaver, which has multiple manifestations, including the restriction or complete control of an individual's autonomy; or the restriction or deprivation of freedom of movement; the absolute lack of consent; the use of physical force, psychological pressure; or taking advantage of a position of vulnerability.

In the case under investigation here, sexual slavery is seen by the Court of San José as a particular form of sexual violence, and its definition always implies the idea of the exercise of property over the woman, to which is added in this specific situation the limitation of sexual autonomy and the pervasiveness in the sphere of control of the other person.

In other terms, what connotes the "sexual" nature of slavery as an autonomous category is precisely that specific historically inherent stereotype in society, which disproportionately sees women as subordinate to men.

In addition, the Court points out that about these behaviors we are facing obligations of an immediately binding nature (i.e., *jus cogens*), the application of which by the States is not subject to any discretion, since in any case they cannot make exceptions[31].

[30] See IACtHR, *Case of Hacienda Brasil Verde Workers v. Brasil*, 20 October 2016, in particular paras. 269-273.

[31] On the *erga omnes* effect of *jus cogens* on the prohibition of slavery, see insights into N. Boschiero, *op. cit.*, p. 37 ff.

Specifically, the elements described above concur in considering whether there has been a violation of the obligation of sexual slavery. In fact, the Court first questions the existence of the so-called "right to property" in the sense above mentioned. Secondly, whether there have been sexual acts that limit the sexual autonomy of the woman either completely or partially.

The use of repeated acts of extreme violence, in conjunction with the exercise of meaningful forms of control and possession lead to a declaration of the existence of the infringement at stake. Furthermore, in this *compositum* system of protection, Article 6, paragraph 1, is the "keystone" which is read in conjunction with other norms of the Convention, which details the gross violation at stake. Those provisions are Articles 1(2), 3, 5, 7, 11, and 22, and they entail the prohibition of any kind of deprivation of physical liberty, the right to privacy and free movement.

As a result, the joint interpretation of those provisions generates an intrinsic connection between personal and psychological integrity, on the one side, and personal autonomy and the possibility to freely take decisions concerning one's own body and sexuality on the other. All these aspects related to personal integrity are totally defeated in the case of sexual slavery, whereby through sexual violence the abuser forces a woman to change the immediate condition of her existence[32].

In the gender violence perspective, the idea of focusing the attention on the "sexual" nature of violence allows us to concentrate on the discriminatory intent of the abductor, which underpins the stereotypes of men's superiority over women[33].

4.2 Torture

The second duty that is ascertained deals with torture[34].

Looking at the relevant legislation on this crime, it is possible to see that in its first paragraph, Article 5 of the American Convention[35] establishes, in general, the right to personal, physical, and moral integrity, while in paragraph 2, in more specific terms, it sanctions the absolute prohibition of torture and inhuman and degrading acts[36].

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[32] On the definition of sexual slavery see, K. Barry, *Female Sexual Slavery: understanding the International Dimensions of Women's Oppression*, in *Human Rights Quarterly*, 3, 2, 1981, p. 48.

[33] Cf. P. Di Nicola, *La mia parola contro la sua. Quando il pregiudizio è più importante del giudizio*, Milano, 2018.

[34] Looking at the Italian system, the Italian Court of Cassation recently intervened on the relationship between the crimes of torture (article 613-*bis* of the penal code) and ill-treatment (article 572 of the penal code), holding that both can be applied to the same case, thus resulting in a material concurrence of crimes (Judgments of the III section, No. 32380, 25 May 2021).

[35] For a detailed study of the IACtHR's case-law on sexual torture, see I. Spigno - F.G. Ruz Dueñas, *op. cit.*, p. 137 ff.

[36] In this regard, also article 6 is relevant: «[..] the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

Within the international law context, even the prohibition of torture has been established in a rule of *jus cogens*[37].

As far as the constitutive elements of the case are concerned, these are not specified in Article 5, paragraph 2, but are introduced on a theoretical basis by the Court, which makes explicit reference to Article 2 of the Inter-American Convention on the Prevention and Punishment of Torture ("ICPPT").

In this perspective, conducts that constitute an act of torture must result in mistreatment that is: (1) intentional, (2) caused physical and mental suffering, (3) and committed with a definite goal or purpose.

With reference to these three elements the Court states that: «[b]ased on the evidence provided, the Court finds that the gravity and intensity of the severe physical, verbal, psychological and sexual abuse suffered by Linda Loaiza has been proved (…); that this was perpetrated intentionally and persisted for almost four months when she was in a situation of total helplessness and under the control of her aggressor. In addition, it has been established that she was subjected to reiterated rape, an extremely traumatic experience that has severe consequences and causes great physical and mental harm leaving the victim 'physically and emotionally humiliated'. In this regard, the Court has affirmed that the severe suffering of the victim is inherent in rape, and, in this case, it was accompanied by extremely severe bodily injuries and physical ailments. The Court also notes that the victim stated that her aggressor showed her photographs of other women who he had subjected to the same treatment, which constituted a form of threat that had a significant psychological impact»[38].

On this point, the Court further observes that «the evidence received reveals that the aggressor's purpose was to intimidate her, obliterate her personality and subjugate her. Ultimately, it was to assert a position of domination over women and assert his relationship of power and patriarchal domination over the victim, which demonstrated the discriminatory purpose. In this regard, the Court has emphasized the significant role played by discrimination when examining violations of women's human rights and its alignment with torture and ill-treatment from a gender perspective. Consequently, the Court finds that Linda Loaiza was subjected to acts of physical, sexual, and psychological torture, in keeping with the three elements that the Court has enumerated and in the terms of article 5(2) of the American Convention»[39].

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction».

[37] For a detailed reconstruction from an international perspective of the prohibition of torture, A. Edwards, *Violence against Women under International Human Rights Law*, New York, 2011, p. 198 ff.

[38] IACtHR, *Case of López Soto et al. v. Venezuela*, cit. para.187.

[39] *Ivi*, para. 188.

In other words, torture was committed, and its purpose identified by the Court is not only in the intent to intimidate but also that of the idea of assuming a position of domination (to be precise, *patriarchal domination*) over women, thus confirming the conception that those violent behaviors are "gender based", that is, to be seen from a gender perspective.

Another aspect to highlight regarding torture concerns the issue of State immutability. Hence, how responsibility for acts of torture can be assigned to the Venezuelan State, given that the torture was not committed by the State authorities. Indeed, the Court of San José[40] stressed that Article 3 ICPPT specifies that the following can be guilty of the crime of torture «[a] public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or *who, being able to prevent it, fails to do so*» (emphasis added). This means that public authorities can be responsible for this crime even in the case they are not the authors of acts of torture but fail in preventing them.

The reasoning that the Court makes on this point is not dissimilar to that made for the obligation of due diligence. In fact, the Court argues that even in this case the State should have prevented the commission of similar acts as far as possible, which, moreover, hinder an effective fight against the eradication of the phenomenon of gender violence.

In short, the Court endorsed a *systemic* and *evolutive* interpretation of the above-mentioned provisions, through a gender lens[41].

In this regard, it specifies that the obligations deriving from the Convention of Belém do Pará would suffer a compression if it were admitted that an act of violence against a woman (also qualifying as torture) is not punishable if committed by a private citizen. Therefore, vice versa, it is as if the overlapping of violent conducts and those culminating in torture against women are punishable only if carried out by public authorities.

For these reasons, even with reference to torture, the Court concludes in the sense of Venezuela's responsibility.

Lastly, we can also see that according to the Court of San José, the definition of the crime of torture established in article 182 of the Venezuelan Criminal Code is inadequate. This provision lays down that: «[s]uffering, offenses against human dignity, ill-treatment, torture or physical or moral abuse committed against a person who is detained by his custodians or prison guards, or the person who gives the order to execute such treatment, in contravention of the individual rights recognized in paragraph 3 of article 60 of the Constitution, shall be punished by 3 to 6 years' imprisonment»[42].

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[40] *Ivi*, paras. 190-191, where the Court recalls General Comment No. 2 of the UN Committee against Torture, adopted on 24 January 2008, on the *Implementation of Article 2 by States Parties*.

[41] I. Spigno - F.G. Ruz Dueñas, *op cit.,* p. 163 ff.

[42] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 251

The Court[43] highlighted three critical elements. The first one deals with the fact that this norm does not specify the elements that constitute what are the acts and purposes of criminal conduct are. Secondly, the point is omitted regarding public authorities as being among those who can commit this crime. Finally, the punishment (3 to 6 years) is too low compared to the nature and gravity of the crime.

5. The Obstacles to the Access to Justice and the Risk of Revictimization

The Inter-American Court assessed the international responsibility of Venezuela even for failing to guarantee Ms. López Soto equal access to justice.

The legal framework of this right can be deduced by the provisions of the American Convention, which impose "general" obligations that should be read in conjunction with the "special" duties described in the Convention of Belém do Pará.

More precisely, the general obligation can be found in articles 25, 8 and 1, paragraph 1 of the American Convention. Article 25 (entitled, «Right to Judicial Protection») ensures «the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention», whereas article 8 (entitled «Right to a Fair Trial») specifies that the effective judicial remedies must be in compliance with the rule of due process of law.

In the Court's opinion, these obligations are reinforced by article 7, paragraph 1, of the Convention of Belém do Pará, which expressly sets down the need «to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence». Among the «all appropriate means» in the following lines the same norm includes adequate legislative measures to fight the phenomenon of violence (letter *e)*), the respect of the duty to protect by authorities, officials, personnel, agents, and institutions (letter *a)*), and a «fair and effective legal procedures for women who have been subjected to violence» (letter *f)*).

Within this legal framework, the Court highlights that these provisions aim at removing the obstacles and restrictions that women face when they have «recourse to the state authorities that impede the effective realization of their access to justice».

In the light of this assumption, the Court adds that: «the absence of *gender training* and awareness of the state agents in the institutions involved in the investigations and the administration of justice, as well as the *existence of stereotypes* that detract from the credibility of the statements made by women victims, constitute fundamental factors that, together with the high rates of impunity in cases of this nature, lead women to decide not to report acts of violence or not to continue with the legal proceedings undertaken. To these factors should be added the lack of access to *quality legal assistance* and the *services* able to provide social assistance and care to victims, and the failure of

[43] *Ivi*, paras. 253-256.

the state authorities who intervene in this type of incident to adopt immediate measures of protection»[44].

Thus, the Court's reflections on access to justice address the cultural perspective of the phenomenon, thereby intending to provide a wide-ranging view of the State's obligation to protect women from violence.

In fact, it is necessary to provide rules that make it possible to conduct effective investigations, conclude criminal proceedings within a reasonable timeframe and to properly punish the perpetrators of gender-based crimes. Additionally, it is also essential to intervene in the field of training, providing preparation for all operators who act in the post-violence phase, such as police officers and doctors. To this end, the Court stresses that specific protocols must be envisaged to indicate what the most suitable and proper behaviors to adopt are.

Reflecting on the words of the expert[45] heard by the Inter-American Court during its proceedings, it is essential the agents of justice adopt «an *approach centered on the victim*», according to which they «must prioritize the safety, privacy and well-being of the victims, verifying the risks, the conditions of special vulnerability, and the differentiated needs they may have to ensure their effective participation in the investigation and in the eventual criminal proceedings».

The objective is to avoid the negative effects of revictimization, the existence of which is due to the permanence of sexist stereotypes in society, having the effect of minimizing the importance of a phenomenon that is still all too widespread.

On the issue of stereotypes, the Court recalls an instructive recommendation of the CEDAW Committee[46], where they are defined as «distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts, [which may lead to the denial of justice, *adds the Court*], including the revictimization of complainants».

For example, stereotypes can affect the objectivity of State agents during the investigation, by undermining the credibility of the woman who subjected to violence. Or this could occur by including inappropriate comments about the woman's life in the judges' rulings. This issue was the subject of the recent judgment of the European Court of Human Rights in the case of *J.L. v. Italy*[47]. The European Court assessed the

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[44] *Ivi*, para. 220 (emphasis added).

[45] We refer to the opinion of Daniela Kravetz pronounced during the public hearing before the IACtHR on 6 February 2018. See IACtHR's judgment in the *Case of López Soto et al. v. Venezuela*, cit., para. 221.

[46] UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 33, adopted on 3 August 2015, on *Women's Access to Justice*.

[47] ECtHR, *JL v. Italia*, 27 May 2021, No. 5671/16, para. 141. The Author of this paper provides the English translation. For a comment, see P. Di Nicola, *La Corte EDU alla ricerca dell'imparzialità dei giudici davanti alla vittima* imperfetta, in *Questione giustizia,* 20 July 2021, and P. Gambatesa, *Il peso delle parole nelle sentenze. Note a margine di una importante decisione della Corte EDU in tema di vittimizzazione secondaria (*J.L. c. Italia, *ricorso n. 5671/16),* in *Osservatorio AIC*, 2, 2022, p. 232 ff.

international responsibility of the Italian State in relation to its obligations under Article 8 of the European Convention on Human Rights, which protects the right to private and family life. In particular, the ECtHR stated that: «[i]t is therefore crucial that judicial authorities avoid reproducing sexist stereotypes in judicial decisions, minimizing gender-based violence, and exposing women to secondary victimization by using blaming and moralizing statements that discourage victims' trust in justice»[48].

In conclusion, quoting an extremely relevant statement of the Inter-American Court, «when the State fails to take concrete actions to eradicate stereotypes, it reinforces and institutionalizes them, which generates and reproduces violence against women»[49].

6. Final Remarks: Preventing and Fighting Violence against Women by Combining the Several Levels of Protection

The Inter-American Court unanimously found the Venezuelan State to be in serious breach of its obligations in the case of Ms. López Soto. To provide compensation for these violations, the Court ordered several reparation measures in accordance with article 63, paragraph 1, of the American Convention. There are approximately twenty such measures[50], some of which were ordered in favor of Ms. López Soto and her family, while others were aimed at implementing new laws and practices in the respondent State to combat the phenomenon of violence more effectively.

Among the measures expressly devoted to Ms. López Soto, we find the requests to conclude the pending proceedings within a reasonable time and to initiate investigations to identify, and then possibly punish, the abuser of the non-convicted crimes (such as rape and sexual slavery) and the State agents who made mistakes during the investigation.

In addition, as rehabilitation and satisfaction measures, the Court requires the provision of all expenses for medical and psychological treatment for the applicant and all the members of her family and provides for the payment of scholarships for their

[48] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 141.

[49] *Ivi*, para. 236.

[50] On the "holistic" gender-sensitive approach on reparations see, R. Rubio-Marín - C. Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cottonfield Judgment*, in *Human Rights Quarterly*, 33, 2011, p. 1062 ff. In particular, the Authors focus their work on the cases *González et al. ("Cotton Field") v. Mexico* (2009) *and Miguel Castro-Castro Prison v. Peru* (2006), both ruled by the IACtHR. See this issue on I. Spigno, *Gender violence against low-income women in Mexico. Analysis of the Inter-American doctrine*, in *Rivista di Diritti Comparati*, Special Issue I, 2019, p. 167 ff., and A. Baraggia, *Transformative Constitutionalism and the Inter-American Jurisprudence on Violence Against Women*, in M. D'Amico - C. Nardocci (eds.), *Gender-Based Violence between National & Supranational Responses: The Way Forward*, cit., p. 19 ff.

future studies. Finally, substantial sums are awarded to her for the pecuniary and non-pecuniary damages suffered.

Besides these measures, the Inter-American Court takes the chance to impose specific duties on Venezuela, to implement more pragmatic public policies to combat the phenomenon of gender-based violence. Firstly, notwithstanding the fact that the State enacted a special law on the Right of Women to a Life Free of Violence[51], the Court notes that Venezuela left some gaps in implementing it. This would require a new regulation that achieves the real aim of the special law by, above all, ensuring the adequate functioning of the special courts for prosecuting crimes against women in each state and implementing conduct protocols for the investigation and assistance for women who suffer from violence.

The measures explicitly addressed to Venezuela, which require compulsory legislative intervention, are also of particular importance in the light of the State's controversial position within the Inter-American system of human rights.

As is known, on September 2012[52] Venezuela announced its withdrawal from the American Convention, pursuant to its article 78, thereby waiving the legal jurisdiction of the Inter-American Court[53].

It is important to clarify that the case investigated, although after the notification, is not affected by the same as it refers to events that occurred before the withdrawal, so when the Convention was fully in force for Venezuela[54].

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[51] Organic Law on the Right of Women to a Life Free of Violence, 23 April 2007, Official Gazette Nos. 38, 668.

[52] The Bolivarian Republic of Venezuela announced on 6 September 2012 its intention to denounce the American Convention on Human Rights, available at this link: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf. On the effect of the Venezuela comunication see the Press Release of the Inter-American Commission on Human Rights on 10 September 2013, titled «IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention», available at this link: https://www.oas.org/en/iachr/media_center/preleases/2013/064.asp.

[53] Cf. A. Caligiuri, *Le conseguenze della denuncia della Convenzione americana dei diritti umani da parte del Venezuela*, in *Diritti Umani e Diritto Internazionale*, 7, 2013, p. 183-187.

[54] IACtHR, *Case of López Soto et al. v. Venezuela*, cit., para. 16. On the non-retroactive effect of the denunciation, *ex multis,* Inter-American Commission on Human Rights, *Balkissoon Roodal v. Trinidad and Tobago*, Case 12.147, Report No. 89/01, para. 23. «By the plain terms of article 78(2), states parties to the American Convention have agreed that a denunciation taken by any of them will not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations. A state party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the supervisory mechanisms under the Convention, including those under Chapter VII of the Convention relating to the jurisdiction, functions, and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to 26 May 1999. Consistent with established

More to the point, in 2019 the denunciation was withdrawn by Venezuela[55], declaring that the Convention is again applicable and with it the competence of the Court. By agreeably specifying, that this second ratification has retroactive value, in this way they do not leave a gap of protection for all those violations of rights in the 2013-2019 period and that may be subject to appeal by the Court of San José.

The rethinking of the Venezuelan State is certainly to be welcomed, and particularly that idea expressed in the letter of 2013 according to which the "*Constitution is enough!*". Consequently, the protection of fundamental rights and freedom *are safe*, even without an International Treaty on human rights.

The Author does not share this thesis, and the *López Soto v. Venezuela* affair strengthens that belief.

We can appreciate the extremely important role of the international organizations[56] in the fight against women's violence within each State belonging to them, thus increasing the standards of protection of the victims. The general change is due to the implementation and renewal duties of national legislation imposed by International Conventions devoted to this issue.

In this perspective, these obligations of the International Law of Human Rights favor and accelerate the process of adopting new, or even better than the existing "hard" laws on fundamental rights in national legal orders[57].

Those legal instruments show that women are at the core of the international safeguard[58]. They often offer all-encompassing visions of the phenomenon of violence by dealing not only with obligations to criminalize offenders but also with provisions on prevention and legal protection. Furthermore, these Treaties, such as the *Istanbul Convention*[59] and the *Convention of Belém do Pará* are increasingly becoming a *living*

jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date».

[55] The Bolivarian Republic of Venezuela lodged the instrument of ratification to the Inter-American Convention on Human Rights on 31 July 2019, text available at this link: http://www.oas.org/es/sla/ddi/docs/B-32_venezuela_RA_7-31-2019.pdf.

[56] More generally, under an historical persective, on the role in safeguarding human rights of international and regional organizations, see F. Cantù, *Sistemi "regionali" per la tutela dei diritti dell'uomo: Il patto interamericano di S. José de Costa Rica*, in *Rivista di Studi Politici Internazionali,* 1989, p. 547 ff.

[57] On the direct impact on constitutional democracies of the provisions against gender-based violence, see T. Groppi, *Gender-Based Violence as a Challenge to Constitutional Democracy,* in M. D'Amico - C. Nardocci (eds.), *Gender-Based Violence between National & Supranational Responses: The Way Forward,* cit., p. 115 ff.

[58] On the approach «victim-centered and human rights-based» to fight against every kind of slavery, see the reflections of N. Boschiero, *op. cit.*, p. 322 ff.

[59] For an insightful study on the impact of the Istanbul Convention on the Italian legal system under Constitutional law perspective, see M. D'Amico, *Una parità ambigua. Costituzione e diritti delle donne*, Milano, 2020, p. 219 ff., and C. Nardocci, *Gender-Based Violence between the European Convention of Human Rights and the Istanbul Convention*, in M. D'Amico - C. Nardocci (eds.), *Gender-Based Violence between National & Supranational Responses: The Way Forward*, cit., p. 129 ff. In international law view, see S. De Vido, *The*

instrument thanks to the evolutionary and systematic interpretation offered by the Supranational Courts proposed *ad hoc*.

In essence, a more effective protection of human rights can only be achieved through an effective complementarity between international and national legal systems.

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Abstract: The paper analyzes the *López Soto v. Venezuela* judgment delivered on 26 September 2018 by the Inter-American Court of Human Rights. The case deals with a young woman who was raped and forced to undergo all sorts of violence (physical, sexual and psychological) and acts of torture for several months. The Court unanimously condemned Venezuela for the gross violation of human rights because it did not adequately protect Ms. López Soto from her abductor. The case offers an opportunity to reflect on the international obligations that lie with national authorities in preventing and fighting violence and torture against women, laid down in the main Conventions entrenched in the Inter-American system of human rights.

Abstract: Il presente testo analizza la sentenza *López Soto v. Venezuela* resa il 26 settembre 2018 dalla Corte interamericana dei diritti umani. Il caso riguarda una giovane donna rapita e costretta a subire diverse forme di violenza (fisica, sessuale e psicologica) e atti di tortura per diversi mesi. La Corte ha condannato all'unanimità il Venezuela per non aver impedito la realizzazione delle gravi violazioni dei diritti umani ai danni della signora López Soto da parte del suo rapitore. Il caso offre l'opportunità di riflettere sugli obblighi internazionali che gravano sulle autorità nazionali in materia di prevenzione e contrasto alla violenza e alla tortura contro le donne, sanciti nelle principali Convenzioni del sistema interamericano dei diritti umani.

Keywords: Gender-based Violence – Torture – Sexual Slavery – IACtHR – Effective protection and remedies.

Parole Chiave: Violenza di genere – Tortura – Schiavitù sessuale – IACtHR – Protezione e rimedi effettivi.

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RIVISTA DI
DIRITTI COMPARATI

Scars on Women's Bodies: The Kunarac Case and the "Figuration" of the Crime of «New Forms of Slavery»*

Entela Cukani

CONTENTS: 1. The Many Faces of "Violence Against Women". – 2. The Facts of the Case *Kunarac and others*. – 3. The Court's Decision and the "Figuration" of the Crime of «New Forms of Slavery». – 4. The Crime of New Forms of Slavery after the *Kunarac* Case.

1. The Many Faces of "Violence Against Women"

That of "violence against women" is a macro-theme that highlights the need to analyze the many new facets that gender crimes take on today and the new challenges that women are faced with as victims of violence because they belong to a specific gender: that is, the female one. On the one hand, the concept of «female victim of gender violence» is complex. Even when looking through the lens of the legislative provisions of the member States of the European Union, there is a multitude of different legal concepts and diversified legal protection responses[1]. On the other hand, the recognition of violence against women as a violation of a fundamental right has only recently been accepted, recognized, and condemned in a specific manner also in the norms of international treaty law or in the norms of supranational law[2].

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[1] On these aspects see B.B. Garìn, *Gender Victim of Gender-Based Violence*, in A. Bartolini - R. Cippitani - V. Colcelli (eds.), *Dictionary of Statutes within EU Law*, Cham, 2019, p. 281 ff. It must be underlined, that most legal commentary hails the ad hoc with revolutionizing the prosecution of sexual violence in the context of female victims and overlooks sexual violence targeting male victims. ICTY's first case, and the first international war crimes trial since Nuremberg and Tokyo, was also the first-ever trial for sexual violence against men. After a three-year trial, the Trial Chamber handed down a guilty verdict. See ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997.

[2] The CEDAW Recommendation no. 19 on Violence Against Women paved the way for such recognition. After this first step, several other instruments that recognize gander-based violence like a violation of human rights, have been adopted. Nevertheless, the more important developments in this aspect have been raised in international jurisprudence. See on this, R.J. Cook (eds.), *Human Rights of Woman. National and International Perspectives*, Philadelphia, 1994.

In this regard, it is sufficient here to recall that the Resolution 48/104 of 20 December 1993 of the United Nations in the first two articles defines violence against women as: «(…) any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (art. 1);

(a) Physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual, and psychological violence perpetrated or condoned by the State, wherever it occurs» (art. 2)[3].

Thus, violence against women is an umbrella term that can encompass a multitude of situations that must be recognized and condemned as gender-based violence which in turn constitutes an independent fundamental human right violation.

Often, however, violence against women takes shape within other phenomena. A forced relational bond that is not desired by the victim - such as the case of forced marriages - is the most common example[4].

Since the end of the last century, the issue of forced marriage has appeared on the public agenda in Western Europe being recognized gradually as an abuse of human rights in many United Nations (UN) treaties and other international documents[5]. Nevertheless, even the recognition of forced marriage as a form of violence against women is recent. Only in 2000 forced marriage has been officially classified as a specific form of violence against women and has been included within the framework of the elimination of violence against women[6]. Since then, the debate regarding this

[3] Declaration on the Elimination of Violence against Women - Proclaimed by General Assembly Resolution 48/104 of 20 December 1993. Full text in https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx.

[4] See on this M. Enright, *Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arrange Marriage*, in *The Modern Law Review*, 72, 3, 2009, p. 332.

[5] UN, Economic and Social Council, *Forced Marriage of the Girl Child*, Report of Secretary-General, E/CN.6/2008/4, December 2007, para. 10.

[6] Indeed, it was introduced as a problematic issue for the first time in 1995 by the UN General Assembly in the context of trafficking in human beings and subsequently, it was mentioned in a few international documents (UN General Assembly Resolution Traffic in women and girls, A/RES/50/167, December 1995). In 1997 the issue of forced marriage was included in the Resolution No. 41/5 of the Commission on the Status of Women. Even the recognition that the issue received by the documents of the Commission on Human Rights in 1999 occurred within the theme of trafficking in human beings (See Resolutions 1999/40 UN, Economic and Social Council, Commission on status of women). Only in 2000 forced marriage has been officially classified as a specific form of violence against women (UN Commission on Human Rights resolutions 2000/45).

phenomenon has been raised all over the world making multiple aspects of violence that take shape within forced marriages more and more interconnected with other forms as the ones of forced labor and slavery[7].

Taking into consideration that the evolutions related to the recognition of forms of violence against women are quite recent, the present contribution will focus on a caselaw of undoubted importance. In the monumental decisions of the *Kunarac and others* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) - judgment of the Chamber of the first instance of 2001[8] confirmed in appeal with a judgment issued in 2002[9] – recognizes and condemns for the first time in history the new type of crime of «contemporary forms of slavery».

As the facts of the case will show, once more, it was inside a forced relational bond not desired by the victim - like the ones of the forced marriage - that the «new forms of slavery» took evidence in that case.

Moreover, before the *Kunarac* case, in the treaty law and in the previous international jurisprudence, slavery/servitude/ forced labor remained three different crimes, and forced labor was identified as a common element for the other two types of crimes[10]. According to the international jurisprudence up to then developed, forced labor was considered as a common element between slavery and servitude. However, if in the case of slavery there would be total power over the subject in such a way as to be treated or sold like an object, in the case of servitude the "domination", in addition to economic reasons, also differs in the aspect of psychological submission[11].

In the *Kunarac* case, in fact, the ICTY identified a hardcore of elements based on which it has diverged from the aforementioned traditional tripartition division - forced labor/slavery/servitude - outlining in the multiform crime of new slavery a synthesis tool capable of embracing the various facets of the crimes committed in the case in question.

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[7] See on this, among others, R.A. Edwige, *Forced Marriage in Council of Europe Member States, Comparative study of legislation and political initiatives*, Strasbourg, 2005; G. Gangoli - M. McCarry, *Criminalising Forced Marriage: Debate in the UK*, in *Criminal Justice Matters*, 74, 1, 2008, p. 44 ff.; N. Dostrovsky - R. Cook - M. Gagnon, *Annotated Bibliography on Comparative and International Law Relating to Forced Marriage*, Canada Department of Justice, 2007; M. Borowska, *The phenomenon of forced marriage*, in *Review of Comparative Law*, XVIII, 2013, p. 23 - 41.

[8] ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23, Judgement 22 February 2001.

[9] ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23/1, Appeals Chamber, Judgement, 12 June 2002.

[10] N. Siller, *'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking?*, in *Journal of International Criminal Justice*, 14, 2, 2016, p. 405 ff.

[11] For a detailed analysis on these aspects see S. Cantoni, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, Torino, 2018; K. Bales - P.T. Robbins, *No one shall be held in slavery or servitude: A critical analysis of international slaver agreements and concept of slavery*, in *Human Rights Review*, 2, 2001, p. 18 ff.; J. Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford, 2012; M.R. Saulle, *Schiavitù (dir. internaz.)*, in *Enc. Dir.*, XLI, 1989, p. 641 ff.

As the facts of the case will put in evidence the configuration of «the new forms of slavery» occurs in presence of circumstances that only when added to others contribute to defining the typical features of some recognized crimes as the ones of forced marriages, forced labor and shavings.

Therefore, in identifying the crime of new slavery, a set of factors contribute, which, taken individually, may not configure it or do not mean the configuration of any crime but, when added together, result in the final effect, precisely of the crime that the ICTY recognized for the first time in history in the *Kunarac* case.

2. The Facts of the Case Kunarac and others

The period is that of the sad page of the history that saw in the case of Bosnia-Herzegovina (BiH) the most atrocious facet of the ethnic revival that accompanied the disintegration of the Former Yugoslavia. The events take place in the Foca region in BiH in the period of ethnic apartheid against the Bosniak (Muslim) population, from 1992 to 1993.

The three defendants then convicted - Kunarac, Vukovic, and Kovac - were commanders (Kunarac) or senior leaders of the Serbian Armed Forces of Bosnia in the district/municipality of Foca. The task of this armed force was to carry out the ethnic cleansing of the territory of Foca from the presence of the Muslim population.

The specific target of this ethnic cleansing was not only the Bosnian fighters but also civilians. In the specific case of civilians, they were deported to some villages around the area: a separation was made between men, children, and women. The destiny of the males was that of being killed, as known from the Srebrenica massacre. Women, instead, were deported and imprisoned in masse in schools or other similar buildings, subjected to constant deportation and displacement from one detention center to another. During this period, mass rapes of women by soldiers belonging to the Serbian forces were reported[12]. More specifically, it was documented during the

[12] In some war conflicts rape has been used as a specific weapon of war with relative impunity. Only recently sexual violence against women and girls during times of conflict has gained recognition as a serious crime, becoming rape, therefore, subject of national and international jurisprudence. For some psychological reflections and debate on this aspect see E. Cherepanova, *Sexual and Gender-Based Violence as Warfare. Handbook of Interpersonal Violence and Abuse Across the Lifespan*, e-book, 2021; for some more juridical debate, see P. Kirby, *How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence*, in *European Journal of International Relations*, 19, 4, 2013, p. 797-821; M. Roman, *Rape, the Least Condemned War Crime. Human Rights are Not Women's Rights*, Munich, 2019. With specific reference to the case of Bosnia see Ch. Benard, *Rape as terror: The case of Bosnia*, in *Terrorism and Political Violence*, 6, 1, 1994, p. 29-43; J.N. Clark, *Untangling Rape Causation and the Importance of the Micro Level: Elucidating the Use of Mass Rape during the Bosnian War*, in *Ethnopolitics*, 16, 4, 2017, p. 388-410; A. Doja, *Politics of mass rapes in ethnic conflict: a morpho dynamics of raw madness and cooked evil*, in *Crime, Law and Social Change*, 1, 5, 2019, pp. 541-580.

process that everything took place under the order of the commander of the Serbian forces in the area: Mr. Kunarac.

Several women who have suffered group rapes testified the following as the most recurring phrase: «now you will get pregnant with one of us, no matter who, but it will be a Serbian child anyway so the race will be cleaned up». Therefore, mass rape was used as a specific weapon with a very specific goal, namely, that of ethnic cleansing.

It happens that 5 women (including adolescents, therefore still minors) were transferred to a house where Mr. Kunarac lived almost permanently. They remained there for months: the alternative was to go back to schools (centers for gatherings and mass rape). The women were "divided" by preferences among the three defendants, being subjected to rape by friends brought to the house. They also had to do housework, cleaning, cooking for the condemned, and striptease shows under intimidation. During this stay, when the soldiers were absent for missions, they sent some family members of theirs to brought bags with food to the women. During their stay in the company of the defendants, the women had been seen at some bars or restaurants in the area. Finally, the women were sold to some Montenegrin citizens and were transported to Montenegro.

According to the defense, there was a love relationship between the women and the defendants; the women remained of their own free will in the house; there was no servitude or slavery since women could have easily left the house, as demonstrated by the fact that they had been spotted in bars and restaurants in the area; the accused took care of the women thereby sending provisions when they were away, and there had been no sale to Montenegrins but the defendants had paid for the women to be taken out to Montenegro for safety.

According to the prosecution, however, the story was quite another. There was no love affair, and the case was typical of forced relationships similar to that of forced marriages. As far as the innovative aspects of the decision are concerned, the fact that the entire Muslim population was under acts of ethnic purge excluded any willingness of women to remain of their own free will. Such a circumstance excluded any space of a possible form of effective freedom of movement for women. They were therefore to be considered slaves subjected to forced labor and forced sexual relations with the accused and there was a trafficking sale of the same in Montenegro.

3. The Court's Decision and the "Figuration" of the Crime of «New Forms of Slavery»

With reference to the allegations, the ICTY carries out a monumental work in its decision, focusing not only on international, supranational, jurisprudential decisions but also on the various constitutional provisions of the States of the world to outline

what was meant by, respectively, sexual abuse, sexual assault, rape, torture, slavery, bondage, hard labor[13].

Going into the merits of the decisions, more specifically, the Court affirms that - in the context of international criminal law - the distinction between forced labor, slavery, and servitude must be considered irrelevant[14]. The Court says that in the crime of slavery and reduction into slavery the factors of control and ownership, the limitation and control of autonomy, freedom of choice or movement, and often the obtaining of an advantage for the criminal, are presupposed. On the other hand, the consent or free will of the victim is absent; it is often rendered impossible or irrelevant through, for example: the threat or use of violence or other forms of coercion, fear of violence, willful misconduct, false promises, abuse of power, the vulnerability of the victim, imprisonment, psychological pressures, or socio-economic conditions.

In the present case, even if women had - in the periods of absence of the soldiers - the possibility to leave the apartment, there can be no doubt that their freedom of movement was minimal. This because belonging to the Bosnian ethnic group that was subject to ethnic cleansing they had nowhere else to go. Therefore, according to the Court, they were in an undoubted position of vulnerability and psychological pressures[15].

The first instance Chamber qualifies as "apparent", in some cases the distinction between slavery, servitude, and forced labor which, irrelevant to the punishment of international crimes, is still defended in other branches of international law. Then, the Court identified further elements of the crime of slavery such as unpaid work, sexual abuse, prostitution, human trafficking. In reference to this last aspect, in fact, the women were sold to Montenegrin men[16]. Furthermore, the compulsion to serve, to perform forced and unpaid labor, the Court reiterated, remains "slavery" even when the treatment of the victim does not reach heinous degrees of physical violence[17].

The position expressed by the Chamber of first instance is also accepted by the Appeals Chamber in the 2002 decision. In the appeal decision not only is reaffirmed that forced labor is an indicator of slavery and its presence must be taken into

[13] It is impossible here to dwell exhaustively on the specific motivations and arguments as well as on the differences between slavery and servitude. See generally J.R. McHenry III, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, in *Vand. J. Transnat'l L.*, 35, 4, 2002, p. 1269, who discusses the history of sexual violence prosecution and the ICTY decision in *Prosecutor v. Kunarac* where enslavement was broadened to include sexual enslavement as a crime against humanity.

[14] ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23, Judgement, cit., para. 542.

[15] *Ivi*, para. 577: « (…) The sole reason for this treatment of the civilians was their Muslim ethnicity» and para. 583: « (…) rape against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims. While raping FWS-183, the accused Dragoljub Kunarac told her that she should enjoy being 'fucked by a Serb'».

[16] *Ivi*, para. 775.

[17] *Ivi*, paras. 780 ff.

consideration to verify the condition of slaves but, for the first time in history, we have the identification of the category of «contemporary forms of slavery».

The step forward made by the Appeals Chamber precisely concerned the assumption according to which: where the facts of the case do not allow to identify all the elements necessary to configure the crime of «chattel slavery», the absence of some of the elements cannot lead to the impunity. The presence of only some of the elements of slavery, led the Court to identify for the first time the new type of crime of «contemporary forms of slavery».

Unlike the previously known categories, the «contemporary forms of slavery» are not characterized by a total control «exercise of the right of property in its most extreme form» as required by the 1926 Convention[18]. In this regard, the Appeals Chamber specifies that: «To establish whether a person is reduced to slavery, control over the individual's movements will have to be assessed» and «among others: psychological control, measures taken to prevent or discourage escape; cruel treatment and torture; control over sexuality and forced labor»[19] take specific relevance.

In practice, what remains of primary importance is the relationship that exists between victim and executioner.

With reference to the consent of the victim the Court emphasizes that the circumstances of the specific case (women moved from school to homes, women of an ethnic group subject to apartheid) are such that they exclude any space for consent even if requested. To put it in the words of the Court «(...) when the circumstances are such as to exclude the expression of a consent, they may be sufficient to infer the absence of consent»[20].

Therefore, to assess whether the treatment of a person constitutes a «new form of slavery», the discriminating element should be identified in the victim's inability to self-determine as the victim is totally subjected to another person who can dispose of the victim up to alienation.

Furthermore, in reaching its conclusions and condemning the accused, the International Criminal Tribunal for the former Yugoslavia after a rich and exhaustive

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[18] ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23/1, Appeals Chamber, cit., para. 117. To put it with the words of the Court: «The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention [available on http://www.ohchr.org [4]] and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law».

[19] *Ivi*, para. 119.

[20] *Ivi*, para. 120.

analysis of the facts of the case and of the decisions of other courts comes to the confirmation that the jurisdictions called to apply humanitarian law are in favor of an extensive definition of slavery according to an orientation that emerged since the rulings of the Nuremberg Tribunal which had already considered unpaid forced labor as an element of slavery.

And finally, the Appeals Chamber explicitly states that «these new forms of slavery can be considered as the crime of slavery and, therefore, as international crimes prohibited by customary international law»[21].

4. *The Crime of New Forms of Slavery after the* Kunarac *Case*

Among the novelties of the *Kunarac* case the most important one undoubtedly concerns the "figuration"[22]- for the first time - of the new forms of slavery as a crime and multifaceted but of equal gravity as that of slavery.

Indeed, in its reasoning, the Court overcomes the traditional distinction between servitude and slavery which, although both identifying a fixed point in forced labor, remained, however, different in the other assumptions, figuring the «new forms of slavery» as a crime capable of embrace and unify slavery, servitude and forced labor. In carrying out this "figuration" of the new crime, the Court puts in correlation acts that individually may not meet the criteria of any type of crime, but when added together they configure the new crime as outlined by the Court.

Other important decisions have been based on the precedent *Kunarac* and on the identification of the elements of the crime of new slavery. The 2007 decision of the International Criminal Court in the *Katanga* case[23] and the 2008 decision of the Community Court of Justice of the West African States (ECOWAS), *Hadijatou Mani Koraou v. Niger*[24] are some of the most known examples. The influence of the *Kunarac* case, albeit in more recent times, is also reflected in the case law of the ECtHR. Indeed, even the ECtHR has remaining more anchored to the traditional approach of diversification between slavery and servitude, starting from 2012, however, in some decisions (e.g. *CN at al. v. France*) begins to accept the novelty introduced with the

[21] *Ivi*, para. 117.

[22] According to the idea of "figuration" as developed by Norbert Elias [*The process of civilization* (1939), trans. it., Bologna, 1988], for the broad analysis of which reference is made to M. Carducci, *Involvement, and detachment in world comparison*, in *Boletín Mexicano de Derecho Comparado*, 128, 2010, p. 595-621, especially p. 609 ff.

[23] International Criminal Court, *Katanga Case - The Prosecutor v. Germain Katanga,* ICC-01/04-01/07.

[24] *Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS): Community Court of Justice, 27 October 2008.

Kunarac case and in *Rantev vs. Cyprus and Russia*, the ECtHR admits that it is «irrelevant to distinguish between slavery, servitude and forced labor in trafficking crimes»[25].

The novelties of the *Kunarac* case also had a significant impact in the proliferation of new institutions and instruments aimed at combating the «new forms of slavery».

In 1975 within the United Nations, there was the birth of a Special Working Group on New Forms of Slavery within a Sub-Commission. But, only starting from 2007 - a few years after the *Kunarac* case - a Special Rapporteur on Contemporary Forms of Slavery within the Council for Human Rights has been established[26]; various Reports have been adopted from the International Labor Organization (ILO), and from 2011 there are continuous Resolutions of the European Parliament on «contemporary forms of slavery»[27].

According to one of the latest reports of the ILO, slavery is a multifaceted crime: «an umbrella term - does not have an all-encompassing definition in the laws - and which basically refers to situations in which the victim cannot refuse or avoid out of fear because of the threat of violence, various coercions, and abuse of power»[28]. To this definition of the ILO, it can be added with the words of the Appeals Chamber that: the *mens rea* consists in the intentional exercise of this abuse of power for coercive purposes[29].

The denigration of the victim as belonging to a different ethnic group, the humiliations of the victim's dignity, the demand for forced labor (therefore unpaid or inadequately paid), are circumstances that individually may not constitute hypotheses of slavery, but if added together, they constitute a scheme through which the executioner assumes the position of "master" with respect to the victim, configuring the multiform crime of "new slavery" which, starting from the *Kunarac* case, is condemned on a par with the crime of slavery in jurisprudential practice and in various international and supranational documents.

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[25] EtCHR, *Case of Rantsev v. Cyprus and Russia* (Application no. 25965/04), 7 January 2010, in https://hudoc.echr.coe.int/fre?i=002-1142.

[26] See on these developments J. Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, cit.

[27] See the Report of the European Parliament, *Contemporary forms of slavery*, 2018 in https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU(2018)603470_EN.pdf. It must be underlined that alongside soft law acts, Article 5 of the European Charter of Fundamental Rights (which is binding for EU institutions and EU Member States when they implement EU law) prohibits slavery, servitude, forced or compulsory labor, and trafficking in human beings.

[28] See R. Plant, *Modern slavery: the concepts and their practical implications*, ILO Working paper, 2015; also for more data on the new forms of slavery, see, the ILO Report, *Global Estimates of modern slavery*, Geneva, 2017 in https://www.alliance87.org/global_estimates_of_modern_slavery-forced_labour_and_forced_marriage.pdf.

[29] To say it with the words of the Court: «Lastly, as far as the *mens rea* of the crime of enslavement is concerned, the Appeals Chamber concurs with the Trial Chamber that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership»: ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23/1, Appeals Chamber, cit., para. 122.

To conclude, I quote a passage from the decision of the Appeal that, in quoting the *Phole* case, helps to identify a crucial element of the crime of new forms of slavery: «Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labor – would remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery»[30].

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Abstract: In various ways women are faced with as victims of violence because they belong to a specific gender: that is, the female one. On the one side, the recognition of violence against women as a violation of a fundamental right is quite recent. And, on the other, violence against women takes shape within other phenomena. A forced relational bond that is not desired by the victim is the most common example. Indeed, within this last one, many other forms of violence - forced labor, servitude, and slavery - takes shape. In the monumental decisions of the *Kunarac and others* the International Criminal Tribunal for the former Yugoslavia (ICTY) recognizes and condemns for the first time in history the new type of crime of «contemporary forms of slavery». The ICTY identified a hardcore of elements on the basis of which it has diverged from the traditional division - forced labor/slavery/servitude - outlining in the multiform crime of new slavery a synthesis tool capable of embracing the various facets of the crimes committed in the case in question.

Abstract: Le donne, in quanto appartenenti ad uno specifico genere, quello femminile, possono essere vittime di diversificate forme di violenza. Il riconoscimento della violenza contro le donne quale violazione di un diritto fondamentale è assai recente. Inoltre, la violenza contro le donne spesso, e quasi sempre, prende forma all'interno di altri fenomeni. Nelle monumentali sentenze del caso *Kunarac and others*, il Tribunale penale internazionale per l'ex Jugoslavia (ICTY) ha riconosciuto e ha condannato - per la prima volta nella storia - il nuovo tipo di reato delle «forme contemporanee di schiavitù». Nelle sue decisioni l'ICTY ha individuato un nocciolo duro di elementi in base ai quali si è discostato dalla tradizionale divisione - lavoro forzato/schiavitù/servitù - delineando nel multiforme reato delle «nuove forme di schiavitù» uno strumento di sintesi capace di abbracciare le varie sfaccettature dei reati commessi nel caso in questione.

[30] *Ivi*, para. 123.

Keywords: Violence against women – new forms of slavery – *Kunarac* case – International Criminal Tribunal for the former Yugoslavia.

Parole Chiave: Violenza contro le donne – nuove forme di schiavitù – caso *Kunarac* – Tribunale penale internazionale per l'ex-Jugoslavia.

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RIVISTA DI
DIRITTI COMPARATI

How Sex Destroys People: Genocidal Rape in the Bosnian War (1992-95), and the Legacy of the ICTY*

*Carna Pistan***

«*Bosnian Muslim refugees nearby could see the rape but could do nothing about it because of Serb soldiers standing nearby. Other people heard women screaming, or saw women being dragged away. Throughout the night and early the next morning, stories about the rapes and killings spread through the crowd and the terror in the camp escalated*».

(ICTY, Trial Chamber, *Prosecutor v. Krstić*, 2001).

1. Introduction

Sexual violence in wartime has been considered throughout the history as an unfortunate but inevitable consequence of armed conflicts. As such, it has been long seen by the international community as a by-product of war, rather than a war crime

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or a crime against humanity[1]. The first attempt aimed at dealing with sexual violence under international humanitarian law can be found in the 1907 Hague Convention. Although it did not enumerate rape or other forms of sexual violence as a violation of the laws and customs, under the broad interpretation of its Article 46 rape could be deemed as a crime against «family honor and rights»[2]. This noble but subtle attempt was not sufficient to prevent the mass rapes against women that occurred in WWII, yet neither the Nuremberg Tribunal nor the Tokyo Tribunal had fully addressed these abuses[3]. The subsequent 1949 Geneva Conventions and the 1977 Additional Protocols – also called the law of armed conflict – did not classify sexual violence within the categories of «grave breaches» or «war crimes» subject to universal jurisdiction and, therefore, capable to be prosecuted by an international tribunal or domestic courts. Rape, enforced prostitution, and indecent assault were designated as attacks against the "honor" of women or as an «outrage upon personal dignity»[4].

The turning point in treating sexual violence under international law arrived only in the early 1990s, with the conflict that exploded in the former Yugoslavia. Stories about mass rapes and other forms of sexual atrocities that took place, especially in the Bosnian war (1992-95), received extraordinary worldwide attention, thus putting the UN under pressure to condemn and end the violence[5]. The UN answer was the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993[6], which formation – along with its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR) set up in 1994[7] – signaled the advent of a new understanding of sexual violence in war. ICTY's creators explicitly envisioned the tribunal as a place to prosecute sex crimes under international criminal law[8], while

[1] See generally S.L. Russell-Brown, *Rape as an Act of Genocide*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 350.

[2] See T. Meron, *Rape as a Crime under International Humanitarian Law*, in *American Journal of International Law*, 87, 3, 1993, p. 425, noting that in practice it has seldom been so interpreted.

[3] Sexual violence was not classified as a war crime or a crime against humanity in the Nuremberg and Tokyo Charters. Despite this, the Tokyo Tribunal specifically included rape as a violation of recognized customs and conventions of war. Although merely as secondary offense, it had also prosecuted rape as a war crime with the result that some Japanese military and civilian officers were found guilty of rape. See N.E. Erb, *Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court*, in *Columbia Human Rights Law Review*, 29, 2, 1998, p. 410.

[4] *See* J. Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, in *International and Comparative Law Quarterly*, 46, 1, 1997, p. 57, noting that in reality, a woman's honor is a concept constructed by men for their purposes and that it has very little to do with women's perception of sexual violence, who experience it as torture.

[5] M. Brashear, *"Don't Worry. These girls have been raped once." Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia*, in *Voces Novae*, 9, 5, 2018, p. 1.

[6] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993).

[7] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994).

[8] C. Powell, *"You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law*, in *Richmond Public Interest Law Review*, 2017, p. 31.

Article 5 of its founding Statute expressly included rape as a crime against humanity[9]. At the same time, sexual violence seemed to have taken on a new form in the Bosnian conflict. It appeared not only as gender-based violence but also as an official policy of war aimed at destroying an unwanted ethnic/national group[10]. This urged to consider wartime rapes not only as war crimes and human rights violations but also as genocidal acts. The concept of «genocidal rape» first emerged in the feminist debates of the early 1990s[11], and later started to be prosecuted in international criminal tribunals. In 1998, the ICTR became the first international court that successfully prosecuted rape and sexual assault as constituent acts of genocide[12].

This article aims to explore the link between sexual violence and genocide in relation to the 1992-95 Bosnian war. The focus is on three main issues. First, the article discusses the nature of sexual violence in the Bosnian conflict and in relation to this introduces the feminist debate about «genocidal rape». Second, it explores how and in which ways sex crimes may function as a constituent act of genocide under international law by referring to the 1948 Genocide Convention and the seminal ICTR's *Akayesu case*. Finally, starting from the 2001 *Krstić case* – the first ICTY's genocide conviction – the article addresses the extent to which the Yugoslav Tribunal has prosecuted rape and other forms of sexual violence as constituent acts of the Bosnian genocide[13]. It is argued, on the one hand, that contrary to the ICTR, the ICTY has failed to prosecute sex crimes as genocidal acts, and some reflections on the possible reasons for this failure are introduced. On the other hand, the article maintains that the concept of «genocidal rape» remains relevant under international law as it helps to clarify the massive rapes politics that systematically occurs in what Mary Kaldor calls «new wars» driven by nationalist politics[14], and in which sex crimes do not amount solely to gender crimes but also to a crime against the group to which a woman is assumed to belong[15].

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[9] Under the weight of the events in the former Yugoslavia, a broader view that the Geneva Conventions and customary international law provide a legal basis for criminalizing rape has been accepted. For example, the International Committee of the Red Cross (ICRC), which played an influential role in drafting the Conventions, included rape under the grave breach of «willfully causing great suffering or serious injury to body or health». In addition, the US Department of State declared that it considers rape a war crime or a grave breach under customary international law and the Geneva Conventions and that it can be prosecuted as such. See T. Meron, *op. cit.*, p. 426.

[10] *See* J. Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, in *Georgetown Law Journal*, 89, 8, 2000, p. 2557.

[11] See generally R. Jaleel, *Weapons of Sex, Weapons of War. Feminisms, ethnic conflict and the rise of rape and sexual violence in public international law during the 1990s*, in *Cultural Studies*, 27, 1, 2013, p. 115.

[12] ICTR, 2 September 1998, Case No. ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment.

[13] IT, *Prosecutor v. Radislav Krstić* Case No. IT-93-33-T, Trial Judgment, August 2, 2001.

[14] M. Kaldor, *New and Old Wars. Organised Violence in a Global Era*, Cambridge, 2012.

[15] Although men were also raped in the Bosnian war, this article focuses limitedly on the mass rapes against women. For an attempt to apply the concept of "genocidal rape" to males who have been victims of sexual violence see C. Bradford Di Caro, *call it what it is: Genocide through male rape and sexual*

2. The Nature of Wartime Sex in the Bosnian Conflict (1992-95)

Sexual violence in armed conflicts may take different forms, including acts such as rape, sexual assault, sexual slavery, forced prostitution, forced sterilization, forced abortion, and forced impregnation[16]. While these different forms of sexual violence have historically represented a recurring phenomenon in all types of armed conflicts, regardless of nationality or geographic location, sexual atrocities that took place in the Bosnian war have been frequently considered unique or different from those committed in previous conflicts[17]. Several interconnected reasons may explain why the events in Bosnia were set apart from the rapes from earlier conflicts.

On the one hand, the Yugoslav Wars of the 1990s have represented the major conflict in Europe since WWII. The Bosnian war, in particular, became the archetypal example of the new post-Cold war model of warfare – ethnic and interstate conflicts largely originating from identity politics[18]. As Nicholas R.L. Haysom argues, the identity-driven nature of these conflicts renders them, in terms of intensity, more brutal, cruel, and emotionally charged than previous types of warfare, with civilians (especially women and children) as principal targets[19]. Inger Skjelsbæk further observes that these are wars where friends and family could turn against each other simply with the recognition that the Other is a Serb or Bosniak, and in which the weapons of war are not the latest in military technology, but knives, Kalashnikovs, and rape[20]. In this sense, the Bosnian war was especially violent. It resulted in more than 100,000 individuals killed[21], 350,000 wounded[22], 20,000 to 60,000 women and girls raped[23], and more than 7,000 Bosnian Muslim men and boys executed in Srebrenica[24]. During the

violence in the former Yugoslavia and Rwanda, in *Duke Journal of Comparative & International Law*, 30, 2019, p. 79.

[16] See generally K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 305.

[17] I. Skjelsbæk, *The Elephant in the Room. An Overview of How Sexual Violence came to be Seen as a Weapon of War*, Peace Research Institute Oslo (PRIO), Report to the Norwegian Ministry of Foreign Affairs, May 2010, p. 2.

[18] M. Kaldor, *op cit*., p. 32.

[19] N.R.L. Haysom, *Constitution Making and Nation Building*, in R. Blindenbacher, A. Koller (eds.), *Federalism in a Changing World – Learning from Each Other*, London, 2003, p. 216.

[20] I. Skjelsbæk, *The Elephant in the Room*, cit., p. 2.

[21] BBC, Bosnia war dead figure announced, 21 June 2007, in http://news.bbc.co.uk/2/hi/europe/6228152.stm.

[22] Center for Justice and Accountability (CJA), *Bosnia and Herzegovina: Torture and Ethnic Cleansing in the Bosnian War*, in https://cja.org/where-we-work/bosnia/.

[23] M. Lent Hirsch, *Conflict Profile: Bosnia*, WMC's Women Under Siege Project, The Women's Media Center, US, 2012, in http://www.womenundersiegeproject.org/conflicts/profile/bosnia.

[24] United States Holocaust Memorial Museum (USHMM), *Confront Genocide-Cases-Bosnia Herzegovina*, USHMM, Washington DC, 2015, in http://www.ushmm.org/confront-genocide/cases/bosnia-herzegovina.The Srebrenica-Potočari Memorial Center and Cemetery for the

war severe atrocities were committed: mass killings, detention camps, torture, ethnic cleansing, sexual violence, and genocide[25].

On the other hand, the issue of wartime sexual violence became public within the first months of the conflict. It was *Newsday*'s journalist, Roy Gutman, the first who reported about mass rapes in the Bosnian war. In August 1992, Gutman launched a series of articles suggesting that Serb forces were engaged in systematic and organized rapes of Muslim and Croat women in a campaign of ethnic cleansing. He also unveiled to the world the existence of rape camps, where women were detained and routinely raped[26]. By the end of 1992, the world was stunned by numerous other media stories exposing and denouncing the widespread sexual violence in the Bosnian conflict[27]. This led international organizations and other human rights groups to set up their fact-finding missions and investigate the abuses. For example, in April 1992, the UN Commission on Human Rights appointed Tadeusz Mazowiecki as Special Rapporteur about Human Rights in former Yugoslavia. After requesting an international team of medical experts to investigate rape, the 1993 Mazowiecki Report concluded that there was «clear evidence that Croat, Muslim, and Serb women have been detained for extended periods of time and repeatedly raped» and that «in Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing» with no attempts made by Serb leaders to stop or punish rape[28].

The (then) European Community (EC) also set up its mission to investigate the treatment of Bosnian Muslim women in the former Yugoslavia. The 1993 EC Report concluded that the rapes of Muslim women were perpetrated on a wide scale and pointed towards a deliberate pattern. It also stressed that rapes were committed with the intent to ethnically cleanse regions in Bosnia and Herzegovina and that Serb

victims of the 1995 genocide indicates that at least 8,372 men and boys were killed. See *https://srebrenicamemorial.org/en.*

[25] L. Gačanica, C. Finkeldey, *Calling war atrocities by their right name. Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes*, Sarajevo, 2019, p. 6.

[26] See R. Gutman, *Bosnia Rape Horror*, in *New York Newsday*, 9 August 1992, p. 5.

[27] See M. Brashear, *"Don't Worry. These girls have been raped once"*, cit., 14, noting that at one point, approximately 5,000 journalists were reporting on the war in Bosnia and Herzegovina and that between April 1992 and September 1993, approximately 139 media stories ran in major world publications with «rape in Bosnia» in the headline of their story. At first, this unusual visibility given to the mass rapes in Bosnia was welcomed, but the media coverage became soon sensationalist, with the graphic depiction of atrocities and women shown on television without protecting their identities asked to talk about their horrible experiences. See D. Knezevic, *Abused and Misused: Women and Their Political Exploitation,* in *Connexions*, 42, 1993, p. 12, who argues that journalists raped symbolically women again. See also A. Doja, *Politics of mass rapes in ethnic conflict: a morphodynamics of raw madness and cooked evil*, in *Crime, Law and Social Change*, 71, 5, 2019, p. 547, stating that raped Bosnian women possibly pregnant and speaking English were in great demand.

[28] United Nations, *Report on the Situation of Human Rights in the former Yugoslavia*, Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission of Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, (E/CN.4/1993/50), 1993.

soldiers forcibly impregnated and detained women until the pregnancy could not be terminated. These acts were denounced as war crimes[29]. The 1993 CIA Report further uncovered 34 facilities throughout Bosnian territory where women were held and raped[30]. Similar evidence can be found in the 1993 Helsinki Watch Report, which concluded that rape was used by all warring parties and listed different ways in which the rapes were carried out, including rape camps, concentration camps, people's homes, and brothels[31]. The 1993 Amnesty International Report also stressed the organized and systematic use of sexual violence in rape camps and specified that «all sides have committed these abuses, but concluded that […] Muslim women have been the chief victims, while Serb armed forces the main perpetrators»[32]. The 1994 CEDAW Concluding Comments additionally specified that «Serbs had a variety of goals in mind when they systematically rape Bosnian women. The factual accounts support the assertion that rape in the Serb-Bosnian war is a display of the conquest of Bosnian women, acts as a tool of terror and humiliation, serves as a form of revenge against other men, and facilitates genocide»[33].

Yet the most influential international document about sexual violence in the Bosnian war is the 1995 Final Report of the UN Commission of Experts (also known as the Yugoslav Commission) set up by the UN Security Council to investigate violations of international humanitarian law committed in the former Yugoslavia[34]. In its Final Report, the Commission of Experts concluded that although all sides to the conflict had perpetrated sexual violence, the vast majority of the victims were Bosnian Muslims, the vast majority of the perpetrators were Bosnian Serbs and that Serbs reportedly ran over 60 per cent of the detention sites where sexual assault occurred. Accordingly, there was strong, although not conclusive, evidence of a systematic pattern of sexual assault by the Bosnian Serbs. The same Report indicated that rape was used as a part of the policy of ethnic cleansing, especially in rape camps, where forced impregnation was institutionalized. It also introduced the definition of ethnic cleansing by describing it as relatively new expression that, in the context of the conflicts in the former Yugoslavia, means «rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area»[35].

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[29] EC Investigative Mission into the Treatment of Muslim women in the Former Yugoslavia, *Report on Rape in Bosnia and Herzegovina*, European Council, Copenhagen, 1993.

[30] CIA Directorate of Intelligence Memorandum, *Rape as an Instrument of Ethnic Cleansing*, 2 April 1993. Released October 2013 by CIA Historical Collections Division.

[31] Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, vol. II, Human Rights Watch, 1993.

[32] Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces*, January 1993, 8, AI Index: EUR 63/01/93 (1993).

[33] United Nations, *Concluding comments of the Committee on the Elimination of Discrimination Against Women: Bosnia and Herzegovina*, February 1994, p. 4.

[34] M. Cherif Bassiouni, *Investigating War Crimes in the Former Yugoslavia War 1992–1994. The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Cambridge, 2017.

[35] United Nations, *Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992),* doc. S/1994/674/Add. 2, vol. V, 28 December 1994, *Rape and sexual attacks*, 12,

There are at least three common features in relation to the Bosnian rapes that emerged from the above-mentioned media reports and international documents. First, although all sides to the conflict have committed rapes, Muslims comprised most victims, and the Serbian military and paramilitary forces bore the responsibility for most human rights abuses, including rape. Second, rape was used as a weapon of war, meaning that it appeared systematic and organized, or as Catharine MacKinnon put it: «this is ethnic rape as an official policy of war [...]. It is rape under orders: not out of control, under control»[36]. In other words, rape and other sexual atrocities did not appear as random acts but as a policy planned at the highest levels of the Bosnian Serb military structure. Finally, rape and sexual violence seemed to be used as an integral part of the policy of ethnic cleansing, considered by many, especially in the early 1990s, as a euphemism for genocide[37]. The parallelism between ethnic cleansing and genocide was probably facilitated by the UN Security Council, which passed a Resolution in December 1992 stating that the ethnic cleansing carried out by Serb military forces was a form of genocide[38]. Therefore, it was because ethnic cleansing was the purpose behind the rape of Muslim women and because the ethnic cleansing was associated with the genocide that sexual violence in the Bosnian war received so much attention and was differentiated from the rapes that occurred in earlier armed conflicts.

Estimates of the number of women and girls who had been raped vary widely from 20,000 to 60,000[39]. The exact number of raped women remains unknown because

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para. 84. The use of rape and sexual assault as a tool of ethnic cleansing was further confirmed by the so-called RAM Plan, with which the Serb military policy to ethnically cleanse Bosnia and Herzegovina was developed, and which mentioned raping women and children as an efficient and integral tool in the process of ethnic cleansing of Muslims in Bosnia and Herzegovina. See T.A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, in *Human Rights Quarterly*, 20, 2, 1998, p. 356.

[36] See C.A. MacKinnon, *Crimes of War, Crimes of Peace*, in *UCLA Women's Law Journal*, 4, 1, 1993, p. 65, who described death camps and rape camps as instruments of genocide and ethnic cleansing.

[37] See generally R. Gutman, *A Witness to Genocide: The First Inside Account of the Horrors of "ethnic cleansing" in Bosnia*, Shaftesbury, 1993.

[38] GA Res 47/121, *The Situation in Bosnia and Herzegovina*, UN Doc A/RES/47/121, 18 December 1992.

[39] At the end of 1992, the Bosnian government stated that the number of women who had been raped was about 14,000, while the Bosnian Ministry of the Interior set the number at around 50,000. The 1993 EC Report estimated that 20,000 women of Muslim ethnicity were raped by Bosnian Serb soldiers – a number which has been criticized by UNHCR representatives who considered it as subjective and superficial, believing that the number was probably lower. The Commission for Gathering Facts on War Crimes in Bosnia and Herzegovina set the number of raped women at 20,000. The Sarajevo State Commission for Investigation of War Crimes estimates that the number up until October 1992 was 50,000, while the Coordinative Group of Women's Organizations of Bosnia and Herzegovina estimates that between 20,000 and 50,000 women were raped. See I. Skjelsbæk, *Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina*, in *Bosnia-Herzegovina*, *Feminism & Psychology*, 16, 2006, p. 398. Catharine MacKinnon estimated that more than 50,000 women and girls had been raped and another 100,000 had been killed, without providing,

during the war, alongside the attempts to document the crimes, the estimation of numbers has been used and misused for political reasons, while the post-conflict response to the wartime rape has been marked by amnesia and silence[40]. Yet the exact number of women that suffered that form of violence seems also less important, considering that, especially in rape camps, women were repeatedly gang raped until impregnated, sometimes by more than forty men in one day[41].

3. Theorizing Genocidal Rape: A Feminist Debate

The international attention given to sexual violence in the Bosnian war and the special place it assumed for the first time in human rights discourses represented a crucial moment for feminists around the world to intervene and play a concrete role in reconsidering the treatment of rape under international law[42]. However, feminist international legal theorists and activists did not always share the same views, and a debate developed about how to approach and prosecute Bosnian rapes under international criminal law. The most contentious issue was whether the mass rapes should be viewed as genocidal acts[43]. Two opposite positions dominated the discussion. The first, called the «global feminist»[44] (or rape-on-all-sides)[45] view, has positioned at the center of the analysis the gendered nature of the crime of rape, viewing it as a common weapon of war used by all parts of the conflict, and directed against women because women. The second, known as «genocidal rape» view, positioned the emphasis on ethnicity and viewed the rapes by Serbs against Muslim women (and to a lesser extent Croat women) not only as a weapon of war but also as a form of genocide[46].

The term «genocidal rape» was firstly used by Beverly Allen, who defined it as «a military policy of rape for the purpose of genocide currently practiced in Bosnia-Herzegovina and Croatia by members of the Yugoslav Army, the Bosnian Serb forces,

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however, any evidence to support these estimates. See S.A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, in *Brooklyn Journal of International Law*, 21, 1995, p. 361.

[40] See T. Todorova, *'Giving Memory a Future': Confronting the Legacy of Mass Rape in Post-conflict Bosnia-Herzegovina*, in *Journal of International Women's Studies*, 12, 2, 2011, p. 3, noting that ensuing silence on the mass rapes has been considered necessary for the reconciliation and the establishment of an inclusive Bosnian national identity.

[41] See P.A. Weitsman, *The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda*, in *Human Rights Quarterly*, 30, 3, 2008, p. 569.

[42] See J. Batinic, *Feminism, Nationalism, and War: The 'Yugoslav Case' in Feminist Texts*, in *Journal of International Women's Studies*, 3, 1, 2001, p. 1.

[43] K. Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, in *The American Journal of International Law*, 99, 4, 2005, p. 779.

[44] R.M. Hayden, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, in *American Anthropologist*, 102, 1, 2000, p. 28.

[45] K. Engle, *op. cit.*, p. 790.

[46] See e.g. R.M. Hayden, *Rape and Rape Avoidance in Ethno-National Conflicts*, cit., p. 28.

Serb militias in Croatia and Bosnia-Herzegovina, the irregular Serb forces known as Chetniks, and Serb civilians»[47]. Catharine MacKinnon – one of the most prominent proponents of the «genocidal rape» position – further developed a distinction between every day wartime rape and the rapes committed by Serb forces by comparing the latter with the Holocaust[48]. MacKinnon never denied the gendered nature of the crime of rape or suggested that the rapes of Serbian women should not be prosecuted. She tried to stress the intersectionality of genocidal rape, considering it a crime that implicates both gender and ethnicity. According to MacKinnon, feminists who viewed the Bosnian rapes as just another instance of aggression of all men against all women were involved in whitewashing the atrocities[49].

The opposite side of the debate expressed numerous concerns in relation to this focus on «genocidal rape». For example, Susan Brownmiller claimed that «Balkan women, whatever their ethnic and religious background, and in whatever fighting zone they happen to find themselves […] are victims of rape in war»[50]. Rhonda Copelon further stressed that rape and genocide are each atrocity and that an emphasis on genocidal rape risks rendering rape invisible once again. What Copelon feared was that an overemphasis on genocidal rape could result in an «elision of rape in genocide», thus obscuring the gendered nature of the crime of rape. She also feared that raped victims will lose their subjectivity because the crime of genocidal rape would be viewed primarily as a crime perpetrated against the group and not against individual women, as well as that the rape in armed conflicts, outside the context of genocide, would not get appropriate attention. Copelon, however, never argued that rape should not be

[47] See B. Allen, *Rape Warfare. The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis-London, 1996, p. VII, claiming that three main forms of genocidal rape existed: a) rapes in public to force Bosnian Muslims to leave their villages, thus furthering the genocidal plan of ethnic cleansing; b) rapes in concentration camps, often as part of torture preceding death, and c) rapes in rapes camps, as either part of the torture preceding death or part of torture leading to forced pregnancy.

[48] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, in A. Stiglmayer (ed.), *Mass Rape. The War Against Women in Bosnia-Herzegovina*, Lincoln and London, 1994, p. 186, noting that «Genocide does not come from nowhere, nor does rape as a ready and convenient tool of it […]. These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference […]. What is happening here is first a genocide, in which ethnicity is a tool for political hegemony; the war is an instrument of the genocide; the rapes are an instrument of the war […]. This is ethnic rape as an official policy of war in a genocidal campaign for political control».

[49] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, cit., p. 188, emphasizing that «The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a culture, meaning men, or in their sex specificity, meaning as attacks on women. But not as at once. Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?».

[50] S. Brownmiller, *Making Female Bodies the Battlefield*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 180.

prosecuted as genocide but claimed instead that genocidal rape should be defined more broadly, and that it can happen on all sides of the conflict[51].

In other words, one side of the debate insisted that the international criminal system should respond equally to rapes committed on all sides; the other side promoted the idea of the uniqueness of genocidal rape by claiming that only rapes committed by Serbs should be prosecuted as genocide[52]. Although probably less studied, feminists in former Yugoslavia also split into two branches, called by Jelena Batinic the «patriotic» (or nationalist) group and the «non-nationalist» (or anti-nationalist) group[53]. The patriotic group gave greater priority to national affiliations and draw an analogy between «women as victims» and «nation as victim», thus moving toward a sort of feminist nationalism. This branch accepted the genocidal rape position and viewed the mass rapes under the orders of Serb forces as a policy of genocide against non-Serbs. The non-nationalist branch disagreed and stressed that women were harmed on all sides of the conflict. The latter group favored women's solidarity regardless their nationality and condemned men on all sides of the conflict for the rapes[54].

Paradoxically, both positions ended up resembling the approaches to the rapes propagated by the Balkans' nationalisms. On the one hand, the notion of ethnic rape was often invoked by nationalist governments for propaganda purposes. For example, in Serbia, with the aim to justify the military action in Bosnia, the Serbian women were constructed as a symbol of suffering, and Croats and Muslims as the rapists of "our" mother, daughters, and sisters. The same propaganda pattern was used in Croatia, where Muslim and Croat women became the symbol of victimhood, while Serb men were turned into the symbol of all rapists[55]. Anti-nationalist feminists who wrote critically about ethnic rapes and maintained gender central in their analysis were proclaimed witches and traitors of the nation[56]. On the other hand, the feminist insistence that women of all ethnic groups were victims of rape perpetuated the position of everyone is guilty, which turned out to be a moral obfuscation and the final position of Serbian nationalism[57].

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[51] R. Copelon, *Surfacing Gender: Reconceptualizing Crimes against Women in Time of War*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 197 ff.

[52] In this sense, see also S.L. Russell-Brown, *op. cit.*, p. 363.

[53] J. Batinic, *Feminism, Nationalism, and War*, cit., p. 3 ff.

[54] *Ibidem*.

[55] *Ivi*, p. 9.

[56] The reference is to the case of «Witches from Rio». It started in 1992 with an article published in the Croatian weekly news magazine *Globus*, entitled *Croatian Feminists Rape Croatia*. The article accused five women intellectuals (Jelena Lovrić, Rada Iveković, Slavenka Drakulić, Vesna Kesić and Dubravka Ugrešić) to hide the truth about the use of sexual violence by Serb forces due to their insistence that Croatian soldiers also committed rapes in war. See C. Pistan, *Satira e libertà di espressione tra comunismo, democrazia e nazionalismo: i casi dell'Ungheria e della Croazia*, in *Percorsi costituzionali*, 1, 2018, p. 149.

[57] See A. Doja, *Politics of mass rapes in ethnic conflict*, cit., p. 554. Some anti-nationalist feminists in former Yugoslavia differentiated between victims and perpetrators. For example, Slavenka Drakulić

Surprisingly enough, what exactly made rapes "genocidal" received less attention. According to Karen Engle, the most recurrent arguments in feminist discussions considered rape as a form of genocide because it was organized and systematic, used as a policy of ethnic cleansing, and to socially ostracize or forcibly impregnate Bosnian Muslim women[58]. Particular attention was given to forced impregnation. Those who assumed that it amounts to a form of genocide insisted that the purpose of rapes in rape camps was to produce children to increase the Serbian population on the territory. Women were ganged raped for an extended period, and if a woman became pregnant she would be held in the rape camp until it was too late to procure an abortion safely. Frequently, Serb soldiers told women that by impregnating them they would create Chetnik babies who would kill Muslims when they grew up. According to this logic, the ethnicity of the father is decisive in determining the ethnicity of the child. Yet, as Beverly Allen observed, this is conceivable only if one completely rejects both science and culture:[59] in genetic terms, the fetus shares an equal amount of genetic material between the non-Serb mother and the Serbian father. Culturally, unless that child is raised by the father within a Serbian community, he or she will assimilate the cultural, ethnic, religious, and national identity of the mother. Todd A. Salzman further observed that even if biologically the child shares an equal amount of genetic material from the male and female, the idea that the male determines a child's ethnic identity, although misinformed, is cross-cultural as its acceptance is not limited to the Serbs but is supported by Muslim and Croat men and women as well. In other terms, a child born from rape by a Serb will always be considered Serbian because this belief is supported by both perpetrators and victims. Salzman also noted that no matter how much one argues against such a perspective, persons (mis)perceptions often dictate how they perceive reality regardless of the facts[60].

There were also some attempts aimed at identifying the causes of (genocidal) sexual violence in the Yugoslav Wars. MacKinnon, for example, adapted to the former Yugoslavia the theory of pornography she previously elaborated for the US. For MacKinnon, pornography «saturated the former Yugoslavia» and was one of the causes of sexual violence in the war of the 1990s. With this war, she argued, pornography emerged as a tool of genocide, thus suggesting that pornography can produce anywhere what it produced in the Yugoslav sphere because of an uncensored

wrote: «Of course, Croats and Muslims have raped Serbian women in Bosnia too, but the Serbs are the aggressors, bent on taking over two-thirds of the territory. This does not justify Croat and Muslim offenses, but they are in a defensive war and do not practice systematic and organized rape». See S. Drakulic, *Mass Rape in Bosnia: Women Hide Behind a Wall of Silence*, in *The Nation*, 1 March 1993, p. 253.

[58] K. Engle, *op. cit.*, p. 788 ff.

[59] See B. Allen, *Rape Warfare*, cit., p. 96 ff., observing that «Serb 'ethnic cleansing' by means of rape, enforced pregnancy, and childbirth is based on the uninformed, hallucinatory fantasy of ultranationalists whose most salient characteristic, after their violence, is their ignorance». See also T.A. Salzman, *op. cit.*, p. 364, who labeled the same mentality as an ignorant genetic and cultural patriarchal myth.

[60] *Ibidem*.

market[61]. This vision was criticized by Vesna Kesić – a well-known anti-nationalist feminist from former Yugoslavia. While Kesić agreed with MacKinnon that rape is a crime against gender and that it can be used as a genocidal war weapon, she also argued that pornography plays an important motivating factor in every war, but it cannot explain alone, as MacKinnon maintained, the origins, deep roots, and complexity of the brutality in this or any other war. Kesić further considered MacKinnon's theory inappropriate as it did not fit the cultural context of the region. Communist Yugoslavia, like other real-socialist countries, was an ascetic society where pornography was not openly permitted. Subsequently, according to Kesić, «if any 'theory' which associates war, rape, and pornography can be created, it is that repressed sexuality and hidden pornography contribute to sexual violence and war crimes»[62].

Finally, it can be noted that in 1994 the same sexual atrocities occurred in Rwanda. However, the debate about «genocidal rape» was not extended to the Rwandan civil war. Although stressing that it cannot be proven scientifically, Inger Skjelsbæk observed that it is highly likely that reports of rape were taken more seriously in relation to Bosnia because the conflict took place in Europe between white Europeans. In other words, the white Western world identified with the victims, as it was not possible just disregard the rape stories as being part of distant cultural traditions or unfamiliar gender relations[63]. Sherrie L. Russell-Brown also stressed that for unknown reasons, the debate about genocidal rape was centered only around the sexual violence that took place in Bosnia and did not include the acts of rape that had occurred in 1994 African genocide[64]. However, Russell-Brown also indicates that the Rwandan genocide had occurred by the time that legal scholars had already written much about the concept of genocidal rape. Similarly, Karen Egle observed that the debate about genocidal rape seemed to fade when the UN proceeded to establish the ICTY in 1993. Feminists often worked together, largely putting aside their disagreements, to play a formative role in the creation and operation of the ICTY and ensure that the crimes of rape and sexual violence will be subject to the jurisdiction of the tribunal[65].

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[61] C.A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 73.

[62] V. Kesic, *A Response to Catharine MacKinnon's Article "Turning Rape into Pornography: Postmodern Genocide*, in *Hastings Women's Law Journal*, 5, 2, 1994, p. 267 ff.

[63] I. Skjelsbæk, *The Elephant in the Room*, cit., p. 15.

[64] See S.L. Russell-Brown, *op. cit.*, p. 356, observing that «[h]ad what happened to African women during the Rwandan genocide been included in the analysis of the debate about genocidal rape[…], I suspect that there would not have been a debate or perhaps the debate would have been more inclusive and comprehensive».

[65] K. Engle, *op. cit.*, p. 779.

4. Sex Crimes as Genocide Under International Law

In the feminist debate about «genocidal rape» the term genocide was used in numerous ways, not always necessarily reflecting its legal definition. As a term, genocide was first coined by the Polish attorney Raphael Lemkin in 1944, who combined the ancient Greek word *genos* (race, tribe) with the Latin suffix *cide* (killing). Lemkin defined genocide as the «destruction of a nation or of an ethnic group»[66]. He further specified that «genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation». It is rather intended to signify a «coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves»[67].

The legal definition of genocide, as well as the lists of acts through which genocide is committed, are contained in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly in 1948 as a response to the Nazi atrocities committed in WWII. Article I of the Genocide Convention defines genocide as a crime under international law whether committed in time of peace or in time of war. Article II specifies that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group, and (e) forcibly transferring children of the group to another group. To prosecute the crime of genocide, two elements must be proven: the *actus reus* (the criminal act), and the *mens rea* (the mental intent to commit the act). In addition, the existence of the protected group should be proven, whilst the term «to destroy» means both the physical and biological destruction of a targeted group. While the acts comprising genocide (indicated through a-e) constitute the *actus reus* of genocide, the *mens rea* for genocide requires specific intent (*dolus specialis*) to destroy, in whole or in part, a protected group defined by national, ethnic, racial, or religious identity. The acts (a-e) covered by the Genocide Convention can be classified either as crimes against humanity or war crimes; however, if committed with the requisite specific intent, those acts will rise to the level of genocide.

William A. Schabas observes that the crime of genocide does not require a result, and courts do not need to determine whether the actual method was well chosen[68]. Sharon A. Healey further stresses that, depending on circumstances, genocide may

[66] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation. Analysis of Government Proposals for Redress*, Washington, D.C., 1944, p. 79.

[67] *Ibidem*.

[68] W.A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, in *Fordham International Law Journal*, 25, 1, 2001, p. 47.

constitute an aggravated crime against humanity or a war crime although it is not identical to either offence. It is different from war crimes, as it may occur outside armed conflicts. It is also different from crimes against humanity (mass murder, racial and religious persecution, etc.) as it requires the specific intent (*dolus specialis*) to exterminate the group[69]. The genocidal intent must be present when the acts are committed, but it does not have to be formed prior to committing the acts[70]. The *mens rea* requirement makes proving genocidal intent particularly difficult because in most genocide cases the direct evidence of intent is unavailable. In the absence of an explicit confession by the defendant, the proof of genocidal intent may be inferred from several facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership to a particular group, or the repetition of destructive and discriminatory acts[71].

Rape is not explicitly enumerated as an act of genocide in the Genocide Convention. However, the existing literature, as well as international criminal tribunals recognize that, under certain circumstances, rape and other forms of sexual violence may constitute an act of genocide in violation of the 1948 Convention. For example, Sherrie L. Russell-Brown specifies that acts such as rape and sexual violence do not constitute «genocidal acts» simply because they occur at the same time or in the context of a genocide as the requisite intent must be proven[72]. In other words, rape and sexual violence will be genocidal acts when they are expressions of specific intent to destroy in whole or in part a protected group during and after the commission of the rapes. Kelly D. Askin further notes that sexual violence can fall under each of the sub-elements (a-e) of a crime of genocide listed in the Genocide Convention[73].

The 1998 *Akayesu case* decided by the ICTR represents the first case under an international tribunal to ever convict someone of genocide as defined under the 1948 Convention and the first case to hold that rape and sexual assault may constitute acts of genocide. The case concerned Jean-Paul Akayesu, the former Bourgmestre (mayor) of Taba Commune in the Kigali Prefecture in Rwanda, who stood trial, among others, for instigating, ordering, and otherwise aiding and abetting acts of rape and sexual violence committed against Tutsi women and girls in and around the bureau communal premises. The ICTR Trial Chamber found Akayesu guilty of several charges, including

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[69] S.A. Healey, *op. cit.*, p. 365.

[70] See, e.g., *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A (Appeal Judgement, November 27, 2007, para. 266), and *Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-I-A (Appeal Judgement, June 1, 2001, p. 91).

[71] *Prosecutor v. Goran Jelišić*, Case No. ICTY-95-10-A (Trial Judgment, July 5, 2001), para. 47. See, e.g., *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11 (Appeal Judgement, November 28, 2007, para. 524), and *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64 (Appeal Judgement, July 7, 2006, para. 40).

[72] S.L. Russell-Brown, *op. cit.*, p. 362.

[73] K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law*, cit., p. 315.

genocide (with rape recognized as an act of genocide) and crimes against humanity (with rape allegation) and sentenced him to life imprisonment. In 2001, the ICTR Appeals Chamber rejected Akayesu's appeal and affirmed his life sentence.

The *Akayesu judgment* represents a groundbreaking decision. As Russell-Brown stresses, it not only addresses but also clarifies some, if not all, of the concerns that emerged in the feminist debate about genocidal rape[74]. In other words, it contains the legacy of feminist fights over the meaning of rape as genocide, even though sexual violence that occurred in the Rwandan civil war was not included in the feminist discussions. Moreover, in connecting rape to genocide, the *Akayesu case* introduced three major contributions to international criminal law. First, the ICTR Trial Chamber clarified «how sex destroys people» under Article 2 of the ICTR Statute (which incorporated the 1948 Convention's definition of genocide) by expressly recognizing that rape and sexual violence may constitute an *actus reus* of genocide[75]. It then found that sub-element (a) (killing members of the group) and sub-element (b) (causing serious bodily or mental harm to members of the group) of the crime of genocide were perpetrated in Rwanda by means of sexual violence[76]. The Trial Chamber also discussed how sexual violence might rise to the level of sub-element (d) (measures intended to prevent births within the group) and held that such measures, which can be both mental and physical, include «sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages»[77].

Second, the ICTR Trial Chamber recognized the intersectionality of the crime of genocidal rape. It defined rape (in conjunction with the charge of a crime against humanity and not as an element of genocide) as «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive»[78]. This was the first time that an international tribunal formulated the definition of rape. By introducing this broad definition of rape within international law, the ICTR indicated that it considers it a gender crime perpetrated against women because they are women, but it also found that rape and sexual violence can amount to a crime against a particular

[74] *Ivi*, p. 371.

[75] See *Akayesu*, Trial Judgment, cit., para. 731: «With regard, particularly, to [...] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such».

[76] *Ivi* at para. 734: rape and sexual violence «certainly constitute infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm […]».

[77] *Ivi* at para. 507, also noting that «in patriarchal societies, where membership of a group is determined by the identity of the father, an example [...] is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group».

[78] *Ivi* at para. 688. The use of the word «invasion» instead of «penetration» to define rape allows more abuses to be prosecuted as rape, including raping women with objects, such as sticks or guns. See C. Powell, *op. cit.*, p. 36.

group[79]. In other terms, it recognized that Tutsi women were targeted on the basis of both their gender and their ethnicity.

Finally, the ICTR Trial Chamber recognized the subjectivity of the victims of the crime of genocidal rape[80]. In this sense, it specified that although the intent of genocidal rape was to destroy a particular group, the effect of the act is also the worst way of inflicting serious injury and harm upon individual Tutsi woman[81].

In sum, the *Akayesu case* set the terms for the future treatment of sexual violence as genocide in international law and sent a clear invitation to the ICTY to do the same[82].

5. Prosecuting Rape and Genocide in the International Criminal Tribunal for the former Yugoslavia (ICTY)

When the ICTY was established in 1993, it held the promise of being the first international court to prosecute the crime of genocide. However, it was not the ICTY but the ICTR, the first international criminal tribunal to pass a judgment of genocide. In doing this, it also established the link between genocide and sexual violence. The ICTY, on the other hand, was very successful in prosecuting sexual violence as a war crime and a crime against humanity by delivering several landmark cases[83]. Genocide

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[79] *Akayesu,* Trial Judgment, cit., para. 733: «The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects […] Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: 'don't ever ask against what a Tutsi woman tastes like'. This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the spirit, of the will to live, and of life itself».

[80] See S.L. Russell-Brown, *op. cit.*, p. 373.

[81] *Ibidem*. See also *Akayesu*, Trial Judgment, cit., para. 733: «In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its individual members in the process».

[82] Other ICTR contributions to the body of international law on sexual violence as genocide include: *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T (Trial Judgment, May 21, 1999); *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-I, (Indictment, June 20, 2001), and *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T (Trial Judgment April 28, 2005). In the *Kayishema* judgment, the ICTR extended the *Akayesu* ruling to the fourth sub-element of the crime of genocide (d) (deliberate infliction of conditions designed to bring about the slow destruction of a group). See S. Rogers, *Sexual violence, or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court*, in *George Washington International Law Review*, 48, 2, 2016, p. 281 ff.

[83] For example, in *Prosecutor v. Delalic*, Case No. IT-96-21-T (Trial Judgment, November 16, 1998), the ICTY found rape to constitute torture and thus a grave breach. The case concerned a Bosnian Muslim, accused of raping Serbian women. With respect to the feminist debate, it has been observed

convictions, however, have been slow in coming, and thus also the possibility to prosecute rape as genocide.

Yet some initial references to sex crimes as a form of genocide can be found in the ICTY case law before the adoption of the first genocide conviction. For example, in *Furundzija* – the first case entirely concentrated on charges of sexual violence – the ICTY Trial Chamber apparently prepared the terrain for the prosecution of genocidal rape[84]. The case focused on the multiple rapes of a Bosnian Muslim woman, which were committed during interrogations led by Anto Furundzija, who was at that time the commander of the Jokers, a special unit of the Croatian Defence Council (HVO) in Bosnia and Herzegovina. It was not Furundzija personally, but his subordinate who raped the woman in front of a laughing audience of other soldiers. The *Furundzija case* is relevant as the Trial Chamber made important remarks on the qualification of rape within the context of international crimes. In the ICTY Statute, the only explicit reference to rape was as a crime against humanity. The Trial Chamber widened that scope by stating that rape may also be prosecuted as a grave breach of the Geneva Conventions, and as a violation of the laws and customs of war. Moreover, by invoking the ICTR's *Akayesu case*, the ICTY confirmed that «rape may also amount to […] an act of genocide, if the requisite elements are met, and may be prosecuted accordingly»[85]. In the *Furundzija case*, the defendant was not, however, charged with sexual violence as a genocidal act.

Kunarac et al. represents the second ICTY case which dealt exclusively with charges of sexual violence and the first conviction of Serb men for raping Bosnian Muslim women[86]. The three accused Serb army officers, Kunarac, Vuković, and Kovač, had a prominent role in organizing and maintaining the system of rape camps in the eastern Bosnian town of Foča, where women were repeatedly raped, gang raped, and subject to other kinds of sexual assault in living conditions of enslavement. The Trial Chamber noted that in the context of a widespread and systematic attack on civilians, rape was used to implement a strategy of «expulsion through terror», the goal

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that through this prosecution, the ICTY signaled that it would prosecute the rapes committed on all sides for violation of international law. This was later confirmed in the *Furundzija case*. See K. Engle, *op. cit.*, p. 798.

[84] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T (Trial Judgment, December 10, 1998).

[85] *Ivi*, at para. 17. In the *Karadžić and Mladić* Rule 61 decision, the ICTY Trial Chamber already made a connection between forced pregnancy and genocide by noting that forced impregnation may constitute evidence of genocidal intent through ethnic cleansing. In particular, it concluded that «the systematic rape of women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child» and that «certain acts submitted for review could have been planned or ordered with genocidal intent». See *Prosecutor v. Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61, Nos. IT-94-95-R61, IT-95-18-R61 (July 11, 1996). See also K.D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, in *American Journal of International Law*, 93, 1, 1999, p. 115.

[86] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T (Trial Judgment, February 22, 2001).

of which was to drive the Muslims out of the region of Foča. Rapes became the way in which «the Serbs could assert their superiority and victory over the Muslims […]. While raping FWS-183, the accused Dragoljub Kunarac told her that she should enjoy being «fucked by a Serb. After he and another soldier had finished, Dragoljub Kunarac laughed at her and added that she would now carry a Serb baby»[87]. Although the ICTY recognized that the treatment of Kunarac for his victims was motivated by their being Muslims, he was not charged with genocide. This was criticized by Shayna Rogers, who observed that, despite the presence of that arguably genocidal *mens rea*, the ICTY refused to prosecute sexual violence as genocide. Kunarac was convicted of sexual violence as a crime against humanity and a war crime, but not as a genocidal act[88]. Karen Egle considered, however, that even without a finding of genocide, the ICTY indicated in the *Kunarac case* that the rapes of Bosnian Muslim women were different from the rapes of Serbian and Croat women as only in the first case were the rapes found to be a form of a systematic attack against an ethnic group[89].

The first concrete possibility to prosecute sexual violence as genocide arrived in 2001, with the *Krstić case* (referred to also as the *Srebrenica case*) – the first ICTY genocide conviction.

5.1 The Krstić case: Rape as Tool of Ethnic Cleansing

Radislav Krstić was indicted variously for genocide, crimes against humanity, and war crimes in relation to his role in the Srebrenica tragedy. Srebrenica – a small town situated in northeastern Bosnia – was formally declared in 1993 as an UN-safe area that was to be free of any armed attack or other hostile act[90]. Despite this, in mid-July 1995 the Bosnian Serb Army (VRS) captured the town. Following the take-over of Srebrenica, the VRS forces executed, within a few days, more than 8,000 Bosnian Muslim men and boys. In addition, approximately 25,000 Bosnian Muslim women, children, and the elderly were forcibly deported from the area, many of whom later reported rape and abuse at the hands of VRS soldiers. At the time of these events, Krstić was a General-Mayor in the VRS with command responsibility for the Drina Corps, a sub-unit of the VRS responsible for Srebrenica. Sexual violence formed a part of the basis of the conviction of Krstić for persecution as a crime against humanity. Despite the strong precedent from the ICTR, sexual violence was not charged as genocide.

On 2 August 2001, the ICTY Trial Chamber found that the actions of the VRS resulted in «the physical disappearance of the Bosnian Muslim population at

[87] *Ivi*, para. 654.
[88] S. Rogers, *op. cit.*, p. 290.
[89] K. Engle, *op. cit.*, p. 798.
[90] UN Security Council, Security Council resolution 819 (1993) [Bosnia and Herzegovina], 16 April 1993, S/RES/819 (1993).

Srebrenica» and concluded that Bosnian Serb forces committed genocide[91]. Krstić was found guilty on several counts including as a co-perpetrator of genocide based on his participation in a joint criminal enterprise to commit genocide and was sentenced to 46 years imprisonment. Following the Trial Chamber's judgment, both the Prosecution and Krstić filed an appeal. On 19 April 2004, the ICTY Appeal Chamber confirmed the Trial Chamber's finding that genocide occurred in Srebrenica but decreased Krstić's sentence to 35 years after determining that Krstić aided and abetted genocide rather than having functioned as a co-perpetrator as initially established by the Trial Chamber[92].

In defining Krstić's individual criminal responsibility, the ICTY first dealt with the broader question of whether genocide took place in Srebrenica. As in the case of ICTR, the definition of genocide was incorporated in the ICTY Statute (Article 4) by mirroring the provisions of the 1948 Convention. Therefore, to prove that the mass atrocities committed in Srebrenica fit into the legal definition of genocide, three elements had to be proven: a) the existence of the protected group; b) the *actus reus*, and c) the genocidal intent. In dealing with these elements, the ICTY Trial Chamber also focused on the nature of sexual violence that took place in and around Srebrenica following the Bosnian Serb takeover of the town. The most relevant findings can be summarized as follows.

The Trial Chamber identified the Bosnian Muslims as the protected group within the meaning of Article 4 of the Statute, largely by using historical analysis. A critical aspect concerned the requirement in the definition of genocide that the group should be destroyed «in whole or in part». The Trial Chamber concluded that to realize the destruction of the group «in whole or in part», the perpetrator must intend to destroy at least a substantial part of the protected group[93]. The determination of when the targeted part of the group is substantial enough to meet this requirement may involve several considerations, including (but not limited to): a) the numeric size of the group as necessary and important starting point to be evaluated not only in absolute terms, but also in relation to the overall size of the entire group; b) the prominence of the targeted part of the group within the overall group, and c) the current and potential area of the perpetrators' activity and control[94].

The Trial Chamber considered that the transfer of women and children, and the death of thousands of Bosnian Muslim civilian and military men in Srebrenica show that the Bosnian Serb forces took a purposeful decision to target the Bosnian Muslim population in Srebrenica because of their membership in the Bosnian Muslim group[95]. It then concluded that the Bosnian Muslim of Srebrenica – a group estimated to comprise about 40,000 people – constituted a part of the protected group under Article

[91] *Krstić*, Trial Judgment, cit., para. 595.
[92] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A (Appeal Judgment, April 19, 2004).
[93] *Krstić*, Trial Judgment, cit., para. 586.
[94] *Krstić*, Appeal Judgement, cit., para. 12.
[95] *Krstić*, Trial Judgement, cit., para. 568.

4 of the ICTY Statute[96]. Despite the Bosnian Muslims of Srebrenica constituting a small percentage of the overall Muslim population of Bosnia and Herzegovina, they occupied a strategic location and were thus the key to the survival of the Bosnian Muslim nation. Srebrenica is located near the Serbian border, and its elimination as a Muslim enclave became an important objective in the consolidation of Serb territory[97].

While the *actus reus* of (a) killing members of the group and/or (b) causing serious bodily or mental harm to the few survivors of the Srebrenica enclave had been established «beyond all reasonable doubt» on the basis of eyewitness reports and extensive forensic evidence[98], the question remained as to whether there was a specific intent (*dolus specialis*) to destroy the protected group in whole or in part. As Mark Drumbl stresses, one of the difficult aspects of this case was that the Bosnian Serb forces did not kill all Bosnian Muslims of Srebrenica[99]. Killings were limited to Bosnian Muslim men and boys, largely of military age, while women, children, and the elderly were previously removed from the territory[100].

To prove the genocidal intent, in the absence of a direct evidence, the proof of intent was derived from the factual circumstances of the crime. The Trial Chamber first considered the long-term impact that the elimination of Bosnian Muslim men from Srebrenica would have on the physical survival of that community. In examining these consequences, it found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would «inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica»[101]. Evidence introduced during the trial supported this finding by showing that, with most of the men killed, their spouses were unable to remarry and have new children. The Trial Chamber noted that the Bosnian Serb forces were aware of these catastrophic consequences when they decided to systematically eliminate two or three generations of Bosnian Muslim men[102]. The Appeal judgment further added that «the physical destruction of the men, therefore, had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction»[103].

The Trial Chamber then explained that the forcible transfer of women, children, and the elderly could be an additional means to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. It completed the removal of all Bosnian

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[96] *Ivi*, para. 593.

[97] *Ivi*, para. 597.

[98] *Ivi*, para. 543.

[99] See M. Drumbl, *Case Notes Prosecutor v. Radislav Krstic: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, in *Melbourne Journal in International Law*, 5, 2, 2004, p. 5.

[100] In referring to the mass killing of men and boys in Srebrenica, the Trial Chamber used the term «men of military age». The Appeal Chamber found the term misnomer, as the group killed by the VRS also included boys and the elderly, normally considered to be outside that range. See *Krstić*, Appeal Judgment, cit., para. 27.

[101] *Krstić*, Trial Judgment, cit., para. 595.

[102] *Ibidem.*

[103] *Krstić*, Appeal Judgment, cit., para. 28.

Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself[104]. The Bosnian Serb forces knew, by the time they decided to kill all the military-aged men, that the combination of those killings with the forcible transfer of the women, children, and the elderly would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica[105]. The Trial Chamber thus concluded that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constituted an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 of the ICTY Statute and, therefore, must be qualified as a genocide[106].

While critics of the *Krstić case* typically assume that calling Srebrenica genocide unreasonably distorted the term[107], an opposite argument to this statement may also be introduced: the limited recognition in the *Krstić case* of the acts that may constitute the *actus reus* of genocide. For example, the Trial Chamber did not consider that the forcible transfer may rise to a genocidal act. Although the forcible transfer (other than that of children from one group to another group) does not explicitly constitute a genocidal act for the purposes of the 1948 definition (set out without a significant change in Article 4(2) of the ICTY Statute), in the *Krstić case* the Trial Chamber expressly stated that the forced transfer constituted a tool of ethnic cleansing, while the Appeal judgment further found that this act constituted evidence from which genocidal intent can be inferred. Then, in *Blagojević et al.* the Trial Chamber concluded that the forcible transfer of women, children, and the elderly from Srebrenica amounted to genocide as it reached the level of causing serious mental harm under article 4(2)(b) of the ICTY Statute[108]. Furthermore, in the *Krstić* Appeal judgment, the ICTY acknowledged, on the basis of the evidence introduced in the trial judgement, that the physical destruction of men had severe procreative implications for the Srebrenica Muslim community. However, the sub-element (d) – the imposition of measures intended to prevent births within the group – was not considered as

[104] *Krstić*, Trial Judgement, cit., para. 595.

[105] *Ibidem.*

[106] *Ivi*, para. 598.

[107] See W.A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina?*, cit., p. 47, who argues that the atrocities committed in Srebrenica surely qualify as crimes against humanity but categorizing them as genocide expanded the concept beyond the definition adopted in 1948. Schabas further argues that the perpetrators' intent was not to physically destroy the protected group but rather to remove it from the territory. R.M. Hayden, *"Genocide Denial" Laws as Secular Heresy: A Critical Analysis with Reference to Bosnia*, in *Slavic Review*, 67, 2, 2008, p. 402, similarly claims that the Trial Chamber extended the definition of genocide to cover mass killings of purely local scope, including the acts made to remove an ethnic or religious community from a specific territory, especially one of strategic importance. K.G. Southwick, *Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable*, in *Yale Human Rights & Development Law Journal*, 8, 2005, p. 206, notes that «[t]he chamber concluded that by killing the Bosnian Muslim men of military age, or part of the Muslim population at Srebrenica, the Bosnian Serb forces intended to destroy the Srebrenica Muslims, part of the Bosnian Muslim group. With this, the ICTY effectively stated that destroying part of a part of a group constitutes genocide».

[108] *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T (Trial Judgment, January 17, 2005), para. 654.

genocidal act even if the ICTR held in the *Akayesu case* that it may include measures such as separation of sexes, prohibition of marriages, and rape.

More generally, it could be observed that rape was mentioned in a 255-page *Krstić* Trial judgment just seven times, while in the press release, it was mentioned only once.[109] Despite this, the *Krstić case* gave some important indications on the nature of sexual violence in the Bosnian genocide. For example, in reconstructing the events that led to the Srebrenica massacre, the Trial Chamber referred to several instances of rape. It observed that as Srebrenica fell under the Bosnian Serb army between 10 and 11 July, about 20-30,000 of its Muslim residents, mostly women, children, and the elderly, fled to the nearby village of Potočari. Several thousand sought protection inside the UN military camp. Serb soldiers, however, entered the compound and threatened, beat, and killed people. They also committed many acts of rape. The *Krstić* Trial judgment further referred to Bosnian Muslim refugees near Srebrenica being «subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes, and murders»[110]. These crimes were committed from 12 to 13 July, when also the separation of men and the forcible transfer of women, children, and the elderly began. The Trial Chamber found that the crimes committed from 11 to 13 July were part of the Serb policy of ethnic cleansing, largely realized through the forcible transfer. On 13 July, however, when the massacre of Bosnian men and boys started, the previous plan to ethnically cleanse the area of Srebrenica turned into genocide[111].

Rape was not considered by the Trial Chamber a genocidal act but limitedly as part of the policy of ethnic cleansing, which was largely performed through forcible transfer. Perhaps, if the ICTY had acknowledged that rape and forcible transfer amounted to genocide, it would have been less difficult to prove in the *Krstić case* the genocidal intent. As already observed, in *Blagojević et al.* the Trial Chamber found that the forcible transfer may lead to the destruction of the protected group. It also recognized that in Srebrenica the forcible transfer was directed against the protected group and that it was preceded by the separation of the community by gender. The Trial Chamber then found that the separation of the Bosnian Muslim men from the rest of the Bosnian Muslim group was a critical piece of evidence in establishing that the Bosnian Serbs, who organized and implemented the transfer, did not want the Bosnian Muslim group to ever reconstitute itself as a group in Srebrenica or elsewhere, and that, therefore, they intended to physically destroy the protected group[112]. Moreover, if the ICTY had argued in the *Krstić case* that the policy of rape and forcible transfer in the context of the campaign of ethnic cleansing represented a pattern of

[109] Press Release, *Radislav Krstić Becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment*, U.N. Press Release OF/P.I.S./609e (August 2, 2001).

[110] *Krstić*, Trial Judgment, cit., para. 150.

[111] *Ivi*, para. 622.

[112] *Blagojević*, Trial Judgement, cit., para. 650.

acts which taken together constituted the *dolus specialis* of genocide, critics would have had probably much harder time in questioning Srebrenica as genocide.

5.2. Genocide and Ethnic Cleansing: Is There Any Difference?

Although the *Krstić case* did not consider rape as genocide, it remains relevant as it established, for the first time, the link between rape and ethnic cleansing, which in the context of Srebrenica crimes was closely associated with genocide. The Trial Chamber, in fact, observed «obvious similarities between a genocidal policy and the policy [of] ethnic cleansing»[113] – an assumption that raises the need for exploring the relationship between ethnic cleansing and genocide.

Contrary to genocide which is a legal term with its legal definition, ethnic cleansing is a term without a legal status and does not constitute an independent crime under international law. The term started to be frequently used in the context of the Yugoslav wars of the 1990s and represents a literal translation of the Serbo-Croatian expression *etničko čišćenje*. From here, the term penetrated international documents, where especially in the 1990s was frequently used as a synonym for genocide. For example, the 1995 Final Report of the UN Commission of Experts suggested that ethnic cleansing can violate the 1948 Convention: «the expression 'ethnic cleansing' […] means rendering an area ethnically homogeneous by using techniques [that] include murder, torture, arbitrary arrest and detention, extrajudicial executions, sexual assault, confinement of civilian populations in ghetto areas, forcible removal, displacement and deportation of civilian populations […]».Those practices, as has been further added, may constitute crimes against humanity, specific war crimes, and could also fall within the meaning of the Genocide Convention[114].

The relationship between ethnic cleansing and genocide has been further discussed by academics. For instance, Andrew Bell-Fialkoff stressed that the term ethnic cleansing is not of easy definition: «[a]t one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an 'undesirable' population from a given territory due to religious or ethnic discrimination, political, strategic, or ideological considerations, or a combination of these»[115]. For Catharine MacKinnon «ethnic cleansing» is a euphemism for genocide.[116] Similarly, Todd A. Salzman observed that in the former Yugoslavia «genocide and ethnic cleansing coincided, the goal being the establishment

[113] *Krstić*, Trial Judgement, cit., para. 562.

[114] United Nations, *Final report of the Commission of Experts*., cit., para. 129.

[115] A. Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, in *Foreign Affairs*, Summer 1993.

[116] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, cit., p. 8, noting that «[i]t is a policy of ethnic extermination of non-Serbs with the aim of 'all Serbs in one nation', a clearly announced goal of 'Greater Serbia', of territorial conquest and aggrandizement».

of a greater Serbia that is, a Serb-inhabited region purged of all non-Serbs throughout Serbia, Bosnia-Herzegovina, and Croatia»[117]. The same view has been accepted by more recent literature. For example, Jonathan M.H. Short argues that «[i]n recent conflicts, sexual violence has taken on a new purpose: ethnic cleansing or genocide»[118].

Most authors argue, however, that ethnic cleansing itself does not constitute genocide. For example, Douglas Singleterrym observes that genocide and ethnic cleansing are distinct concepts that share similar features[119]. For William A. Schabas ethnic cleansing is not genocide because the intent is to remove a population from the territory not to physically destroy it. He further specifies that ethnic cleansing is not even considered an *actus reus* of genocide[120]. However, Schabas also observes that «[e]thnic cleansing is a warning of genocide to come […]. Genocide is the last resort of the frustrated ethnic cleanser»[121]. Norman Naimark argues that the distinction between ethnic cleansing and genocide is complicated. For instance, forced deportation seldom takes place without violence, often murderous one. This is because people do not leave their homes on their own but resist, and the result is that forced deportation often becomes genocidal, as people are violently ripped from their native towns and villages and killed when they try to stay. Even when forced deportation is not genocidal in its intent, it is often genocidal in its effect[122]. Schabas also observes that genocide and ethnic cleansing may share the same goal, which is to eliminate the persecuted group from an area[123].

Another interesting issue is the nexus between ethnic cleansing and proof of genocidal intent. According to Martin Shaw, «[i]t is not just that 'cleansing' is sometimes genocidal, or that genocide is 'extreme' cleansing. Cleansing language invariably oozes genocidal intent, resonating with the idea of destroying, if not murdering, groups to which it is applied»[124]. The ICTY case law also recognized that ethnic cleansing may under certain circumstances ultimately reach the level of genocide and that the *dolus specialis* may be inferred from the gravity of ethnic cleansing[125]. In the

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[117] T.A. Salzman, *op. cit.*, p. 349.

[118] See J.M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, in *Michigan Journal of Race and Law*, 8, 2003, p. 503, noting that «[e]thnic cleansing is a term of modern adaptation; it is the zero-sum game of genocide. Ethnic cleansing is accomplished, for example, by removing individuals of a certain national, ethnical, racial, or religious group from a community or region. The gain of the perpetrating group is measured by the loss to the victimized group».

[119] D. Singleterry, *"Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?*, in *Genocide Studies and Prevention: An International Journal*, 5, 1, 2010, p. 40.

[120] W.A. Schabas, *Genocide in International Law*, Cambridge, 2009, p. 233.

[121] *Ivi*, p. 234.

[122] N.M. Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, Cambridge (MA), 2001, p. 3.

[123] W.A. Schabas, *Genocide in International Law*, cit., p. 234.

[124] M. Shaw, *What Is Genocide?*, Cambridge, 2007, p. 58.

[125] See *Prosecutor v. Karadžić and Mladić*, Confirmation of Indictment, Case No. ICTY-95-18-I (November 16, 1995): «The policy of 'ethnic cleansing' […] presents, in its ultimate manifestation,

context of the *Krstić case*, however, although the rapes were identified as part of a campaign of ethnic cleansing, the ICTY showed the preference not to prosecute sex crimes as genocide; in fact, Krstić was found guilty of the rapes, but as a crime against humanity.

6. In the Aftermath

In the aftermath of the *Krstić case*, sexual violence has been included in some of the genocide indictments, notably against Slobodan Milošević, Radovan Karadžić, and Ratko Mladić[126]. However, no conviction has been entered on this basis. For example, the indictment of Milošević (issued in 2002) charged him with the «planning, preparation and execution of the destruction, in whole or in part, of the Bosnian Muslim national, ethnical, racial or religious groups, as such, in territories within Bosnia and Herzegovina» through «widespread killings of thousands of Bosnian Muslims» and «[t]he causing of serious bodily and mental harm to thousands of Bosnian Muslims during their confinement in detention facilities within Bosnia and Herzegovina [where they] were continuously subjected to, or forced to witness, inhumane acts, including murder, sexual violence, torture, and beatings»[127].

The issue of sexual violence as genocide was then included in the 2009 Prosecution's Marked-Up Indictment of Karadžić (President of the self-proclaimed *Republika Srpska* during the Bosnian War) and the 2011 Fourth Amended Indictment of Mladić (colonel-general who led the VRS during the Bosnian war). Both indictments charged them with two counts of genocide, the first related to the acts committed in Bosnia and Herzegovina and the second to the acts committed in Srebrenica. Only in the first case Karadžić and Mladić were charged with rape and other forms of sexual violence committed in detention centers as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of

genocidal characteristics. Furthermore, in this case, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is specific to genocide, may be inferred from the gravity of the 'ethnic cleansing' practiced in Srebrenica and its surrounding areas, i.e., principally the mass killings of Muslims which occurred after the fall of Srebrenica in July 1995, which were committed in circumstances manifesting almost unparalleled cruelty». See also *Prosecutor v. Brđanin*, Case No. IT-99-36 (Trial Judgment, September 1, 2004): «ethnic cleansing may under certain circumstances ultimately reach the level of genocide […]».

[126] See C.A. MacKinnon, *Defining Rape Internationally: Comment on Akayesu*, in *Columbia Journal of Transnational Law*, 44, 3, 2006, p. 947, who argues that many perpetrators have been indicted for rape and sexual violence under other rubrics and for genocide for other acts. As of July 21, 2005, twenty-eight indictments by the ICTY charged rape or other sexual assault as something other than genocide in the ex-Yugoslav region. Twelve additional cases, most of them for the atrocities at Srebrenica, charged genocide on facts that did not mention sexual assault. Despite *Akayesu* showing the way, only ten ICTY cases have indicted rape as genocide.

[127] *Prosecutor v. Slobodan Milošević*, Amended Indictment "Bosnia and Herzegovina", Case No. IT-02-56-T (November 22, 2002).

the group[128]. Shayna Rogers observed that these prosecutions could yield the first genocide convictions for sexual violence[129], but neither Karadžić nor Mladić was found guilty of genocidal rape[130].

The reluctance to deal with rape as genocide in international courts can be further found in the long-awaited *Genocide case* decided by the International Court of Justice (ICJ) in the suit filed by Bosnia and Herzegovina against Serbia and Montenegro[131]. Bosnia asserted that the systematic rape carried out by Serb forces against Muslim women constituted an act of genocide under Article II(b) (d) (e) of the 1948 Convention (causing serious bodily or mental harm to members of the protected group; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group), but the ICJ did not acknowledge that rape and sexual violence amounted to genocidal acts[132].

7. Concluding Remarks

Although the concept of «genocidal rape» has been theorized in the early 1990s in relation to the conflict that took place in the former Yugoslavia and especially in Bosnia and Herzegovina, sexual violence has not been included as genocide in the ICTY case law. On the one hand, the ICTY recognized that theoretically sex crimes can amount to genocide. It also indirectly linked rape to genocide by considering it a tool of ethnic cleansing. On the other hand, the Yugoslav Tribunal not only declined the invitation of the ICTR to prosecute rape and other forms of sexual atrocities as genocidal acts but refused also to consider sexual violence as evidence of the *mens rea* intent to destroy in whole or in part the protected group. As a result, despite the ethnically motivated, widespread, systematic, and organized sexual violence in the Bosnian war, rape was generally prosecuted as a crime against humanity.

Several reasons may explain this reluctance to prosecute sexual violence as genocide. First, rape and other forms of sexual atrocities were not expressly included as a crime of genocide in the ICTY Statute. The definition of genocide, contained in Article 6 of the Statute, mirrored the 1948 Convention, while the real novelty was introduced in Article 5, which categorized wartime rape as a crime against humanity.

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[128] *Prosecutor v. Karadžić*, Prosecution's Marked-Up Indictment, Trial Chamber III, Case No. IT-95-5/18-PT (October 19, 2009).

[129] S. Rogers, *op. cit.*, p. 290.

[130] *Prosecutor v. Mladić*, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Trial Chamber I, Case No. IT-09-92-PT (December 16, 2011).

[131] ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)(February 26, 2007).

[132] See A. Marino, *Bosnia v. Serbia and The Status of Rape as Genocide Under International Law*, in *Boston University International Law Journal*, 27, 2009, p. 205 ff., noting that the ICJ treated the allegations relating to the rape and sexual violence incompletely, failing to consider relevant evidence, and reaching, as a result, questionable conclusions.

Cassie Powell noted that rape was not included as a crime of genocide because, contrary to crimes against humanity, genocide and war crimes had pre-existing definitions within international law[133]. Yet the ICTR Statute also contained the 1948 definition of genocide, but the Rwandan Tribunal went beyond the textual definition and recognized sexual violence as a constituent act of genocide. Despite this, the ICTY's refusal to follow the way the *Akayesu case* opened and prosecute rape as genocide may still be in part explained by the lack of an express provision authorizing it to prosecute genocidal rape. For example, under the 1998 Rome Statute, which governs the International Criminal Court (ICC), rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity are recognized as crimes against humanity and war crimes. Similarly, to the ICTY, the ICC refused to prosecute sex crimes as genocide. For this reason, Shayna Rogers proposed to change the Rome Statute to expressly include sexual violence as a constituent act of genocide. This solution, according to Rogers, would offer the best means of ensuring the prosecution of genocidal sexual violence under international law[134].

Second, in *Karemera et al.* the ICTR took judicial notice of the genocide in Rwanda[135]. This meant that the prosecutor in this and future cases no longer needed to prove that genocide occurred; the fact of genocide in Rwanda became beyond argument[136]. No such notice was taken by the ICTY. Therefore, to prosecute rape and other forms of sexual violence as genocide, the prosecution needed first to prove on a case-by-case basis that genocide had occurred. Moreover, the only genocide convictions in the ICTY are those related to the 1995 Srebrenica massacre.

Third, prosecuting rape as genocide appeared probably more complex in the case of the Bosnian conflict than in the Rwandan civil war. To amount to an *actus reus* of genocide, it is not sufficient to prove that rape has been committed during genocide but also that it was committed with the intent to destroy the protected group. The ICTR found in *Akayesu* that the rape of Tutsi women was systematic and that it was perpetrated against all Tutsi women and solely against them. It further found that in most cases the rapes of Tutsi women were accompanied by the intent to kill those women. Although it has been sometimes argued that the rapes of Bosnian Muslim women by Serbs generally ended in death, this was much harder to prove than it was in Rwanda. In Bosnia and Herzegovina, the connection between genocide and rape did not ultimately rely on murder but on forced impregnation. Moreover, in the case

[133] C. Powell, *op. cit.*, p. 33.

[134] S. Rogers, *op. cit.*, p. 304 ff.

[135] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 35-38 (June 16, 2006) of the fact that «[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group as a fact of common knowledge».

[136] R. Faulkner, *Taking Judicial Notice of the Genocide in Rwanda: The Right Choice*, in *Penn State International Law Review*, 27, 3, 2009, p. 896.

of Bosnian rapes, it was very difficult to argue that the rapes were occurring only on one side, as sexual violence was used by all parts in the conflict.

Finally, it can be assumed that not only the ICTR but also the ICTY case law on sexual violence contains the legacy of feminist fights over genocidal rape. However, contrary to the ICTR, the ICTY chose a more mediating role between the two feminist positions. It successfully prosecuted the rapes committed on all sides of the conflict (*e.g.*, *Delalic*, 1998) but, at the same time, acknowledged that the rapes of Bosnian Muslim women by Serbs were different. Only in the latter case the rapes were found to be systematic (*e.g.*, *Kunarac*, 2001), linked to ethnic cleansing, and thus also indirectly to genocide (*e.g.*, *Krstić*, 2001).

Despite the ICTY's reluctance to directly prosecute rape as genocide, the concept of genocidal rape still appears relevant. When genocide – the most serious of international crimes – took place, it seems important to acknowledge that sexual violence may no longer be only a violation of individual women or a gender crime, but that it can amount to an act that is committed «with the specific intent to destroy, in whole or in a part, a particular group targeted as such». For example, Catharine MacKinnon observes that the survivors of rape in Bosnia and Herzegovina «typically understood that they had been raped precisely to destroy their ethnic and religious communities, in acts of sexual violence against women because they were not Serbian». However, the ICTY's seeming reluctance to prosecute sex crimes as genocide «made survivors unwilling to put themselves in its hands, damaging trust and opportunities for cooperation. The limited access to witness that ensued no doubt had a circular effect on [ICTY's] charging practices»[137]. For these reasons, linking rape to genocide may even be necessary for seeking the appropriate justice for the survivors. If so, then the above-mentioned reasons that led the ICTY to avoid genocide convictions for sexual violence may eventually be of some help for setting up specific guidelines for future prosecution of genocidal rape under international criminal law.

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Abstract: This article focuses on the nexus between wartime sexual violence and genocide in relation to the 1992-95 Bosnian war. It first discusses the nature of sexual violence in the Bosnian conflict through the lens of the feminist debate about «genocidal rape». It then explores how sex crimes may function as a constituent act of genocide under international law, as well as the extent to which the International Criminal Tribunal for the former Yugoslavia (ICTY) has prosecuted rape as a constituent act of the Bosnian genocide. The article argues, in particular, that although the ICTY has failed to prosecute sex crimes as genocide, the concept of «genocidal

[137] C.A. MacKinnon, *Defining Rape Internationally*, cit., p. 949.

rape» remains relevant under international law. It not only helps clarify the massive rape politics that systematically occurs in identity-driven conflicts, but linking rape to genocide may even be necessary for seeking the appropriate justice for the survivors of wartime sexual violence.

Abstract: L'articolo si focalizza sul nesso tra stupri di guerra e genocidio in relazione alla guerra bosniaca del 1992-95. Si analizza, in primo luogo, la natura della violenza sessuale nel conflitto bosniaco attraverso la lente del dibattito femminista sullo «stupro come strumento di genocidio». L'articolo esplora, quindi, i modi in cui i reati sessuali possano costituire uno strumento di genocidio ai sensi del diritto internazionale, nonché la misura in cui il Tribunale penale internazionale per l'ex Jugoslavia (TPIJ) abbia perseguito lo stupro come atto costitutivo del genocidio bosniaco. Si sostiene, in particolare, che sebbene il TPIJ abbia rifiutato di perseguire i reati sessuali come genocidio, il concetto di «stupro come strumento di genocidio» rimane rilevante ai sensi del diritto internazionale. Non solo tale concetto aiuta a chiarire la politica di stupro di massa che si verifica sistematicamente durante i conflitti identitari, ma collegare lo stupro al genocidio può risultare anche necessario nella ricerca di una giustizia appropriata per i sopravvissuti alla violenza sessuale in tempo di guerra.

Keywords: Wartime sexual violence – genocide – genocidal rape – Bosnia and Herzegovina – ICTY.

Parole Chiave: Stupri di guerra – genocidio – stupro come strumento di genocidio – Bosnia ed Erzegovina – TPIJ.

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RIVISTA DI
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Women Who Kill Women. A Gendered Reading of The Crime of Genocide: From *Mass* to *Genocidal* Rape*

Costanza Nardocci

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1. Introduction

Whether there is or there must be a connection between gender and genocide is increasingly under debate in international criminal and human rights law.

The feasibility of a gendered reading of the crime of genocide has nevertheless not yet been fully endorsed and it is likewise debatable whether it should be appropriate and, even more, necessary to disentangle the concept of genocide from that of race and ethnicity.

In as much as genocide is inherently linked to the destruction of an ethnic, racial, or religious group[1] and, at the same time, women are not conceived as a social group, there has always been very little discussion in the literature about the legitimacy in

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[1] On this, see the definition of the concept of genocide endorsed by the UN Convention on the Prevention and Punishment of the Crime of Genocide according to which: «genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group» (article 3).

defining as genocide even the systematic killing of women belonging to a racial or ethnic group.

Without neglecting the traditional notion enshrined in the Geneva Convention[2], the article seeks to question whether a renewed definition of genocide might emerge that takes gender into proper account as it does with race, ethnicity and other factors of discrimination used to identify targeted social groups.

The chance is offered by the case of Pauline Nyiramasuhuko[3] in the 1994 Rwanda Tutsi genocide, the first woman in history ever condemned for the crime of genocide. This case offers the opportunity to rethink the adequacy of international criminal law and international human rights law in addressing the key features of the crime of genocide by way of challenging its traditional definition.

The article departs from a description of Rwanda and Rwandan women's *status* before the 1994 genocide to then go on to examine the specifics of the case brought against Pauline Nyiramasuhuko.

As the first woman ever condemned for the crime of genocide, the article sets out to challenge the gender stereotype that depicts women as mere passive victims without considering their active role in the context of armed conflict.

Lastly, the article argues for a gender interpretation/perspective of the crime of genocide that will eventually favor the emergence of the true features of the conduct under scrutiny, neglecting a unilateral interpretation of women and their agency in times of war and ignoring their active, and sometimes even, leading role, in perpetrating crimes against humanity.

2. Rwanda before the Genocide: from Ethnicity to Gender

To understand the reality behind the 1994 Tutsi genocide, it is necessary to start by looking at the ethnic composition of Rwanda before 1994[4].

From the data available, Rwanda was originally composed of three major ethnic groups. The Hutus represented almost 85% of the population, whereas the Tutsis and the Batwa, who were the natives of Rwanda, made up 14% and 1% of it respectively[5].

It would exceed the scope of this article to discuss the reasons that brought two very diverse ethnic groups inhabiting the same territory under the sovereignty of the same legal system, but it might likewise be worth recalling that the boundaries of

[2] For an overview of the contents and significance of the UN Convention on the Prevention and Punishment of the Crime of Genocide, see N. Robinson, *The Genocide Convention. A Commentary*, New York, 1960.

[3] For an insight into the life of Pauline Nyiramasuhuko, see P. Landesman, *A Woman's Work*, in *The New York Times*, 15 Sept. 2002.

[4] For a study on the ethnic composition of Rwanda before the genocide, C. Newbury, *The Cohesion of Oppression Clientship and Ethnicity in Rwanda, 1860-1960*, New York, 1993.

[5] See C. Taylor, *Sacrifice as Terror: The Rwandan Genocide of 1994*, London, 1999.

Rwanda, as they are known nowadays, are the result of the Belgian colonial occupation that exacerbated the lines of division among the ethnic groups[6] and lasted until 1962 when Rwanda finally gained its independence. It is reported that following the European colonization and despite the physical differences between the Tutsis and the Hutus, the consolidation of the theory was favored that the two social groups should have belonged to a different race[7].

Ethnicity was nevertheless not the only trait that featured in Rwanda before the genocide. Alongside ethnic and racial differences, there were also significant gaps between the *statuses* of men and women regardless of whether women belonged to the majority of the said minority groups.

Rwandan women were structurally discriminated against, based on sex in the private as well as in the public spheres. They were denied inheritance rights of any sort and they lacked economic autonomy as they were under the obligation to get their husband's consent before opening a bank account.

In a similar way, the rules governing citizenship acquisition were strongly inspired by discriminatory principles. A Rwandan woman was supposed to lose her citizenship following her marriage with a non-Rwandan man following a trend that similarly characterized several other laws governing the consequences of mixed marriages, meaning marriages contracted with a non-member of the ethnic group.

The reality of the public sphere was quite close in that Rwandan women were almost lacking in every representative political body, and they were also excluded from leading positions in the executive or the judiciary. The absence of women in the public sphere is something to keep in mind in the light of the consequences of the genocide, which resulted in the increase in women's activism and participatory role, even overcoming men's presence in national elective bodies.

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[6] On this and with specific reference to the role of women, see M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Rwandan Genocide*, Princeton and Oxford, 2001; S. Peterson, *Me Against My Brother: At War In Somalia, Sudan, and Rwanda*, London, 2001; A.A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, in *Penn State Law Review*, 108, 2003, p. 349 ff., who underlined that: «The status enjoyed by the Tutsi served as the mechanism by which Belgian colonizers in the early twentieth century created an ethnic rift between the two groups. These colonizers encouraged a historical myth of differences between Hutu and Tutsi to control the majority Hutu and institutionalize minority rule. In addition, the Belgians proposed a 'scientific' racial theory, which eventually became the official history of Rwanda. This 'scientific' racial theory asserted that the Tutsi were a Nilo-Hamitic race from Egypt and Ethiopia who naturally ruled over the Bantu Hutu»: *ivi*, p. 352.

[7] See G. Prunier, who notes that: «[u]sing physical characteristics as a guide – the Tutsi were generally tall, thin, and more 'European' in their appearance than the shorter, stockier Hutu – the colonizers decided that the Tutsi and the Hutu were two different races. According to the racial theories of the late 19th and early 20th centuries, the Tutsi, with their more 'European' appearance, were deemed the 'master race' […]. By 1930 Belgium's Rwandan auxiliaries were almost entirely Tutsi, a status that earned them the durable hatred of the Hutu», in *Rwanda's Struggle to Recover from Genocide*, in *Microsoft Encarta Encyclopedia 99*. See, also, of the same Author, his *The Rwanda Crisis: History of a Genocide*, London, 1998.

3. The 1994 Tutsi Genocide: A New "Victim Paradigm" between Gender Stereotypes and Intersectionality

Before going into the case of Pauline Nyiramasuhuko, at least two other aspects deserve proper attention.

The first deals with the factual reality of the genocide.

The second with the aspects of the victim targeted during the 1994 Tutsi genocide, which sees a departure from the victim definition endorsed by the Geneva Convention.

About the first aspect, the Tutsi genocide lasted around one hundred days. It is reported to have started on April 7th, 1994 and lasted until July 15th of the same year. One hundred days resulted in the killing of 1,174,000 individuals out of 7,300,000 Rwandan citizens, which means four hundred victims per hour, seven victims per minute. Around 250, 000 women were raped, some of them later killed or infected by HIV[8].

The enormous number of women who were raped, killed or both constitutes one of the key features of the 1994 Tutsi genocide[9].

Distancing itself from the traditional legal concept of genocide, which would solely rest on racial or ethnic traits, the target of the Rwandan genocide was largely women and, more specifically, women belonging to the Tutsi minority.

The hatred against the Tutsi population by the Hutu majority did not just come out of nowhere but was instead preceded by a massive propaganda campaign [10].

[8] On this, R. Degni-Ségui, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Report about Human Rights in Rwanda*, United Nations Economic and Social Council, 1996, Special Reporter of the Commission on Human Rights in Rwanda. The full report is available at the following link: *https://digitallibrary.un.org/record/228462?ln=en*. More specifically, the Report highlights that: «[t]he 15,700 cases of rape recorded by the Ministry of the Family included women aged between 13 and 65. Under-age children and elderly women were not spared. Other testimonies mention cases of girls aged between 10 and 12. Pregnant women were not spared either. Women about to give birth or who had just given birth were also the victims of rape in the hospitals. Their situation was more alarming in that they were raped by members of the militias some of whom were AIDS virus carriers (as was the case of the national chief of the militias, as several witnesses report). Women who had just given birth developed fulminating infections and died. Women who were 'untouchable' according to custom (e.g., nuns) were also involved and even corpses, in the case of women who were raped just after being killed», 7

[9] See E. Powley, *Strengthening Governance: The Role of Women in Rwanda's Transition*, in *inclusivesecurity.org*, 2003.

[10] On the role played by propaganda and, more specifically, on the intersectional nature of the propaganda perpetrated against Tutsi women even highlighting the inadequacy of international human rights law to properly tackle hate speech and incitement to sexual violence, see extensively L.L Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, in *Columbia Human Rights Law Review*, 33, 2002, p. 733 ff.

One of the leading newspapers of the country, the Kangura, is emblematic of the public incitation of violence against the Tutsis and, even more so, the Tutsi women.

In a number of the newspaper published just a few months before the first day of the Hutu genocidal campaign, the Kangura read as follows: «[e[very Hutu should know that a Tutsi woman, wherever she is, works for the interest of her Tutsi ethnic group. As a result, we shall consider a traitor any Hutu who: marries a Tutsi woman; befriends a Tutsi woman; or employs a Tutsi woman as a secretary or a concubine. Every Hutu should know that our Hutu daughters are more suitable and conscientious in their role as women, wives, and mothers of the family. Are they not beautiful, good secretaries, and more honest? »[11].

This extract depicts the intertwined and double dimensions of the enemy. The enemy is the Tutsi, but more so are Tutsi women that were targeted as evil in comparison with the "good" well-mannered Hutu women.

The commandments were even more specific according to the gendered dimension of the target which superseded or, at least, went hand in hand with the ethnic and racial motif behind the committed crime of genocide. According to the above-mentioned commandments every woman was considered an enemy who: belonged to the Tutsi minority; was married to a Tutsi man regardless of her affiliation to the Hutus; was associated with the Tutsi group or happened to be in the «wrong place at the wrong time».

From this perspective, it might be argued that the intersectionality between ethnicity and gender stood at the core of the Rwandan genocide, in that the mixture of these two human traits constituted one of the main criteria to identify the out-group[12].

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[11] P. Landesman observed with this regard that: «[u]nlike the Nazis, who were fueled by myths of Aryan superiority, the Hutus were driven by an accumulated rage over their lower status and by resentment of supposed Tutsi beauty and arrogance. […]. This pernicious idea […] came to full fruition during the genocide. The collective belief of Hutu women that Tutsi women were shamelessly trying to steal their husbands granted Hutu men permission to rape their supposed competitors out of existence. Seen through this warped lens, the men who raped were engaged not only in an act of sexual transgression but also in a purifying ritual», in *A woman's Work*, cit.

[12] On this, see Human Rights Watch/Africa, Shattered Lives. Sexual Violence during the Rwandan Genocide and its Aftermath 1996, that underlined that: «Tutsi women were targeted based on the genocide propaganda which had portrayed them as calculated seductress-spies bent on dominating and undermining the Hutu. Tutsi women were also targeted because of the gender stereotype which portrayed them as beautiful and desirable, but inaccessible to Hutu men whom they allegedly looked down upon and were 'too good' for. Rape served to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi woman. Even Tutsi women married to Hutu men were not spared, despite the custom that a wife was protected by her husband's lineage after marriage. Most of the women interviewed described how their rapists mentioned their ethnicity before or during the rape. Rape survivors recounted comments such as: 'We want to see how sweet Tutsi women are'; or 'You Tutsi women think that you are too good for us'; or 'We want to see if a Tutsi woman is like a Hutu woman'; or «If there were peace, you would never accept me». The full report is available at the following link: *https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf*.

Nevertheless, the intersection of gender and race in the context of the Rwandan genocide does not only rely on the fact that the victims were targeted based on their sex and race, as women were systematically raped and killed. Additionally, race and gender played a central role also on the perpetrators' side.

As the case at issue exemplifies, women were not only victims but, rather, they were actively involved and contributed to the planning and the realization of the Tutsi genocide.

The latter represents the most significant aspect of the Rwandan genocide. The one that pushes for a renovated construction of the role of women during armed conflict and that aims at questioning the unilateral interpretation of women as passive targets disregarding their agency in the committing of crimes against humanity.

4. The First Woman Condemned for Genocide: the Pauline Nyiramasuhuko Case

The *Pauline Nyiramsuhko* case represents the first judgment in history that found a woman responsible for the crime of genocide[13]. This is the most significant feature of the case which could hardly reconcile with the ideal type that neglects women's agency in war times, peace-building processes and, more broadly, in situation of concerns.

The case originated from the accusations of crimes against humanity and genocide against the Tutsi minority brought before the International Criminal Tribunal for Rwanda (ICTR) against six members of the established government at the time of the 1994 genocide.

The ICTR was the first tribunal that delivered judgments against individuals responsible for the crime of genocide in Rwanda, as enshrined in the United Nations Geneva Convention[14]. It is reported that, throughout its judicial activities, the ICTR indicted 93 individuals and sentenced 62 persons[15].

As well as other well-known cases, such as *Akayesu*, the peculiarity of the case goes beyond the condemnation of the six individuals indicted. Conversely, the novelty of the case lies first in the prominent role acquired, as said, by a woman, Pauline

[13] A second case is offered by the conviction of Biljana Plavgi by the International Criminal Tribunal for the Former Yugoslavia. For further details, see *Prosecutor v. Plavgi*, Case No. IT-00-39 & 40/1-ES, Decision on the Application for Pardon or Commutation of Sentence, 1 5 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14 2009). For an overview on the legal proceedings featuring the case at issue, see M.A. Drumbl, *She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko*, in *Michigan Journal of International Law*, 34, 3, 2011, p. 599 ff.

[14] The ICTR was established in 1995 by the United Nations Security Council to «prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994». The Tribunal is in Arusha, Tanzania, whereas its Appeals Chamber in The Hague, Netherlands.

[15] More statistics are reported on the ICTR's webpage at the following link: *https://unictr.irmct.org/en/tribunal.*

Nyiramsuhko, in orchestrating and realizing the systematic ethnic eradication of the Tutsis and the Tutsi women.

The second reason worth mentioning deals with the involvement of Pauline Nyiramsuhko's son in the crimes, which highlights the complexity of the figure of Pauline Nyiramsuhko who, at the same time, was appointed to promote women's rights across the country, and was also the mother of one of the individuals belonging to the group found responsible for crimes against humanity and genocide and was the mastermind behind the ethnic cleansing of the Tutsi community.

Third, Pauline Nyiramsuhko was the incumbent Minister of Family and Women's Development of the interim government that followed the death of Rwandan President Habyarimana on April 6th 1994, which deteriorated the relationships among ethnic groups forced to cohabit in Rwanda resulting in the following genocide of the Tutsi community. Not only does, therefore, the case witness a woman, and not a man, ordering the commitment of crimes against humanity and genocide, but it also demonstrate that, unfortunately, sometimes, empowered women do not always "do good". In a nutshell, the case entirely challenges gender stereotypes, and it represents a prominent example of the risks of wrong and harmful caterogizations.

4.1. From the International Criminal Tribunal for Rwanda to the Appeals Chamber

Coming to the specifics of the case, the judicial proceeding started before the International Criminal Tribunal for Rwanda after the arrest in Belgium in 1995 of two of the six individuals indicted – namely Kanyabashi and Ndayambaje –, whereas Pauline Nyiramsuhko and her son were arrested two years later in Kenya, on 18 July 1997 and 24 July 1997 respectively.

All six individuals were jointly charged before the ICTR for the crimes of conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity of extermination, murder, persecution, and other inhumane acts as well as violence to life as a war crime. With the only exception of Ntahobali, Pauline Nyiramsuhko and the other four members of what will become dramatically famous as «The Butare Group» were additionally charged with direct and public incitement to commit genocide against the Tutsis, and Pauline Nyiramasuhuko and Ntahobali for the crime of rape as a crime against humanity and other significant outrages against personal dignity defined as a war crime.

As stated in the ICTR's judgment, that trial commenced on June 12th 2001 before the II Chamber[16], the prosecution closed its case on October 18th 2004 and involved 59 witnesses as well as expert witnesses. Pauline Nyiramasuhuko's defense

[16] An overview of the content of the indictment, its criticisms, and challenges in bridging the gap between rape and genocide before the first judgment of the ICTR, see A.A. Miller, *op. cit.*

ran from January 31st, 2005, until November 24th 2005, with 26 witnesses heard during the proceeding.

The judgment more broadly dealt with two main legal questions that were brought before the ICTR. The first concerned the feasibility of the interpretation of rape during armed conflict as a form of crime against humanity. This was a legal question that had nevertheless had already been answered by the same Tribunal in the *Akayesu* case, but that in the case at issue gains more weight and peculiarities due to the gender trait of the person who ordered the systematic rapes and killings of Tutsi women. From this perspective, the key legal question rested on the identification of the major traits to take into consideration to define rape not merely as a form of sexual violence, but as a crime against humanity.

The second argument the ICTR was asked to clarify was the identification of the criteria to establish a nexus between the alleged offenses of crimes against humanity and the proof of the criminal liability of the accused.

As to the legal norms, the six members of the «Butare Group» were indicted for the following alleged violations: Article 3(g)[17], *Genocide*, of the Geneva Convention, Articles 4(a)[18], *Violations of Article 3 common to the Geneva Conventions and Additional Protocol II*, and (e)[19], 6(1)[20], *Individual criminal responsibility*, and Article (3)[21], *Crimes against humanities*, of the Statute of the International Criminal Tribunal for Rwanda.

Narrowing down the analysis of Pauline Nyiramasuhuko and leaving aside the indictments of the others involved in the trial, the ICTR found her criminally responsible for several crimes covered under the umbrella of the crime of genocide and crimes against humanity.

On the question of genocide, Nyiramasuhuko was firstly held responsible for the crime of conspiracy to commit genocide against the Tutsi, defined by the Tribunal

[17] Common to the Geneva Conventions and Additional Protocol II.

[18] The provision reads as follows: «The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment».

[19] Letter *e*) states as follows: «Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault».

[20] «A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime».

[21] The provision comprehends a vast series of war crimes and reads as follows: «The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts».

as the «agreement between two or more persons to commit the crime of genocide»[22], pursuant to Article 2 (3)(*b*) of the Statute. According to the ICTR, «Nyiramasuhuko agreed with other members of the Interim Government to issue directives to the population to encourage the population to hunt down and kill Tutsis»[23] and she similarly took part in the events that led to the killings of several men and women belonging to the Tutsi community in the Butare *prefecture*. Most importantly, as to the recurrence of the crime at issue, the ICTR established without any reasonable doubt that Nyiramasuhuko «agreed with members of the Interim Government […] to kill Tutsis […] with the intent to destroy, in whole or in part, the Tutsi ethnic group»[24].

Together with the conspiracy to commit genocide under Article 6(1) of the Statute, Nyiramasuhuko was additionally considered responsible for committing genocide, in that, given the evidence at its disposal, the ICTR was at the time of the trial capable of proving that she «ordered the killings of Tutsis taking refuge at the Butare prefecture office, which constituted genocide»[25] and that, even sooner, she was also complicit in the removal of the former President of Rwanda for reasons «other than maintaining peace»[26].

Conversely, Nyiramasuhuko was not found criminally liable for the crime of complicity in genocide under Article 2 (3)(*e*) of the Statute despite her direct and public incitement to commit genocide proving the existence of the genocidal intent[27]. The ICTR, therefore, concluded by acquitting her of this charge excluding her responsibility for direct and public incitement to commit genocide according to Article 6 (1) of the Statute[28].

[22] ICTR, *Prosecutor v. Nyiramasuhuko et al.*, cit., para. 5655.
[23] *Ivi*, para. 5678.
[24] *Ibidem*.
[25] *Ivi*, para. 5969.
[26] *Ivi*, para. 6736.
[27] According to the jurisprudence of the ICTR, «In the light of the Tribunal's jurisprudence, genocidal intent may be inferred from certain facts or indicia, including but not limited to: (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts, and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators», see ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, para. 731.
[28] ICTR, *Prosecutor v. Nyiramasuhuko et al.*, cit., para. 6034.

Concerning the crimes against humanity, Nyiramasuhuko was charged with and found guilty of extermination[29], murder[30], prosecution[31], and rape as a crime against humanity[32].

About Pauline Nyiramasuhuko's indictment for rape as a crime against humanity, the prosecutor charged her with incitement to rape in connection with the acts of her son, Nathobali, who was indicted and subsequently found guilty of rape.

In the appeal judgment the ICTR and the ICJ found Pauline Nyiramasuhuku responsible for rape as a crime against humanity, in that there was enough evidence to prove her involvement in the incitement to rape Tutsi women. What was instead missing in the indictment was a charge of rape as genocide, as in Akayesu, because it was assumed lacking the intent to make use of rape to destroy the Tutsis. Since rape could be interpreted as genocide only in the presence of a demonstrated genocidal intent, Pauline Nyiramasuhuku was considered not guilty of rape as genocide, but merely of rape as a crime against humanity.

The centrality of the crime of rape in the context of the Rwandan genocide will be further explored, but it is worth mentioning that the ICTR considered an aggravating factor the «numerous victims of rapes and killings at the Butare 204 préfecture office in particular, many of whom were particularly vulnerable»[33]. Even though the ICTR did not ascertain that mass rape constitutes genocide, it nevertheless emphasized its relevance in connection with the criminal responsibility of Pauline Nyiramasuhuko.

Moreover, the ICTR found Nyiramasuhuko guilty of ordering prosecution[34] alongside a long list of other serious violations of article 3 Common to the Geneva Convention and of the Additional Protocol II pursuant to article 4€ of the Statute, including – as corollaries of the crime of genocide and crimes against humanity – violence to life, health and physical or mental well-being, and outrages upon personal dignity.

Following the verdict of the ICTR on June [2]4th, 2011, that sentenced Nyiramasuhuko to life imprisonment, the case was heard before the International

[29] For more details on the argumentation endorsed by the ICTR, see paras. 6049 ff.

[30] *Ivi*, paras. 6067 ff.

[31] *Ivi*, paras. 6093 ff.

[32] On the specifics of the reasoning of the ICTR concerning the allegations of rape as a crime against humanity and not as a conduct integrating the crime of genocide itself, see critically paragraph no. 4.2.

[33] ICTR, *Prosecutor v. Nyiramasuhuko et al.*, cit., para. 6208. One additional aggravating factor established by the ICTR with respect to Nyiramasuhuko was the abuse of general authority *vis-à-vis* the assailants as the ICTR recognized that «Nyiramasuhuko's position as Minister for Family and Women's Affairs during the events made her a person of high authority, influential and respected within the country and especially in Butare préfecture from where she hails. Instead of preserving the peaceful co-existence between communities and the welfare of the family, Nyiramasuhuko, on several occasions, used her influence over Interahamwe to commit crimes such as rape and murder», *ivi*, para. 6207.

[34] *Ivi*, para. 4.3.6.4.

Court of Justice which delivered its sentence on December 14th, 2015. The ICJ confirmed the charges[35] alongside the most significant aggravating factors, but it limited the definitive punishment to 43 years of imprisonment following up on Nyiramasuhuko's defense that submitted that the punishment of life imprisonment sentenced by the ICTR constituted inhumane and degrading treatment.

Like the ICTR, the ICJ excluded that rape constitutes genocide, but it firmly reaffirmed the reasoning endorsed in Akayesu, therefore grounding its jurisprudence on sexual violence.

4.2. Rape as Genocide: between Intersectionality and Group Crimes

«[R]ape was the rule and its absence the exception»[36].

This is how the report of the UN Special Rapporteur about human rights in Rwanda in 1994 described the massive resorting to sexual violence against Tutsi women and girls during the genocide.

In the following passage, the UN Special Rapporteur states that: «[r]ape was systematic and was used as a 'weapon' by the perpetrators of the massacres»[37].

Given the seriousness and widespread pattern of sexual violence, the report dedicates a vast section of its analysis to the crime of rape, its nature, forms, and consequences on women and young girls during and even after the genocide in the light of its dramatic long-lasting effects on women's bodies and their societal *statuses*.

«Systematic» is the word most frequently used in the report of the UN Special Rapporteur. In fact, «systematic», structured, and widespread, was the prominent feature of rapes occurring in Rwanda.

About the victims, the Special Rapporteur underlined that: «[n]o account was taken of the person's age or condition»[38], which included women aged between 13 and 65 years old, under-age children, elderly women, pregnant women, women about to give birth or who had just given birth, «untouchable» women like nuns and even corpses of women previously killed.

Besides the identification of the victims and the lack of differentiation of any sort among those who were subjected to sexual violence, another element that contributed to the «systematic» pattern of rape that occurred during the genocide lies

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[35] See p. 208 of the Appeal judgement, ICTR-98-42-A. The ICJ affirmed the convictions for: conspiracy to commit genocide; genocide, extermination, violence to life, health and physical or mental well-being and rape as a crime against humanity and outrages upon personal dignity. The text is available at the following link: https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-42/MSC46274R0000566969.PDF.

[36] R. Degni-Ségui, *op. cit.*, para. 16.

[37] *Ibidem*.

[38] *Ibidem*.

in its ways of realization or manifestation. The report claimed that mass or gang rape but, even more, incest were the two most recurrent types of rape. According to the report, it was common for militiamen to force «fathers or sons to have sexual relations with their daughters or mothers and vice versa», dramatically increasing the cruelty and brutality of the crimes committed.

An additional facet of rape in Rwanda, that helps highlight its long-lasting effects on the victims, was the deliberate plan to rape Tutsi women by Hutu men who were also very likely AIDS carriers. Despite the evidence that the Special Rapporteur relied on in her document and the connection between the increase in HIV infections following the genocide and the high percentage of Tutsi militiamen who were AIDS carriers, the ICTR and the ICJ did not consider Pauline Nyiramasuhuko responsible without any reasonable doubt for having ordered the constitution of armed forces composed of HIV positive soldiers. Nonetheless, there were claims that she voluntarily chose to release groups of Hutu HIV positive militiamen with the goal of raping, infecting and eventually causing Tutsi women to die in the years to come.

The intersection between present and future harm caused to Tutsi women is even more evident when examining the consequences of mass rape and incest.

The report details the numerous and heterogeneous consequences suffered by Tutsi women raped during the genocide. Tutsi women were firstly massively and extensively physically injured, and some of them, especially the youngest, died soon after being raped. The others who survived the genocide were psychologically affected and socially excluded from the community of belonging[39] whose affiliation was considered ultimately disrupted by the «contamination» with non-member of the groups.

Social stigma, together with the death of women after having been raped, is the most significant consequence to consider in investigating the appropriateness of an alternative interpretation of the crime of genocide, which includes rape within the conduct that constitutes an act of genocide.

Despite the widespread and systematic nature of rape that occurred in Rwanda, there is nothing in the judgments that suggests that mass rape and incest should be regarded as genocidal or as acts possibly subsumed under the notion of genocide.

Following the definition of the *actus rea* of rape according to its jurisprudence[40], the ICTR and the ICJ found Nyiramasuhuko guilty of rape, but, at the same time, both

[39] The social stigma was especially severe for young girls the victims of rape who would be unable to find a husband and, even more so, for women pregnant or who had given birth to children born because of rape or incest. According to the Report: «[t]heir situation is all the more delicate because conception has been the result of rape and/or incest; it is therefore difficult for them to accept their offspring, the fruit of their own womb», ivi, p. 22.

[40] There is no universal definition of rape regardless of its prohibition under international human rights law, neither under international criminal law. Rape is, therefore, not autonomously considered as an international crime. A first definition of rape was suggested by the ICTR in *Prosecutor v. Jean-Paul Akayesu*, in 1998 establishing that rape constitutes: «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive» and, also, that «rape is a form of aggression and

Courts confined their reasoning and narrowed the interpretation of rape pursuant to article 6 (3) of the Statute as a crime against humanity instead of considering it a manifestation of the crime of genocide[41] as in the *Akayesu* case.

In short, neither the ICTR nor the ICJ believed that rape in the case at stake represented a constitutive element of the crime of genocide, nor did the two Courts acknowledge the existing link between the rape and killing of Tutsi women with the crime of genocide. In other words, once again the ICTR or the ICJ did not fully examine how gender shaped the crimes committed in Rwanda by Nyiramasuhuko and the other members of the «Butare Group».

In so doing, the judgments neglected an alternative reading of the crime of genocide, set forth under Articles 2 and 3 of the Geneva Convention, in a way that would consider relevant two additional types of conduct to define the notion of genocide. First, acts intended to destroy a social group by targeting the victims because of his/her sex or gender and not solely due to his/her nationality, ethnicity, race, or religion as lines of divisions among humans explicitly mentioned under the normative provisions; second, conduct that does not immediately cause the death of the victim but that, likewise, negatively impacts on the survival of the ethnic group in the years to come.

From this angle, the two judgments depart from *Akayesu* for two reasons: they did not endorse the interpretation shared in *Akayesu* where rape was considered an act capable of integrating the crime of genocide. Furthermore, they convicted a woman as the perpetrator of gender-based crimes and not a man as in *Akayesu*.

On the first aspect, the ICTR and the ICJ defined rape only as a crime against humanity and did not go further. The difference from *Akayesu* thus rests on the definition of the acts under scrutiny, in that rape was not equated to genocide.

The ICTR and the ICJ shared the view that rape is an individual crime without emphasizing its collective dimension and its feasibility as an act instrumental in destroying the targeted social group. Although the ICRT and the ICJ discussed and

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that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. This approach is more useful in international law», para. 138. In the Nyiramasuhuko case, the ICTR defined rape as: «the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily, because of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to affect this sexual penetration, and the knowledge that it occurs without the consent of the victim», ICTR, Prosecutor v. Kunarac et al., cit., para. 125.

[41] On the distinction between crimes against humanity and genocide, in that only the latter presupposes the intent to destroy an identifiable social group, see S. Glaser, *Droit international conventionnel*, Brussels, 1970, p. 165 ff. and P. Thornberry, *International law and the rights of minorities*, London, 1991, p. 58.

investigated mass rape cases, they did not endorse the *Akayesu* approach that recognizes mass rape as an act of genocide[42] and as a group crime.

There is no difference among types of rape in Nyiramasuhuko that seems to go backward in the evolving conceptualization of the acts integrating the crime of genocide in a gender-sensitive approach. The denial of the collective dimension of rape lies in the fact that Courts did not state that rapes were motivated by genocidal intent, which stands at the core of its definition as a crime against humanity and not, conversely, as a crime of genocide[43].

Turning to the second element mentioned above, while the ICTR and the ICJ did not innovate their jurisprudence on the interpretation of the crime of rape, they nevertheless contributed to suggesting a new role for women in the context of armed conflicts.

In accepting and recognizing that even a woman can order the committing of the crime of genocide and other sexual violence-related crimes, Nyiramasuhuko reshaped gender relationships in a way consistent with the possibility that a woman, together with or even without a man, is fully capable of committing crimes against humanity, including rape and genocide.

Despite the lack of judicial acknowledgment of systemic rape as acts integrating the crime of genocide, it may therefore be argued that there are features of the crime of rape perpetrated in the context of the Rwandan genocide that should instead foster a closer connection with the crime of genocide, as in Akayesu, boosting the identification of a new type of rape, defined as «genocidal rape».

The idea is that there are circumstances where due to the ways used in armed conflicts and its systematic nature, rape results in the destruction of a social group like all other conduct that the jurisprudence sanctions as acts of genocide under Articles 2 and 3 of the Geneva Convention.

When it is an integral part of the policy of a State, a strategic method to fight against the targeted group, capable of causing the dismantling of the ethnic and racial unity of a social group, rape, and specifically mass rape, can no longer be regarded as isolated practices and solely as crimes against humanity.

In other words, the recurrence of these elements should favor the departure from the conceptualization of rape as an individual crime against sexual autonomy to its interpretation as a group-based crime[44], shifting its definition from being a crime

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[42] For a comment on the *Akayesu* case, see C.A. MacKinnon, *Defining Rape Internationally: a Comment on Akayesu*, in *Columbia Journal of Transnational Law*, 44, 3, 2006, p. 940 ff., and, of the same Author, C.A. MacKinnon, *Are Women Human? and Other International Dialogues*, Cambridge (MA), 2007.

[43] On the challenging relationships between interpreting mass rape as a group crime or as an individual crime, see D. De Vito - A. Gill - D. Short, *Rape characterised as genocide*, in *International Journal on Human Rights*, 10, 2009, p. 29 ff.

[44] On the interpretation of mass rape as a group crime, see J.L. Green, *Uncovering Collective Rape: A Comparative Study of Political Sexual Violence*, in *International Journal of Sociology*, 34, 1, 2004, p. 97 ff.; S.L. Russell-Brown, *Rape as an Act of Genocide*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 350 ff.

against humanity to genocide. As the cruelest manifestation of sexual violence, rape therefore becomes something more in the light of its ability to cause the integral or partial destruction of a social group. That is to say that when coupled with the genocidal intent as it was in Rwanda, rape becomes a tool of ethnic cleansing like all other acts of killing.

Time is also an important factor to be considered.

Rather than being confined to the moment when the rape took place, its effects on women are severe and prolonged in time. Raped women are often isolated, suffer from social exclusion and stigma, and are eventually forced to leave their community of belonging. The genocidal intent that was behind the mass rapes that occurred in Rwanda requires the recognition of the recurrence of genocide even when its effects are postponed and are other than the killing of other human beings[45].

What must also be considered is the fact that children born because of rape are considered impure because they are deemed the result of intercourse between a member and a non-member of the social group. The report of the UN Special Rapporteur is clear and in line with this argument when it recalls that Rwandan children born because of rape committed during the genocide were called «little monsters», «gifts of the enemy», or «children of shame», highlighting the unfortunate destiny of their and their mothers' lives who abandoned their lands in search of a quiet place to settle in peace[46].

As a second aspect, even the deliberate infection of women with deadly diseases could represent a relevant reason to turn rape into «genocidal rape», meaning to consider rape as an act of genocide.

Despite the absence of an ascertained responsibility in the case at stake, the report testifies to the high number of women raped during the genocide, who later died of HIV. Similarly, it is estimated that around 35% of Hutu militiamen were HIV positive at the outbreak of April 1994. Rape thus somehow transforms itself into a peculiar but very effective mechanism to kill members of the out-group by way of sexual violence. Not an immediate killing as mentioned, but a postponed one which shares the result with the former: the death of the woman infected and the ultimate destruction of the victim's group.

The fact that the victim is targeted based on her sex rather than solely in the light of his/her race, ethnicity, religion, or nationality, as the definition of genocide requires,

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[45] Share this view, H. Fein, *Genocide, and gender: the uses of women and group destiny,* in *Journal of Genocide Research*, 1, 1, 1999, p. 43 ff., where the A. observes that: «[v]ictimization estimates should not be based solely on numbers killed and destroyed but must take into account the numbers tortured, raped, maimed and impaired»: *ivi*, p. 59.

[46] In this sense, rape cannot be immediately equated to a «measure to prevent births within the group» as provided under Article 2, lett. *d*) of the Geneva Convention, but the effects caused by limiting the reproductive capacity of a social group overlap those arising in the case of women victims of rape who are excluded from the group, therefore preventing them from contributing to the reproduction of the group.

should not in itself neglect the gendered and intersectional facet of the crime of genocide and the dramatic but essential role that sexual violence and rape possess in putting into practice a genocidal intent like in the *Nyimarasuhko* case.

To conclude on this point, it could be argued that although the judgments did not put forward any argument in favor of the endorsement of an intersectional approach to the crime of genocide, nor did they endorse a conceptualization of mass rape as an act of genocide being a group-based crime, nevertheless, they left at least some conceptual space to reflect on the persistent need to reshape the gender perspective of sexual violence in armed conflict.

5. Following up: Women as Victims or / and Women as Perpetrators?

As mentioned above, the true novelty of the Pauline Nyimarasuhko case has not much to do with the merit of the judgment itself, but rather with the factual circumstances that originated it, as it recognized the agency's criminal responsibility for crimes against humanity of a woman[47].

Following the genocides witnessed in the 1990s in Rwanda and the former Yugoslavia and the demonstrated gendered feature of the crimes committed against women, the relationship between women and peace and the issues concerning violence against women in armed conflicts started gaining more attention from international organizations.

The United Nations negotiated and approved UN Resolution No. 1325 on *Women, Peace, and Security*[48] advocating for the increase in the presence of women in peace-building processes and peace negotiations. The *rationale* was that women could greatly help the peaceful resolution of potential or already existing conflicts. In other words, women could serve peace, fight wars and ethnic conflicts and eventually prevent armed conflicts.

Although acknowledging the necessity to include women in peace-building processes and post-conflict strategies, it should also be stressed that the UN Resolution *rationale* rests on a gender stereotype, that conceptualizes women as naturally or

[47] On the role of women as perpetrators in the context of genocide, see S.E. Brown, *Female Perpetrators of the Rwandan Genocide*, in *International Feminist Journal of Politics*, 16, 3, 2014, p. 448 ff. In line with this interpretation of the case, see P. Landesman, *A woman's work*, cit., who not surprisingly speaks about a «new kind of criminal».

[48] The Resolution can be read at the following link: *https://peacemaker.un.org/sites/peacemaker.un.org/files/SC_ResolutionWomenPeaceSecurity_SRES1325%282000%29%28english_0.pdf*. For a comment on the innovative content of the Resolution, see, among others, T.I. Gizelis - L. Olsson, *Gender, Peace and Security: Implementing UN Security Council Resolution 1325*, London, 2014; C. Cohn - H. Kinsella - S. Gibbings, *Women, Peace and Security Resolution 1325*, in *International Feminist Journal of Politics*, 6, 1, 2004, p. 130 ff.; and, more recently, S.E. Davies - J. True, *The Oxford Handbook of Women, Peace, and Security*, Oxford 2019; C. Chinkin, *Women, Peace and Security in International Law*, Cambridge, 2022.

inherently incapable of fighting or not inclined to fight or to order the committing of crimes.

The Pauline Nyimarasuhko case and, more broadly, the entire facets of the Rwandan genocide proved quite the opposite.

In Rwanda, women were perpetrators of violence and victims at the same time and Pauline was in charge and ordered several of them. Victims and perpetrators in the same way as men can be.

The twofold role of women in the context of the Rwandan genocide was also acknowledged by the UN Special Rapporteur in the above report of 1996 that, in the paragraph dedicated to «special situations», noted that «[i]t is true that a number several parts in the genocide and other crimes against humanity. Most, however, were rather the victims. They may even be regarded as the main victims of the massacres, with good reason, since they were raped and massacred and subjected to other brutalities»[49].

Rwandan women were actively involved in the perpetration of genocide as leaders in the Hutu government, such as Pauline Nyimarasuhko. They also acted as spies to recruit and imprison Tutsi women and even helped in the execution of mass or gang rape by luring Tutsi women into their traps.

The analysis and typology of the Hutu women's role in the genocide and genocidal rapes perpetrated by them to the detriment of Tutsi women are emblematic of the different nature of gender relationships existing between men and women during armed conflicts. From this perspective, it is evident that women can no longer be confined to the victim *statutes* and that their agency as perpetrators in armed and ethnic conflicts should instead be fully acknowledged.

In the case of Pauline Nyimarasuhko, the two aspects are peculiar and worth underlining in the present analysis.

The first is that Nyimarasuhko was also a mother of one of the other individuals indicted at the same trial. Not only was Pauline a woman with political responsibilities, but she was also a mother, one who closely cooperated with her son in planning and ordering the systematic rape and killing of Tutsi women.

However, the case not merely needs a re-shaping of gender relationships between men and women in war times, recognizing that women can be likewise as brutal, cruel, and rationally evil as men. It also proved that women could perpetuate the most brutal crimes even when they are mothers. In other words, maternity does not figure as a factor capable of altering a woman's attitude to commit crimes and acts of violence. This assumption represents another pattern of the case. In a nutshell, women were victims during the Rwandan genocide, but they showed themselves to be as capable as men of committing all forms of violence against other women and their children regardless of their gender and even maternal roles.

The second aspect likewise revolves around another of Pauline's traits. She was Minister in a State that, as shown above, hardly ever recognizes women's roles in the

[49] R. Degni-Ségui, *op. cit.*, para. 12.

political sphere. On the contrary and despite the general underrepresentation of Rwandan women in politics, at the time of the genocide, Pauline was one of the very few women at the head of a governmental position. From this standpoint, it is impressive to note that even before such a scarcity of women in politics, those who were appointed to high-ranking positions so actively contributed to the committing of the genocide instead of preventing the deterioration and subsequent displacement of the Tutsi community. This element represents an additional demonstration of the misleading interpretation of the inherent (and immutable) peaceful nature of women compared to men.

Lastly, it can be argued that the urge to close the gender gap, that persists in the political governance of peacebuilding processes, needs to be interpreted as an equality-based claim, meaning that men and women should be treated equally in the political sphere, but not as an imperative deriving from the erroneous conceptualization of women as human beings inherently unable to fight a war. In other words, the presence of women and the recognition of their right to have a say in war, peace, and security discourse should be linked to the realization of the principle of equality instead of being anchored to misleading gender stereotypes.

Pauline Nyimarasuhko proves that there is nothing more wrong than believing women are incapable of committing genocide and gender-based crimes. Instead, a step forward would be the acknowledgment of their agency in perpetrating individual and group crimes on an equal footing with men.

6. Rwanda after the Genocide: The Rise (and Fall) of Rwandan Women

Looking beyond the case, it is interesting to examine what happened to Rwandan women after the genocide[50].

I While it is true that Tutsi women were heavily targeted and many of them did not survive the genocide or died shortly afterwards, and that before 1994 Rwandan women did not fully participate in the public life of their country, the situation radically changed in the years following the end of the ethnic conflict between the Hutus and Tutsis[51].

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[50] A very detailed analysis is offered by E. Powley, *op. cit.*, and P. Abbott - D. Malunda, *The Promise and the Reality: Women's Rights in Rwanda*, in *African Journal of International and Comparative Law*, 24, 4, 2016, p. 561 ff. More details on post conflict Rwanda might be found in P. Musoni, *Rebuilding Trust in Post Conflict Situation Through Civic Engagement: The Experience of Rwanda*, in *Building Trust Through Civic Engagement*, Publication based on the 7th Global Forum workshop on Building Trust Through Civic Engagement 26 to 29 June 2007, Vienna, Austria, full text available at the following link. *https://digitallibrary.un.org/record/655054?ln=zh_CN*.

[51] P. Abbott, D. Malunda, *op. cit.*, refer to the genocide as a «catalyst for change and enabled women to seize openings, change gender ideologies and make significant political gains». On the same subject see also, E. Powley, *op. cit.*

One of the most significant elements to consider is that in the aftermath of the genocide Rwanda's population was made up of almost 70% women[52]. Rwanda became what was later called a «Country of women», which suggested that the men were the true victims of the genocide, whereas women were "only" sexually abused but eventually survived the genocide.

The same data support the argument that neglects the gendered features of the genocide. In other words, it is argued that the higher percentage of women living in the country after the genocide testifies the more severe impact of the genocide on men and boys.

The data are nevertheless quite conclusive.

On the contrary, it was extensively motivated by the significant numbers of Tutsi men who left Rwanda before or during the genocide. On the Hutu side, the data are consistent with the mass incarceration of Hutu men, that did not include those Hutu women who similarly took part in the genocide but whose agency was neglected because of their gender and supposed inability for a woman to commit violence and perpetrate acts of war.

Regardless of the reasons that justified the higher female composition of Rwanda after the genocide, it is interesting to look at what changed for women and their rights after 1994.

From 1994 to 2021 Rwandan women – at least, some of them – moved from being considered subordinate to their male counterparts to having a say in the public and political life of their country.

Women were actively involved in the drafting of the 2003 Constitution, which marked a significant step forward in the recognition and safeguard of Rwandan women's rights. The commitment to gender equality results in the text of the Constitution starting from its preamble[53], and in the Conventions and international human rights law treaties ratified by Rwanda over the years[54].

Data gathered in the decades that followed confirm this trend.

In 2021 the World Economic Forum placed Rwanda among the top 10 best countries in the Global Gender Gap Index and, as of January 2021, Rwanda ranked first among the countries with the highest number of women in national parliaments, reaching 61.3% of women in national elected bodies.

Despite the data showing the significant presence of women in the public sphere, there are two aspects to consider when examining the effects of the genocide on the rights of Rwandan women.

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[52] This data is reported by Human Rights Watch in the report, *Shattered Lives. Sexual Violence during the Rwandan Genocide and its Aftermath*, 1996, cit.

[53] The Preamble reads as follows: «We, the People of Rwanda, […] COMMITTED to building a State governed by the rule of law, based on the respect for human rights, freedom and on the principle of equality of all Rwandans before the law as well as equality between men and women».

[54] It suffices to of the UN Convention on the Elimination of All Forms of Discrimination against Women, ratified in 1981.

Firstly, the data do not take into proper account the reality of the private sphere. Conversely to what could be possibly interfered from the statistics, Rwandan women continue to occupy a subordinate position in the private sphere, where patriarchal relationships between husbands and wives continue to be the norm.

Secondly, data on the participation of Rwandan women in the public sphere, especially regarding their presence in the political assemblies, do not properly consider the condition two additional elements. The first is that these statistics do not consider Rwandan women living in the rural area of the country, who conversely do not enjoy the same equal *status* that data suggest with respect to women living in the urban areas. Another aspect deals with the female contribution to the political agenda. In fact, it should be noted that the high percentage of Rwandan women sitting in Parliament did not result in any significant legislative improvement in the recognition of women's rights under national law[55]. For instance, the Rwandan Parliament did not tackle the rural environment as it should have done and, more broadly, the agriculture sector where most Rwandan women are employed[56]. Likewise, the Parliament did not enact any significant legislation except for a regulation on gender-based violence in 2018[57].

Moreover, as more women live in the rural areas of Rwanda, the data are not truly representative of the conditions of all Rwandan women, whereas picturing just some information about the *statuses* of a very small portion of them.

One conclusion could be drawn beyond the statistics. The higher numbers of women after the genocide facilitated their active public role in governmental organisms and elected bodies. At the same time, it nevertheless did not result in the abandonment of deep-rooted Rwandan customs and traditions that are still widespread, testifying to a much more complex reality when it comes to the full realization of the principle of gender equality.

7. Beyond Nyiramasuhuko: Group-based v. Gender-based Genocide?

Like Akayesu, the case of Pauline Nyiramasuhuko proved the existence of a close connection between gender and genocide.

The institutionalized and widespread resorting to mass and gang rape to violate and exploit Tutsi women and young girls belonging to the victim group likewise contributes to unifying genocide and sexual violence as intertwined notions.

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[55] On this, see J.E. Burnet, *Women Have Found Respect: Gender Quotas, Symbolic Representation, and Female Empowerment in Rwanda*, in *Politics and Gender*, 7, 3, 2011, p. 303 ff.

[56] See S. Randell - M. McCloskey, *Sustainable Rural Development in Rwanda: The Importance of the Focus on Agriculture*, in *International Journal of Agricultural Extension for Sustainable Development*, 2014, p. 107 ff.

[57] Reference is to Law No. 59/2018 on Prevention and Punishment of Gender-Based Violence, which came into force on 30 August 2018. The text can be read at the following link: *https://www.refworld.org/docid/4a3f88812.html.*

Linking gender-based violence to genocide eventually revealed an additional pattern of the traditional concept of genocide as enshrined in the Geneva Convention.

Leaving behind its unique and bidirectional relationship between genocide and race and/or ethnicity or religion, the Rwanda case demonstrates the feasibility of a notion of genocide that additionally emphasizes its intersectional dimension deriving from the overlapping relationships between gender and ethnicity.

Following this line of reasoning, genocide is no longer to be interpreted solely as a concept that covers all acts aimed at destroying a racial or ethnic group because of its race, ethnicity[58], or religion by way of the intentional and structural killing of its members, but as a concept that also includes conducts whose target rests on the interrelation between gender and ethnicity. Put differently, this "new" concept of genocide should value the role of gender in the process of the identification and subsequent annulment of the victim group[59].

The challenges of connecting genocide to factors of discrimination other than race, ethnicity and religion derives from the group or collective concept that lies underneath the traditional concept of genocide. Genocide is defined traditionally as a group crime, in that genocide is committed only when a social group has been subjected to a threat to its survival and to the extent to which it is eventually eliminated and canceled by another ethnic or racial group. Recognizing genocide as a group crime leaves no space for including sexual violence, and its gender pattern within its framework, as rape is essentially first and foremost conceived as an individual-based crime.

Therefore, a joint interpretation of genocide and rape requires envisioning a different approach to rape, that should first depart from the interpretation of rape as an individual crime only to identify a new type of rape – the so-called genocidal rape or gendercide –, whose peculiarity is instead centered on its attitude to impact on the survival of a collectivity. This should eventually support the view that rape, and not only genocide, should possess a collective dimension.

Genocidal rape would therefore become something other than (individual) rape. Defining rape as genocidal should require proof of the recurrence of several elements: firstly, rape and sexual violence should be institutionalized, meaning they should perform and result from a policy implemented by the State or a political organization; secondly, (genocidal) rape should seek to target and destroy a social group identified by race/ethnicity and gender as well; thirdly, it should cause the ethnic cleansing of the out-group by infiltrating the purity of its race or ethnicity by way of ceasing the

[58] For an insight into the significance attributed to the concept of race and ethnicity, see C. Nardocci, *Razza e etnia. La discriminazione tra individuo e gruppo nella dimensione costituzionale e sovranazionale*, Napoli, 2016.

[59] On the concept of ethnic group under international human rights law, see, extensively, F. Capotorti, *Study on the persons belonging to ethnic, religious, and linguistic minorities*, New York, 1979 and, by the same A., F. Capotorti, *Minorities*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, 1985, p. 385 ff.

connection between members and non-members of the group as a result of forced mixed sexual intercourse and forced impregnation.

Nevertheless, there is another argument that generally hinders the acknowledgment of rape as an act of genocide. Besides the lack of an adequate definition of acts of sexual violence, including rape, as gender-based crimes under international human rights law and constitutional law, the reluctance to consider women as a social group[60] is often used to disclose the contradiction existing between rape and genocide. As the concept of genocide implies the destruction of a group, if women are not defined as such, any act committed against them cannot reach the definition of???? conduct having a group-based *rationale*.

As opposed to such a strict and literal interpretation of genocide, Akayesu represented a significant step forward in the direction of the correct understanding of the implication of mass rape on the group's survival.

Mass rape can prevent birth within the community, as sexually assaulted women are often expelled by the community, left unable to procreate or pregnant, giving birth to mixed racial babies unwanted by the group of belonging. Rape is an incredibly powerful tool to destroy a group, causing harm to women who are the first chain of transmission of the ethnicity of the social group.

Recognizing that rape can constitute an act of genocide does not therefore imply the endorsement of any of the theories strongly fought for by the feminist movement, that depicts women as a social group in need of special protection. Rather, it offers a more truthful understanding of the traits of genocide, ensuring a prompter response by international and national Courts.

While the so-called "gender-specific" genocides are rarer than retributive genocides[61], understood as genocides that respond to threats, and although the comparative analysis offers us only one at least universally accepted example of an entirely gender-specific genocide[62], the case of Pauline Nyiramasuhuko should be rightly included within this last category regardless of the outcome of the judgment. Whereas genocide in Rwanda has been depicted as both a total and a gender-specific genocide, Akayesu and Nyiramasuhuku demonstrate that rape was institutionalized and instrumental in the destruction of the Tutsi.

A more recent confirmation of the correctness of the argument that conceives rape as a tool for mass destruction is offered by the Rohingya genocide[63] in Myanmar which constitutes an example of gender-specific genocide, as the violence perpetrated

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[60] The definition of women as a social group is first and foremost denied by the feminist movement, emphasizing its negative consequences, especially linked to the general inferior status attributed to communities defined as social groups.

[61] On this, see H. Fein, *op. cit.*, p. 58 ff.

[62] Reference is to the genocide perpetrated by the Serbs to the detriment of the Bosnians and, especially, the Muslim minority of the Bosnians.

[63] Additional situations of current concern cover the cases of the Uyghurs, the Yazidis and the Tigrayans.

by Myanmar's security forces was profoundly gendered. The Rohingya genocide is currently the subject of an application pending before the International Court of Justice in the case *Gambia v. Myanmar*[64]. In reading the judgment of the Court, it will be interesting to verify whether and to what extent the gender perspective will play a role in sanctioning the rape and sexual abuse endured by women belonging to the Rohingya ethnic group.

Undoubtedly, the Rohingya case will offer a chance to move forward in the interpretation of the crime of genocide, as being gender-specific and not merely as retributive genocide, and possibly give entrance and recognition to gender-based crimes in the international criminal law scenario[65].

8. Concluding Remarks: Placing Gender in the Genocide Discourse

Going beyond the traditional definition of genocide to give entrance to a gender-specific concept of genocide seems more urgent than ever[66].

Patterns of rape and sexual abuse are becoming increasingly intertwined with acts aimed at eliminating the "other" social group and therefore call for a rediscovery of the inherent facets of the crime of genocide as enshrined in the UN Geneva Convention.

The consequences arising from mass rape perpetrated during genocide and its destructive impact on the ethnic unity and survival of the victim group are no different

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[64] The Republic of Gambia issued its suit against the Republic of the Union of Myanmar on 11 November 2019 claiming the violation of the Genocide Convention before the International Court of Justice. All the information and latest developments on the case might be consulted at the following link: *https://www.icj-cij.org/en/case/178*.

[65] On the implementation of a gender-sensitive perspective in international human rights law, see the *World Conference on Human Rights: Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23.

[66] On this see, among others, the 2021 Report issued by the New Lines Institute for Strategy and Policy, *Gender and Genocide in the 21st Century: How Understanding Gender Can Improve Genocide Prevention and Response*, that might be read at the following link: *https://newlinesinstitute.org/wp-content/uploads/Final-Edits_Gender-and-Genocide-Conference-Report_ep-Final.pdf*. Interestingly, the gender perspective is likewise missing in the 1951 UN Refugee Convention that, similarly to the Geneva Convention, does not consider gender as an element on which to establish membership. On the concept of membership within the meaning of the UN Refugee Convention, see also, the *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of article la (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UNHCR (7 May 2002)*, available at the following link: *http://www.unhcr.org/3d58de2da.html*. The literature likewise debated on this topic, see the seminal work by A. Macklin, *Refugee Women and the Imperative of Categories*, in *Human Rights Quarterly*, 17, 2, 1995, p. 213 ff., and, more recently, M. Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States*, in *American University Journal of Gender, Social Policy & the Law*, 23, 4, 2015, p. 529 ff.

from the killings unanimously covered under the umbrella of the traditional notion of genocide.

As examined above, the passing of time between the act of rape and its consequences on women, as members of the victim group, does not contradict this line of reasoning and does contribute to altering the genocidal effect. The destruction of the victim group through acts of rape occurs due to a variety of reasons, ranging from the forced impregnation of women belonging to the victim group, birth prevention because of physical injuries caused to women by rape, social stigma, and expulsion from the affiliated group, ethnic contamination, along with forced marriages and ethnic cleansing.

All the above reasons, therefore, justify the inadequacy of the interpretation that neglects the existence of a connection between genocide and rape owing to the absence of the immediate death of the victim exposed to episodes of sexual violence. Put differently, the crime of genocide should be considered as recurring even before the absence of a direct and temporarily traceable causal link between the act of rape itself and the death of the woman or young girl subjected to it.

Moreover, not only are recent experiences of genocide emblematic of the gendered nature of the crimes committed but, with the need for the development of the interpretation of the crime of genocide, stands a different conceptualization of the inherent traits of the crime of rape.

In connecting genocide to rape and *vice-versa* both concepts undergo profound challenges in their original and historical meanings. When occurring during genocide and when used as a weapon of war, rape leaves behind its nature of individual crime to assume a communitarian trait. Systematic rape occurring in war times thus becomes an example of a group crime, that should be regarded as an act of genocide.

The same conclusion should be drawn even neglecting the controversial definition of women as a social group. In other words, the "genocidal" effect rests on the intent that supports the committing of the crime, and it is once again the genocidal intent that transforms the traditional concept of rape, as an individual crime of sexual violence violating sexual autonomy, into a group-based crime, closing the gap between the traditional meanings of the two crimes at stake.

Neither the group-based dimension featuring genocide, which could by definition possibly exclude its applicability to women as a social group, nor the individual one attached to the concept of rape, that similarly could separate rape from the crime of genocide, are capable of distancing the existing link between gender and genocide.

Gender-specific genocides do happen, and mass rape is one of the most efficient and structured practices used during armed conflicts to orchestrate and realize a genocidal intent.

By all counts, it is the time to acknowledge the gendered pattern of the crime of genocide and to recognize and tackle gender-based crimes associated with genocide especially once occurring during armed conflicts.

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Abstract: The paper analyses the case of Pauline Nyiramasuhuku who was the first woman in history ever convicted for the crime of genocide during the 1994 Rwandan genocide. By way of the investigation of the circumstances of the facts and the normative provisions at stake, the paper argues that the Pauline Nyiramasuhuku case offers the chance for a re-reading of the crime of genocide through gendered lens.

The paper, therefore, emphasizes and supports the existence of a strong link between forms of sexual violence and exploitation perpetrated during armed conflicts, gang rape or mass rape, with the ultimate goal to boost a new envisioning of the crime of genocide under international criminal law and human rights law.

Abstract: Il presente testo analizza il caso di Pauline Nyiramasuhuku, la prima donna nella storia a essere condannata per il crimine di genocidio durante il genocidio ruandese del 1994.

Attraverso l'indagine dei fatti e delle disposizioni normative in gioco, il saggio sostiene che il caso Pauline Nyiramasuhuku offre l'occasione per una rilettura del crimine di genocidio attraverso una lente di genere.

Il documento, quindi, sottolinea e sostiene l'esistenza di un forte legame tra le forme di violenza sessuale e lo sfruttamento perpetrati durante i conflitti armati, lo stupro di gruppo o di massa, con l'obiettivo finale di promuovere una nuova visione del crimine di genocidio ai sensi del diritto penale internazionale e del diritto dei diritti umani.

Keywords: Genocide – Gender-Based Genocide – Sexual Violence – Rape – Armed Conflict – Women's Rights.

Parole Chiave: Genocidio – Genocidio di genere – Violenza sessuale – Stupro – Conflitto armato – Diritti delle donne.

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