FACULTAD DE DERECHO

THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO CRIMES OF SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS AS A TACTIC OF WAR AND A TACTIC OF TERRORISM

Autora: Marta Urbano de Felipe

5º E5

Derecho Internacional Público

Tutora: Cristina Gortázar Rotaeche

Madrid

Abril, 2021

Abstract

This Bachelor´s Degree dissertation analyzes the applicability of International Humanitarian Law (IHL) to crimes of sexual violence against women and girls as a tactic of war and a tactic of terrorism, a pervasive reality that characterizes current conflict. Specifically, it addresses the prohibition of sexual violence under treaty and customary IHL for both international and non-international armed conflicts and examines the type of sexual violence committed during conflict, as well as the gravity threshold, that may amount to a war crime. Lastly, it approaches the possibility that sexual violence perpetrated during armed conflict may amount to crimes against humanity or genocide.

Key words

International Humanitarian Law, sexual violence, rape, armed conflict, tactic of war, tactic of terrorism.

Resumen

Este Trabajo de Fin de Grado analiza la aplicabilidad del Derecho Internacional Humanitario (IHL) a crímenes de violencia sexual contra mujeres y niñas como táctica de guerra y táctica terrorista, una realidad extendida y recurrente que caracteriza los conflictos armados actuales. Concretamente, aborda la prohibición de violencia sexual en el derecho internacional humanitario convencional y consuetudinario tanto en conflictos armados internacionales como internos, y examina el tipo de violencia sexual que, cometida en este contexto, puede considerarse crimen de guerra. Asimismo, trata la posibilidad de que la violencia sexual perpetrada durante un conflicto armado pueda considerarse crimen contra la humanidad o genocidio.

Palabras clave

Derecho Internacional Humanitario, violencia sexual, violación, conflicto armado, táctica de guerra, táctica terrorista.

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List of Abbreviations

AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
CEDAW	Committee on the Elimination of Discrimination Against Women
CRSV	Conflict-Related Sexual Violence
ECCC	Extraordinary Chambers in the Courts of Cambodia
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
IACs	International Armed Conflicts
NIACs	Non-International Armed Conflicts
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
SCSL	Special Chambers for Sierra Leone
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
WHO	World Health Organization
WPS	Women, Peace and Security

I. Introduction

1. Background and motivations

The year 2020 celebrated the 25th anniversary of the adoption of the Beijing Declaration and Platform for Action and the 20th anniversary of the adoption of Security Council resolution 1325 (2000), both milestones of the inception of the Women, Peace and Security (WPS) Agenda at the United Nations. In these past two decades, the issue of violence against women and girls has received increasing interest from academia, governments and multilateral organizations. The understanding of the gendered nature of both conflict and peacebuilding has expanded substantially, and we are now aware of how women and men experience conflict differently, mainly because they adopt different roles, symbolize different things to their communities and their opponents, are targeted differently and sustain different livelihoods[1]. Moreover, although women may also experience war in different ways, depending on factors such as the type and intensity of conflict, roles, social status or relationships, they have a number of risks in common, one of the most prevalent being sexual violence[2]. This does not mean that men and boys cannot suffer sexual violence, but that women and girls are particularly vulnerable to, and disproportionally affected by, it.

There is a myriad of identified causes of women increased vulnerability to sexual violence during armed conflict. On the one hand, patriarchal presumptions that view women as property, men´s control over "their" women as an indicator of manhood and women´s chastity as key to family honor, have the effect of rendering sexual assault of women as a weapon to attack opponents[3]. Also, the symbolic representation of women as reproducers and protectors of identities, including ethnic, national or religious, combined with patrilineal descent systems rendering them unable to pass on membership to their children, constructs forced impregnation as a way to undermine, ethnically cleanse or commit genocide against a certain group[4]. Lastly, gendered roles and visions of labor also

[1] Cohn, C., "Women and Wars: Toward a Conceptual Framework", in Cohn, C. (ed.), *Women & Wars,* Polity Press, Cambridge, 2013, p. 22
[2] DeLargy, P., "Sexual Violence and Women´s Health in War" in Cohn, C. (ed.), *Women & Wars,* Polity Press, Cambridge, 2013, p. 54.
[3] *Ibid,* p. 61.
[4] Cohn, C., *op. cit.*, p. 29.

play a role, as, for instance, women´s role as caregivers for elders and children makes it difficult for them to flee quickly, and their work as gatherers leaves them vulnerable to attack in isolated sites[5]. These same gendered constructions also increase women´s vulnerability after an initial sexual attack, in the form of ostracization from the family nucleus or the community, which in turn make them more susceptible to further sexual violence and exploitation.

The international community is gradually coming to accept that sexual violence perpetrated during conflict is not unrelated but rather closely linked to the gender dynamics that characterized a certain society before the outbreak of hostilities, hence the need to address violence against women in a more comprehensive manner. The Convention on Preventing and Combating Violence against Women and Domestic Violence*,* also known as the Istanbul Convention, which entered into force in 2014, recognizes the wartime-peacetime violence continuum and aims, *inter alia,* to *"protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence"*[6]. Unfortunately, as of April 2021, only 33 states have ratified the Convention, with another 12 states having signed but not ratified it. Moreover, Turkey denounced the Convention on March 22nd, 2021, and the denunciation will enter into force on July 1st.

The WPS framework is built on four main pillars: *prevention* of conflict and all forms of violence against women and girls not only during conflict, but also in post-conflict situations; *participation* of women at all levels of the decision-making process; *protection* of women and girls from all forms of sexual and gender-based violence, ensuring the protection and promotion of their basic rights in conflict situations; and *relief and recovery,* safeguarding the specific relief needs of women and guaranteeing their capacities to participate in post-conflict reconstruction. This dissertation falls between the *prevention* and *protection* components of the agenda and aims to provide a comprehensive analysis of the prohibition of sexual violence committed during armed conflict under IHL and its potential criminalization and prosecution as a war crime, as well as a crime against humanity or genocide.

[5] *Id.*
[6] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, article 1(1)(a).

The unanimously adopted resolution 1325 (2000) is the cornerstone of the WPS Agenda. It addresses the disproportionate effect that armed conflict has on women and recognizes the important role of women in both conflict prevention and conflict resolution[7]. Subsequently, there have been other resolutions addressing specific issues related to women and armed conflict. Resolution 1820 (2008) recognized the use of sexual violence as a tactic of war in order to achieve military or political ends, which may not only persist after the end of hostilities but also exacerbate and prolong them[8]. Also, resolution 2242 (2015) acknowledged that women and girls are often the target of terrorist groups, and that sexual and gender-based violence are frequently used as tactics of terrorism to further strategic and ideological objectives of some non-state actors[9].

Indeed, current conflict is characterized by widespread sexual violence against women and girls, in violation of IHL, both by states and non-state actors[10]. In fact, the latter are the predominant perpetrators of documented acts of sexual violence during armed conflict[11]. The latest report of the Secretary-General on conflict-related sexual violence, released on March 30th, reveals that, in 2020, *"sexual violence was employed as a tactic of war, torture and terrorism, in settings in which overlapping humanitarian and security crises, linked with militarization and the proliferation of arms, continued unabated"*[12], including, for instance, the military operations in the Ethiopian Tigray region in November 2020. Likewise, *"the nexus between sexual violence, conflict-driven trafficking in persons and violent extremism (…) continued to disproportionately affect women and girls"*[13], including ISIS- and Al-Qaeda-affiliated groups across the Sahel and the Middle East. Consequently, this dissertation focuses particularly on sexual violence perpetrated as a tactic of war or of terrorism, that is, sexual violence used to advance military, political or terrorist objectives.

[7] UN Security Council (UNSC), "Security Council Resolution 1325 (2000), 31 October 2000, S/RES/1325.
[8] UNSC, "Security Council Resolution 1820 (2008), 30 September 2009, S/RES/1820.
[9] UNSC, "Security Council Resolution 2242 (2015)", 13 October 2015, S/RES/2242.
[10] It is widely accepted that IHL applies not only to states but also to non-state armed actors.
[11] UNSC, "Conflict-related sexual violence. Report of the Secretary-General" (2021), 30 March 2021, S/2021/312, para. 28.
[12] *Ibid,* para. 12.
[13] *Ibid,* para. 13.

2. Objectives and research questions

This dissertation aims to evaluate the applicability of IHL to crimes of sexual violence against women and girls as a tactic of war and a tactic of terrorism. Firstly, it intends to provide a thorough analysis on the prohibition of sexual violence under treaty and customary IHL and determine whether it is comprehensive. Moreover, it will evaluate the usefulness of provisions relative to the conduction of hostilities, including the principles of distinction and proportionality, when it comes to sexual violence perpetrated to advance a military or terrorist objective. Secondly, in light of the jurisprudential requirement of "necessary or sufficient nexus", it will analyze which type of sexual violence perpetrated during armed conflict amounts to a violation of IHL. Specifically, it aims to assess whether acts of sexual violence committed as part of a tactic of war or of terrorism would inevitably fulfil such a requirement.

Whether an act amounts to a violation of IHL is relevant because, on the one hand, it entails state responsibility and, on the other, it is the first step towards its potential consideration as a war crime, which is defined as a serious violation of IHL. Consequently, and given that the Geneva Conventions do not explicitly mention rape or other types of sexual violence as "grave breaches" or serious violations, this dissertation will address whether they can be deemed implicitly included in other provisions and which types of sexual violence, and which gravity threshold, have been considered as serious violations. Lastly, because war crimes are not the only international crime that may be committed during armed conflict, it will assess whether sexual violence perpetrated during armed conflict as a tactic of war or of terrorism could also amount to crimes against humanity or to genocide.

3. Structure

This dissertation is structured in seven chapters, including this first introductory one setting forth the object, background, research questions and methodology of this analysis. Chapter two deals with the conceptualization and differentiation of rape, sexual violence and gender-based violence in international law. Chapter three addresses the prohibition of sexual violence under treaty and customary IHL. Chapters four and five analyze which

acts of sexual violence amount to violations and serious violations of IHL, respectively. Chapter six assesses the possibility that sexual violence committed during armed conflict amounts to other international crimes, notably crimes against humanity and genocide. Lastly, chapter seven includes the concluding remarks of this dissertation.

4. Methodology

This dissertation follows a doctrinal legal methodology primarily based in a thorough analysis of the relevant international law instruments, including soft law, as well as case law and doctrine provided by pertinent international organizations and scholars. With regards to conflict-related sexual violence, there are three complementing, and somewhat overlapping, legal frameworks, namely IHL, International Human Rights law (IHRL) and International Criminal Law (ICL). The focus of this dissertation is IHL, and hence it draws significantly from the analysis of the 1949 Geneva Conventions and its 1977 Additional Protocols, customary law rules and the various Commentaries to the Conventions provided by the International Committee of the Red Cross (ICRC).

However, and even though the study of sexual violence under general IHRL is beyond this analysis, the broad and comprehensive framework it provides for dealing with sexual and gender-based violence, as well as its interpretive value when it comes to relevant notions such as torture or cruel treatment, have allowed for occasional references to instruments such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration on the Elimination of Violence Against Women, or the aforementioned Istanbul Convention, as well as recommendations by human rights committees, including the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture and the UN Human Rights Council (UNHRC). In the same line, Security Council Resolutions integrating the WPS Agenda, as well as recent reports of the Secretary-General on Conflict-Related Sexual Violence have provided invaluable insight for the purpose of this analysis.

Also, given the criminalization of serious violations of IHL as war crimes, this dissertation relies significantly on the review of the Rome Statute to the ICC and its

Elements of Crimes, the Statutes to *ad hoc* and hybrid international criminal tribunals and, for the purpose of chapter six, also on the Convention on the Prevention and Punishment of the crime of Genocide. Moreover, it builds on the substantial analysis of relevant international case law for the purpose of illustrating not only the application of ICL, but also the interpretation of IHL when it comes to the prohibition of acts of sexual violence in armed conflict, including their consideration of violations, and grave violations of, IHL. Last but not least, this analysis is guided by pertinent academic international law articles on conflict-related sexual violence and complemented by other resources provided by organizations such as the World Health Organization (WHO), Amnesty International and Human Rights Watch, which help illustrate the situation on the ground.

II. Rape, sexual violence and gender-based violence: a conceptualization. Defining sexual violence.

Rape, sexual violence and gender-based violence, both during armed conflict and in peace time, are dealt with in several instruments of international law[14]. Moreover, rape and sexual violence are implicitly or explicitly prohibited by several international treaties[15] and norms of customary law[16]. However, no international treaty, including the Geneva Conventions and their Additional Protocols, contains a precise definition of either notions. Similarly, statutes of *ad hoc* and hybrid tribunals have explicitly recognized them as amounting to international crimes[17], but do not provide a specific definition. Consequently, the tribunals have, in their jurisprudence, made several attempts at delineating their key elements. Subsequently, the Rome Statute to the International Criminal Court (ICC) criminalized rape and sexual violence as war crimes, crimes against humanity and genocide and, in its *Elements of Crimes*, the ICC has provided a definition of both rape and sexual violence, as well as of the more specific notions of enforced prostitution, forced pregnancy, and enforced sterilization, which are considered forms of sexual violence.

Although there is no universally agreed-upon definition of either term, their conceptualization is insightful for the purpose of this dissertation. Moreover, the distinction between sexual violence and gender-based violence ought to be made. Even though both terms are very relevant to the experiences of women and girls in conflict-

[14] See, for example, the Declaration on the Elimination of Violence Against Women (1993), the Vienna Declaration and Program of Action (1993), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), the Protocol to the African Charter on Human and People´s Rights on the Rights of Women in Africa (2003), or the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011).

[15] Prohibitions of rape and sexual violence include article 27(2) Fourth Geneva Convention; Articles 75(2)(b) and 76(1) Additional Protocol I; article 4(2) Additional Protocol II; Article 3 Common to the Geneva Conventions. Moreover, the right to physical integrity contained in many international treaties, notably article 7 of the International Covenant on Civil and Political Rights, can be argued to encompass the prohibition of being subjected to rape or sexual violence.

[16] International Committee of the Red Cross (ICRC), "Rule nº. 93: rape and other forms of sexual violence are prohibited". *Customary International Humanitarian Law, Volume I: Rules,* 2005.

[17] The Statute of the International Tribunal for Rwanda explicitly mentions rape in article 3, on crimes against humanity, and article 4, on violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Similarly, the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia, include rape in their respective articles 5, on crimes against humanity. The Statute of the Special Court for Sierra Leone includes both rape and any form of sexual violence on article 2, on crimes against humanity, and rape on article 3, on violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.

ridden and post-conflict situations, the former is narrower, may amount to an international crime and is, ultimately, the focus of this analysis.

1. Conceptualizing rape in International Law

At the international level, rape was firstly defined by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *Akayesu case,* the Trial Chamber broadly defined rape as the *"physical invasion of a sexual nature, committed on a person under circumstances which are coercive",* understanding coercion not necessarily in terms of physical force, but also encompassing threats, intimidation, extortion and duress that prey on the victim´s fear or desperation[18]. Subsequent rulings gave way to more precise definitions, notably the one provided in the *Furundžija Case*, whereby rape is the penetration of the vagina, the anus or the mouth by the penis, or of the vagina or anus with another object, performed by force, threat of force or coercion against the victim or a third person[19]. In the *Kunarac Case*, however, the Trial Chamber considered that the definition offered in the *Furundžija Case* was too narrow because it considered an act as rape only if committed under coercive circumstances, and that the definition should also extend to those acts of sexual penetration in which there are factors rendering it *"non-consensual or non-voluntary"* on the part of the victim[20]. This way, this definition shifts the focus from a coercive environment to the lack of consent of the victim, which is more consistent with international human rights law standards[21].

The ICC *Elements of Crimes* draw from this and other relevant case law and provide a more detailed and comprehensive definition of rape. The objective element or *actus reus* of rape is the invasion of the body of a person by the perpetrator *"by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator*

[18] International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4, Judgement (Trial Chamber), 2 September 1998, para. 688.
[19] International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Anto Furundžija, Case No. IT-95-4, Judgement (Trial Chamber), 10 December 1998, para. 174.
[20] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), 22 February 2001, para. 438.
[21] Amnesty International, "Rape and Sexual Violence. Human Rights Law and Standards in the International Criminal Court", 2011, p. 11.

with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body" that is committed by force, threat of force or coercion against the victim or a third person, or by taking advantage of an environment that is coercive, or against a person that is not capable of giving genuine consent[22]. Subsequently, the Special Court for Sierra Leone (SCSL) has built on the definition of rape provided by the ICC *Elements of Crimes,* and the *Furundžija* and *Kunarac* cases, though explicitly including psychological oppression and abuse of power as circumstances that would render the act non-consensual[23]. In contrast, the Extraordinary Chambers in the Courts of Cambodia (ECCC) have tended to limit their definition of rape to the one held in the *Kunarac case*[24].

2. Conceptualizing sexual violence in International Law

Sexual violence was defined by the first time in the *Akayesu case* as *"any act of a sexual nature which is committed on a person under circumstances which are coercive"*[25]. The difference between this definition and the one provided for rape is that while the latter encompasses a physical invasion of the victim´s body, the former may include any act which is deemed of sexual nature. Indeed, 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"*[26]. Therefore, sexual violence is broader than, and encompasses, rape. Moreover, the term "coercion" includes not only physical force, but instead *"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"*[27].

Under the *Elements of Crimes (ICC)* an act is considered sexual violence if the perpetrator commits an act of sexual nature against one or multiple victims or makes the victim(s) engage in an act of sexual nature using force, the threat or force, coercion or by taking

[22] International Criminal Court (ICC), "Elements of Crimes", 2011, articles 7(1)(g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1.
[23] Special Court for Sierra Leone (SCSL), Prosecutor v. Issa Hassan Sesay, Morris Kallon and Agustine Gbao (the RUF accused), Case No. SCSL-04-15-T (Trial Judgement), 2 March 2009, para. 145.
[24] Extraordinary Chambers in the Courts of Cambodia (ECCC), Judgement (Kaing, Guek Eav alias Duch), Case No. 001/18-07-2007/ECCC/TC, Judgement (Trial Chamber), 27 July 2010, para. 362-363.
[25] ICTR, Prosecutor v. Jean-Paul Akayesu, *op. cit.,* para. 688.
[26] *Id.*
[27] *Id.*

advantage of a coercive environment or of the victim(s) incapacity to give genuine consent[28]. As for what constitutes coercion, it includes *"fear of violence, duress, detention, psychological oppression or abuse of power"* not only against the victim(s), but also against a third person[29]. Regarding the gravity threshold for sexual violence to amount to an international crime, the ICC only prosecutes acts that are of a certain gravity. Both article 7, on crimes against humanity, and article 8, on war crimes, provide a list that is non-exhaustive, including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization and any other form of sexual violence of comparable gravity[30] or that constitutes a grave breach of the Geneva Conventions[31] or of common article 3[32].

This way, the question is left to judicial interpretation. However, forms of sexual violence that are not considered of enough gravity by the ICC may still be considered a crime under other treaties, charters of *ad hoc* or hybrid tribunals, or even under national legislations. For instance, the SCSL Statute criminalizes as crimes against humanity rape, sexual slavery, enforced prostitution, forced pregnancy and *"any other form of sexual violence",* when committed as part of a widespread or systematic attack against any civilian population[33]. Moreover, case law provides a number of other acts that can be considered sexual violence, including sexual harassment and forced undressing[34], forced public nudity[35], or forced marriage[36].

It should be noted that, beyond the sphere of criminal prosecution, the gravity threshold for sexual violence is considerably lower. For instance, according to the World Health Organization (WHO), sexual violence can be defined as *"any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their*

[28] ICC, "Elements of Crimes", 2011, article 8(2)(b)(xxii)-1, 3 and 6, amongst others.
[29] *Id.*
[30] Rome Statute of the International Criminal Court (ICC), article 7(1)(g) on Crimes Against Humanity.
[31] *Ibid*, article 8(2)(b)(xxii) on War Crimes in international armed conflict.
[32] *Ibid*, article 8(2)(e)(vi) on War Crimes in non-international armed conflict.
[33] Statute of the Special Court for Sierra Leone (SCSL Statute), 16 January 2002, article 2(g) on crimes against humanity.
[34] ICTR, Prosecutor v. Jean-Paul Akayesu, *op. cit.,* para. 693.
[35] *Ibid,* para. 688.
[36] SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Agustine Gbao (the RUF accused), *op. cit.,* para. 466.

relationship to the victim, in any setting, including but not limited to home and work"[37], and includes but is not limited to rape, sexual abuse, unwanted sexual advancements, sexual harassment, including the demand of sex in return for favors, forced marriage or cohabitation, denial of the right to use contraception, forced abortion, female genital mutilation, obligatory inspections for virginity, forced prostitution and trafficking of people for the purpose of sexual exploitation[38]. More recently, the Istanbul Convention has established that states party to it must criminalize the following conducts as sexual violence: *"a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b. engaging in other non-consensual acts of a sexual nature with a person; c. causing another person to engage in non-consensual acts of a sexual nature with a third person"*[39]. Moreover, it adds, *"¨[c]onsent must be given voluntarily as the result of the person´s free will assessed in the context of the surrounding circumstances"*[40].

3. Gender-based violence and violence against women

There is no universally agreed-upon definition of gender-based violence. The UN Committee on the Elimination of Discrimination Against Women (CEDAW) defines it as *"violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty"*[41]. This way, gender-based violence is broader than sexual violence because it also includes acts of non-sexual nature, including honor killings, domestic violence or forced marriage, that target women as such or that affect women disproportionately. However, and even though this definition is broad in scope, it is limited to the violence to which women are subjected to because of their gender.

[37] UN World Health Organization (WHO), "World Report on Violence and Health", 2002, p. 149.
[38] *Ibid,* pp. 149-150.
[39] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *op. cit.,* article 36(1).
[40] *Ibid,* paragraph (2).
[41] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women,* 1992, para. 6.

Nevertheless, there are other definitions accounting for the gender-specific violence suffered by both genders. For instance, the Inter-Agency Standing Committee (IASC) defines gender-based violence as *"an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed differences between males and females"*[42]. Either way, what distinguishes it is not the act in itself, but rather the fact that it is gender-specific, and so targets or disproportionately affects certain people on the basis of their gender.

Around the world, gender-based violence has a greater impact on women and girls, and so it has received increased attention from the international community. Likely as a consequence, the term "gender-based violence" is often used interchangeably with the term "violence against women". However, the Declaration on the Elimination of Violence against Women defines the latter 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"*[43]. In this sense, it does not seem to suggest that both terms are essentially the same, but rather that violence against women is gender-based violence, due to the fact that it is perpetrated against women on the basis of their gender.

The scope of violence against women as defined by the Declaration is broad, as it encompasses *"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"*[44].

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[42] Inter-Agency Standing Committee (IASC), "Guidelines for Gender Based Violence Intervention in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies", September 2005, p. 18.
[43] UN General Assembly, *Declaration on the Elimination of Violence against Women,* 20 December 1993, article 1.
[44] *Ibid,* article 2.

In short, gender-based violence is broader than sexual violence and encompasses it, and the term violence against women ought to be understood as violence that targets women because they are women, and consequently is gender-specific. During conflict, women and girls are often subjected to sexual violence precisely because of the socially ascribed values, characteristics and expectations placed upon them. For instance, in the *RUF case,* the Trial Chamber documented that Revolutionary United Front (RUF) carried out sexual violence campaigns with the intention of destroying family nucleus and destabilizing society[45]. They relied on the stigma placed upon sexual violence survivors that is present in the Sierra Leonean society, whereby victims are ostracized, left by their husbands or unable to marry within their community[46]. In the same line, the Chamber found evidence that sexual violence campaigns were aimed at extending a feeling of terror and helplessness among the population, and at proving to male members of the community that they could not protect women[47]. Such a strategy capitalizes on the protection component of traditional masculine roles and undermines intra-communal relations overall.

[45] SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Agustine Gbao (the RUF accused), *op. cit.,* para. 1349.
[46] *Id.*
[47] *Ibid,* para. 1350.

III. Sexual violence under treaty and customary International Humanitarian Law

Under the Geneva Conventions and its two Additional Protocols, both rape and other types of sexual violence are prohibited. While the prohibition of rape is explicit, for both international[48] and non-international conflicts[49], the prohibition of sexual violence is expressed in more implicit ways, including the prohibition against cruel treatment and torture[50], outrages against personal dignity[51], indecent assault[52] and, generally, those provisions intended to ensure respect for persons and honor[53]. Moreover, there is an explicit prohibition of enforced prostitution[54]. Similarly, the prohibition of rape and other forms of sexual violence is a norm of customary International Humanitarian Law (Rule no. 93) and it is considered to apply both in international and non-international armed conflict[55].

1. International Armed Conflicts (IACs)

The protection provided by Geneva Law regarding international and non-international armed conflict is not comparable, the former being both more extensive and more, though peripherally, gender specific. For International Armed Conflicts (IACs), article 14 of the third Geneva convention states that prisoners of war are *"entitled in all circumstances to respect for their persons and their honor"*[56] and that *"women shall be treated with all regard due to their sex"*[57]. Moreover, article 27(2) of the fourth Geneva Convention

[48] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GC IV), Article 27(2); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, article 76(1).
[49] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, article 4(2)(e); also, article 3 Common to the Four Geneva Conventions.
[50] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (GC I), article 12; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (GC III), Articles 17 and 87; GC IV, article 32; article 3 Common to the Four Geneva Conventions; AP I, article 75; AP II, article 4(2)(a).
[51] Article 3 common to the Four Geneva Conventions; AP II, article 4(2)(e).
[52] GC IV, Article 27(2); AP II, article 4(2).
[53] GC III, Article 14; GC IV, Article 27(1); AP I, article 75(1); AP II, article 4(1).
[54] GC IV, Article 27(2); AP I, article 76(2)(b).
[55] International Committee of the Red Cross (ICRC), "Rule nº. 93: rape and other forms of sexual violence are prohibited".
[56] GC III, Article 14 (1).
[57] *Ibid,* article 14(2).

provides that women *"shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any other form of indecent assault"*[58]. This provision is mirrored in Additional Protocol I[59]. This way, the prohibition of rape is made explicit, whereas sexual violence more broadly understood is prohibited under the, gendered and somewhat outdated, notions of honor and indecency.

The provisions set forth in the Geneva Conventions ought to be analyzed in light of the commentaries produced by the International Committee of the Red Cross. According to the commentary of 1960 to the Third Geneva Convention, respect for the person should be understood as respect for both physical integrity and moral[60], whereas the sentiment of honor is deemed *"one of the factors of personality"*[61]. The recent commentary of 2020 helps clarify both terms, indicating that respect for someone´s person entails a sense ov the worth of a person and regard for their feelings and rights, whereas respect for someone´s honor is more specific, and signifies the regard for the sense of value that every person has of themselves[62].

The respect for physical integrity entails that is prohibited to kill, wound or endanger prisoners of war and ought to be read along with article 13 of the Third Geneva Convention which prohibits the serious endangering of the health of a prisoner, including any act of torture, mutilation, cruelty or violence[63]. This confirms the prohibition of sexual violence, as observed in the commentary of 2020[64]. Moreover, regarding the moral integrity of prisoners of war, article 14 can be considered to outlaw any treatment that humiliates prisoners during detention, including sexual and other types of harassment[65]. It also entails that the Detaining Power has the duty to protect prisoners from humiliation on the basis of gender, whether deliberate or unintentional[66]. Lastly, the honor of

[58] GC IV, Article 27(2).
[59] AP I, article 76(1).
[60] International Committee of the Red Cross (ICRC), "Commentary to the III Geneva Convention relative to the Treatment of Prisoners of War", Geneva, 1960, p. 143-144.
[61] *Ibid,* p. 145.
[62] International Committee of the Red Cross (ICRC), "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", 2020, para. 1658.
[63] ICRC, "Commentary to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.*, p. 143.
[64] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.*, para. 1664.
[65] *Ibid,* para. 1666.
[66] *Ibid,* para. 1667.

prisoners of war must be protected not only vis-à-vis guards, but also vis-à-vis the other prisoners[67] and the general public[68]. It calls for the avoidance of humiliating labor and dishonorable punishment[69], which arguably includes those of a sexual nature.

As for the provision of treatment of women *"with all regard due to their sex"* contained in article 14(2), the commentary of 1960 highlights, again, "honor and modesty", and expressly states that the main intention of the provision in this regard is to protect women prisoners of war against rape, forced prostitution and any other form of indecent assault[70]. The Commentary of 2020 states that the social and international legal developments in relation to gender equality since 1949 need to be reflected in the interpretation and application of article 14 of the Third Geneva Convention and related provisions[71]. Particularly, the protection owed to women following the aforementioned provision requires the Detaining Power to, on the one hand, prevent sexual violence and, on the other, to ensure that victims have access to healthcare that is appropriate and gender-specific[72]

Finally, as stated in the commentary of 1958 to the Fourth Geneva Convention, the special protection for women provided for in Article 27(2) is founded on the principles enshrined in paragraph 1 of the same article, including the notions of "respect for the person", and "honor". As for the former, it should be understood in its widest sense, including but not limited to, the right to physical, moral and intellectual integrity[73]. Similarly, the "respect for honor" entails that *"the fact that a protected person is an enemy cannot limit his right to consideration and to protection against slander, calumny, insults or any other action impugning his honor or affecting his reputation"*[74]. Moreover, the commentary points out

[67] ICRC, "Commentary to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* p. 145.
[68] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* para. 1662.
[69] ICRC, "Commentary to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* p. 145.
[70] *Ibid,* p. 147.
[71] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* para. 1682.
[72] *Ibid,* para. 1684.
[73] International Committee of the Red Cross (ICRC), "Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War", Geneva, 1958, p. 201.
[74] *Ibid*, p. 202.

that the specific acts enlisted as constituting an attack on women´s honor are exemplary[75], and so the prohibition applies to any act that may be deemed an "indecent assault".

2. Non-International Armed Conflicts (NIACs)

For Non-International Armed Conflicts (NIACs), Article 3 common to the four Geneva Conventions states that *"persons taking no active part in the hostilities (..) shall in all circumstances be treated humanely"*[76] and it outlaws *"violence to life and person, in particular (...) mutilation, cruel treatment and torture"* and *"outrages upon personal dignity, in particular humiliating and degrading treatment"*[77]. Moreover, it states that the acts enlisted in the article *"shall remain prohibited at any time and in any place whatsoever"*[78]. It should be noted that, according to the International Court of Justice (ICJ) Article 3 common contains the *"elementary considerations of humanity",* and therefore its provisions are applicable to any type of armed conflict[79].

Although common Article 3 does not explicitly prohibit sexual violence, it does so implicitly by establishing, on the one hand, an obligation to humane treatment and, on the other a prohibition of violence to life and person, including mutilation, cruel treatment and torture, as well as a prohibition of outrages upon personal dignity. According to the recent commentary of 2020 to the Third Geneva Convention, given that rape, enforced prostitution and indecent assault are listed in article 27 of the Fourth Geneva Convention as examples of inhumane treatment, such acts should also be considered inhumane in the context of common article 3, and thus outlawed following its general provision of humane treatment[80]. Coherently, in the *Prlić case,* the ICTY Trial Chamber argued that *"any sexual violence inflicted on the physical and moral integrity of a person by means of*

[75] *Ibid, p. 206.*
[76] Article 3(1) Common to the Four Geneva Conventions
[77] *Ibid,* paragraphs (a) and (c)
[78] *Id.*
[79] Case Concerning Military and Paramilitary Activities In and Against Nicaragua *(Nicaragua v. United States of America*); *Merits,* International Court of Justice (ICJ), 27 June 1986, para. 218.
[80] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit., para*. 737.

threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhumane treatment"[81].

Moreover, prohibition of sexual violence should also be considered included in the prohibition of violence to life and person, and may amount to torture, mutilation or cruel treatment[82]. It is noteworthy that all the Geneva Conventions and both Additional Protocols prohibit torture, but do not define it. Instead, they rely on the definition provided for by the 1984 Convention against Torture[83], with the exception that humanitarian law does not require official involvement or acquiescence for an act to be considered torture[84]. This way, the ICTY has defined torture in humanitarian law as the intentional infliction, either by act or omission, of severe pain or suffering, physical or mental, aimed at obtaining information or a confession, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person[85]. Such list of purposes for the offence of torture has been subsequently recognized as non-exhaustive[86]. In the *Kunarac case*, the Trial Chamber held that rape *per se* meets the threshold of severity for torture because it *"necessarily implies such pain or suffering"*[87]. Moreover, other types of sexual violence may be considered torture, when meeting said threshold, or cruel treatment, including involuntary sterilization[88]. Lastly, a well-documented act of mutilation in the context of sexual violence is the mutilation of sexual organs[89].

[81] International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Prlić et al., Case No. IT-04-74-T (Trial Judgement, Vol. 1), 29 May 2013, para. 116.
[82] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* para. 738.
[83] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1984, article 1(1).
[84] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.,* para. 681.
[85] ICTY, Prosecutor v. Dragoljub Kunarac and Others, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.*, para. 497.
[86] See, for example, ICTY, Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T (Trial Chamber), 1 September 2004, para. 487.
[87] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), 12 June 2002, para. 151.
[88] UN Committee Against Torture (CAT), "Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture – Peru, 26 July 2006, para. 23.
[89] See, for example, ICTR, Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement and Sentence (Trial Chamber), 18 December 2008, para. 2266; ICTY, Prosecutor v. Dusko Tadic aka "Dule", Case No. IT-94-1-T (Opinion and Judgement), 7 May 1997, para. 45.

According to the commentary of 2020 to the Third Geneva Convention, the prohibition of "outrages upon personal dignity" contained in common Article 3 ought to be understood as covering acts of sexual violence, as confirmed by the subsequent explicit inclusion of some acts of sexual violence as outrages upon personal dignity in Additional Protocol II[90]. Indeed, in its Article 4(2)(e), it prohibits *"outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"*[91]. In the same lines, the ICTR and SCSL Statutes have listed rape, enforced prostitution and any form of indecent assault as outrages upon personal dignity under common Article 3[92]. Moreover, international tribunals have held in multiple occasions that acts of sexual violence ought to be considered outrages upon personal dignity[93].

3. Sexual violence as a tactic of war and a tactic of terrorism under International Humanitarian Law

Sexual violence is often used as a tactic or weapon of war and of terrorism[94], meaning that it is utilized in order to advance military or terrorist objectives. In this sense, several principles of international humanitarian law ought to be highlighted. On the one hand, the so-called principle of distinction or non-combatant immunity requires parties to the conflict to distinguish between combatants and civilians and to abstain from deliberately or discriminately attacking the latter[95]. On the other hand, the principle of proportionality codified in Additional Protocol I, prohibits *"an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"*[96]. Moreover, direct attacks on civilians are prohibited,

[90] ICRC, "Commentary of 2020 to the III Geneva Convention relative to the Treatment of Prisoners of War", *op. cit.*, para. 741.
[91] AP II, article 4(2)(e).
[92] Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), 8 November 1994, article 4(e); SCSL Statute, article 3(e).
[93] See, for example, ICTY, Prosecutor v. Anto Furundžija, *op. cit.*, para. 270-275.
[94] See, for example, UNSC Resolution 1888 (2009), on acts of sexual violence against civilians in armed conflicts; UNSC Resolution 2106 (2013), on sexual violence in armed conflict; and UNSC Resolution 2331 (2016) on trafficking in persons in armed conflicts.
[95] AP I, article 48. Also, Rule nº. 1 of Customary International Law.
[96] AP I, article 51(5)(b). Also, Rule nº. 14 of Customary International Humanitarian Law.

as well as acts or threats of violence aimed at spreading terror among, or retaliating against, the civilian population[97]. Likewise, regarding the use of sexual violence as a "weapon", international humanitarian law permits or bans the use of certain weapons depending on whether they are indiscriminate in nature, understood as the ones that *"cannot be directed at a specific military objective"* or whose effects cannot be limited[98], or cause superfluous injury or unnecessary suffering[99].

Said principles regulating the methods and means of warfare pale in comparison to the protection provided by the prohibition of sexual violence explained above. Under international humanitarian law, sexual violence is prohibited *as such,* regardless of its utility in war advancements, nature, or level of injury or suffering. In this sense, the general prohibition is wider, and more comprehensive, than the potential protection afforded by the principle of proportionality or the provisions regarding the unlawfulness of weapons. Moreover, and although the principle of distinction and the prohibition of direct attack, retaliation and terror campaigns could be useful in the criminalization of conflict related sexual violence, they arguably add little to the prohibition of sexual violence acts under international humanitarian law[100]. In short, the characterization of sexual violence in conflict as a tactic of war or of terrorism reflects a reality of current conflict, and is adequate to address root causes, and for humanitarian and post-conflict reconstruction purposes. However, its criminalization seems better suited with the general prohibition of sexual violence under international humanitarian law than under the provisions regarding methods and means of warfare.

[97] *Ibid,* article 51(2) and (6).
[98] *Ibid,* article 51(4)(b) and (c). Also, Rule nº. 71 of Customary International Law.
[99] *Ibid,* article 35(2). Also, Rule nº. 70 of Customary International Law.
[100] Gaggioli, G., "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, vol. 96, n. 894, 2014, pp. 518.

IV. Which sexual violence committed during an armed conflict amounts to a violation of International Humanitarian Law? Necessary nexus between the armed conflict and the act of sexual violence.

Sexual violence can be committed both in peacetime and during armed conflict, for a myriad of purposes. Moreover, not all sexual violence committed during an armed conflict is necessarily conflict related from an international law perspective. For instance, marital rape, just as any type of rape, may be committed in peacetime just as much as it may be committed during conflict, and even in the last instance it may be unrelated to the hostilities taking place. Moreover, there are well documented cases of worldwide sexual violence, including gang rape, sexual trafficking, female genital mutilation or forced marriages, committed during peacetime[101]. This is not to say that the sexual violence that women and girls are subjected to during an armed conflict, in the narrowest sense, is unrelated to the one they suffered previously or unshaped by their circumstances. In fact, many scholars have argued that sexual violence during war builds on societal gendered attitudes during peacetime[102], creating a sort of "peacetime-wartime continuum"[103].

Notwithstanding, from an international law perspective, the fact that an act of sexual violence is deemed related to the armed conflict taking place is of outmost importance. International Human Rights Law is applicable in all instances, both in peacetime and during armed conflict, regardless of a connection or lack thereof to the hostilities. In contrast, for an act of sexual violence to amount to a violation of IHL, there needs to be a sufficient nexus or link between such an act and the armed conflict taking place. The establishment of a violation of international humanitarian law has two main consequences. For one, according to customary law applicable to both international and non-international armed conflicts, it entails state responsibility[104]. Moreover, it may give rise to individual criminal liability in the form of war crimes. However, as will be addressed in Chapter 4, not all IHL violations amount to war crimes, only the ones deemed "grave breaches".

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[101] UN World Health Organization (WHO), "World Report on Violence and Health", 2002, ISBN No. 92-4-154561-5.
[102] DeLargy, P., *op. cit.*, p. 60.
[103] Jayakumar, K., "Sexual Violence as a Peacetime-Wartime Continuum", *Peace Insight,* April 2013.
[104] International Committee of the Red Cross (ICRC), "Rule nº. 143: responsibility for violations of international humanitarian law".

This way, the contextual element, or nexus between the act and the armed conflict, serves to distinguish war crimes from ordinary crimes. Indeed, the fact that an act of sexual violence does not fulfil the requirement of necessary nexus with the armed conflict taking place only means that it does not amount to a violation of IHL. However, it does not mean that it cannot, or should not, be prosecuted as an ordinary crime. In the same line, a violation of international humanitarian law not considered a "grave breach" and therefore not amounting to a war crime, could also be prosecuted as an ordinary crime. Moreover, other international crimes, notably genocide and crimes against humanity, do not require the contextual element or nexus, and so acts of sexual violence that do not amount to war crimes may still amount to other international crimes, if the remaining criteria are met.

1. Conflict-related sexual violence and the notion of sufficient nexus

The term conflict related sexual violence (CRSV) is increasingly used to refer to sexual violence undergone in times of armed conflict, especially regarding peacekeeping and post-conflict management[105]. However, and although they may sometimes be used interchangeably[106], it is not equivalent to the notion of sufficient or necessary nexus to an armed conflict, nor does it, necessarily, imply a violation of international humanitarian law. Both terms are relevant to the experience of women and girls in conflict, and also post-conflict, situations. Hence, for the purpose of this analysis, it is useful to briefly contrast the two.

Although there is no internationally agreed-upon definition of conflict-related sexual violence, the United Nations has consistently defined it as *"rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to conflict"*[107]. The link, it follows, *"(...) may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities or networks; the profile of the*

[105] See, for example, UNSC, "Conflict-related sexual violence. Report of the Secretary-General" (2020), 3 June 2020, S/2020/487.
[106] Gaggioli, G., *op. cit.,* p. 513.
[107] UNSC, "Conflict-related sexual violence. Report of the Secretary-General" (2020), 3 June 2020, S/2020/487, para. 4.

victim, which is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or sexual identity; the climate of impunity, which is generally associated with State collapse; cross-border consequences, such as displacement or trafficking; and/or violations of the provisions of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence and/or exploitation, when committed in situations of conflict"[108].

Such definition of conflict-related sexual violence is a wide one, which is understandable from a humanitarian and human rights standpoint. For one, it considers that the listed sexual violence acts are conflict-related even when they are "indirectly linked" to an armed conflict, including if favored by the "climate of impunity" following state collapse. As will be addressed, for an act of sexual violence to be considered linked to an armed conflict in international humanitarian law there needs to be a direct, or at least sufficient nexus. Even though the notion of nexus has led to divergent interpretations by different tribunals, it is always narrower and more nuanced than the above-mentioned definition. Consequently, it follows that not all conflict-related sexual violence amounts to an IHL violation. In other words, not all sexual violence considered conflict-related for humanitarian purposes, is automatically deemed conflict-related in IHL.

2. Nexus requirement in case law and in the Rome Statute

No international humanitarian law treaty, including the Geneva Conventions, provides for the notion of nexus or link between an act and an armed conflict. Instead, it has been developed in case law and subsequently included in the ICC *Elements of Crimes,* with regards to war crimes. The nexus requirement has been understood differently by different tribunals. For one, while the ICTY uses the terminology of "nexus" or "link"[109], the ICTR sometimes opted for the term "direct conjunction"[110]. Either way, both tribunals have produced broad definitions that leave room for judicial interpretation. Given that the

[108] *Id.*
[109] See, for example, ICTY, Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T (Trial Chamber), 3 March 2000, para. 69; ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.,* para. 402.
[110] ICTR, Prosecutor v. Jean-Paul Akayesu, *op. cit.,* para. 643.

necessary or sufficient nexus is particularly complex to assess in practice, a case-by-case analysis has been useful for the courts to determine the relation between the act and the conflict.

The ICTY has held that, in order to qualify as a war crime, a conduct must be *"closely related to the hostilities"*[111]. However, this does not mean that the offense need be committed exactly while the fighting is taking place, or even at the combat scene[112]. Indeed, the court has held that the laws of war apply in the whole territory of the states that participate in an international armed conflict or, in the case of an internal armed conflict, in the whole territory under the control of the warring parties, regardless of whether actual combat is taking place, and until a peace agreement is reached[113]. Consequently, *"a violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place"*[114]. This way, it is sufficient that the alleged crimes were closely linked to hostilities occurring in other parts of territories controlled by parties to the conflict[115], that is, that they are committed either in furtherance of or "under the guise of" the general environment created by the fighting[116].

Moreover, the court has held that the offense in question need not be part of an official, or at least tolerated, policy or practice, nor does it need to be in actual furtherance of war objectives or in interest of one of the parties to the conflict[117]. In the same line, the armed conflict need not be the cause to the commission of the crime[118]. However, the existence of the armed conflict must, at least, have played a substantial role in the perpetrator's

[111] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.*, para. 402.
[112] *Ibid,* para. 57; also, International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Tihomir Blaškić, *op. cit.,* para. 69.
[113] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.,* para. 57.
[114] *Id.*
[115] ICTY, Prosecutor v. Tihomir Blaškić, *op. cit.,* para. 69; International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Dusko Tadic aka "Dule", Case No. IT-94-1-T (Opinion and Judgement), *op. cit.,* para. 573.
[116] ICTY, Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32-T (Trial Chamber), 29 November 2002, para. 25; ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), 12 June 2002, para. 58.
[117] ICTY, Prosecutor v. Tihomir Blaškić, *op. cit.,* para. 70; ICTY, Prosecutor v. Dusko Tadic aka "Dule", Case No. IT-94-1-T (Opinion and Judgement), *op. cit.,* para. 574.
[118] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.*, para. 58.

ability, decision, manner or purpose[119]. More precisely, in the *Kunarac case*, the Appeals Chamber identified, *inter alia,* a number of factors to determine whether or not an offense is sufficiently related to the armed conflict to constitute a war crime (and, hence, to amount to a violation of IHL). These include: *"the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said the serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties"*[120]. Evidently, these criteria are not exhaustive nor cumulative. Instead, they serve as mere examples of the factors that could be taken into account to determine the existence of a nexus.

In the *Furundžija Case,* for instance, the Trial Chamber concludes that the fact that the victim was a civilian being questioned by the accused, who was a commander of the military unit holding her captive, was an active combatant and participated in the expulsion of the Muslim population from their homes, was sufficient to link the alleged offenses to the armed conflict taking place at the time[121]. Moreover, in the *Brđanin case,* the Appeals Chamber concluded that rapes committed during weapon searches fulfilled the sufficient nexus to the armed conflict and therefore were not to be considered mere "individual domestic crimes"[122]. Regarding non-combatants, the Trial Chamber held in the *Vasiljevic case* that the fact that the accused was closely associated with Serb paramilitaries, his acts were committed to further war aims and he acted "under the guise of armed conflict", were enough to conclude a sufficient nexus[123].

In the same line, the ICTR *Rutaganda* and *Semanza* cases illustrate the subsequent endorsement of the "Kunarac criteria"[124]. In *Rutaganda,* the Appeals Chamber duly clarifies that the expression "under the guise of conflict" does not mean at the same time as, or in any circumstance partially created by, the armed conflict[125]. Consequently, it

[119] *Id.*
[120] *Ibid*, para. 59.
[121] ICTY, Prosecutor v. Anto Furundžija, *op. cit.*, para. 65.
[122] ICTY, Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A (Appeals Chamber), 3 April 2007, para. 256.
[123] ICTY, Prosecutor v. Mitar Vasiljevic, *op. cit.*, para. 57.
[124] Cassese, A., "The Nexus Requirement for War Crimes", *Journal of International Criminal Justice,* vol. 10, 2012, p. 1411.
[125] ICTR, Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-A, Judgement (Appeals Chamber), 26 May 2003, para. 570.

argued, if a non-combatant murders a neighbor they have hated for years, taking advantage of the lessened effectiveness of police forces in the chaotic circumstances brought about by the armed conflict, such an offense would not, on its own, be considered sufficiently linked to the armed conflict for it to qualify as a war crime[126]. On the contrary, if combatants take advantage of their positions of authority to rape individuals whose displacement was an explicit objective of the military campaign they partook in, that would be considered a sufficient nexus[127].

In the *Semanza case*, for instance, the Trial Chamber concluded that the armed conflict between the Hutu Rwandan government forces and the Tutsi Rwandan Patriotic Front (RPF) created the situation and provided the pretext for the extensive killing and abuse of Tutsi civilians[128]. Moreover, the development of the armed conflict substantially motivated the attacks. For instance, the court documented that the advancement of the RPF towards the communes Bicumbi and Gijoro led to the intensification of killings of Tutsi civilians[129].

In the line with the presented case law, the ICC *Elements of Crimes* has established the requirement that, for an offense to be considered a war crime, it must have taken place "in the context of" and "associated" with, an armed conflict, whether internal[130] or international[131]. The expression "associated with" refers to the sufficient or necessary nexus to the armed conflict. This brief mention does not offer more precision that the definitions provided by the ICTY and ICTR, and also leaves substantial room for judicial interpretation and a case-by-case assessment.

In short, for any act to amount to a violation of IHL, it needs to be necessarily or sufficiently linked to the armed conflict. Although the jurisprudential notions of nexus are rather broad, relevant case law has provided with a series of elements that could be considered in order to assess the nexus, or lack thereof, to the conflict. The involvement in the hostilities, the advancement of war objectives or the status of the victim as a non-

[126] *Id.*
[127] *Id.*
[128] ICTR, Prosecutor v. Georges Anderson Nderubumwe Rutaganda, *op. cit.,* para 518.
[129] *Ibid,* para. 521.
[130] ICC, "Elements of Crimes", 2011, article 8(2)(c).
[131] ICC, "Elements of Crimes", 2011, article 8(2)(a).

combatant seem to be some of the decisive factors to take into account. This way, if the perpetrator was acting on an official mission related to the conflict, unless there is any indication to the contrary, the offense will typically be aimed at advancing war objectives and, given that the victim is a protected person under international humanitarian law, tribunals will be likely to infer the nexus between the act and the conflict[132]. In contrast, if the perpetrator is a civilian, then it must be proved that the armed conflict created the pretext and the opportunity for the act in question. If, for instance, they can be shown to identify with one of the parties to the conflict and the act was carried out in accordance with the goals of a military campaign of said party, then it will be easy to infer a nexus between the offense and the armed conflict[133].

3. Sexual violence as a tactic of war and a tactic of terrorism. Meeting the *Kunarac* standards.

From the overview of the relevant case law on the notion of necessary or sufficient nexus, we can observe that not every act of sexual violence that occurs during armed conflict is necessarily considered to amount to a violation of IHL. Indeed, sexual violence during conflict may be unrelated to it, or only indirectly linked, perhaps stemming out of the general context of chaos and criminality, which would not meet the jurisprudential standards set forth in the previous section. However, the use of sexual violence as a tactic of war or a tactic of terrorism, that is, either as a way to make military advances or to terrorize the civilian population to benefit a given party´s objectives, would arguably fulfill the necessary or sufficient nexus requirement.

For one, and insofar as sexual violence is utilized to further the cause of one of the parties to the conflict, be it a state military or a non-state armed group, it can be said to be *"closely related to the hostilities"*[134]. As required in the *Kunarac case*[135], the existence of the armed conflict would arguably play a substantial role in the perpetrator's ability but, most

[132] Cassese, A., *op. cit.,* p. 1413
[133] *Id.*
[134] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.,* para. 402.
[135] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.,* para. 58.

importantly, on their decision to commit sexual violence, the manner in which they choose to do so, or the purpose behind it. For instance, the Independent International Fact-Finding Mission on Myanmar has documented cases of sexual violence in northern Myanmar and in southwest region of Rakhine, overwhelmingly perpetrated by the Tatmadaw, Myanmar´s armed forces, against ethnic women and girls, *"with the intent to intimidate, terrorize and punish the civilian population and as a tactic of war*"[136]. In Somalia and neighboring countries, al-Shabaab has been using sexual violence, including abduction, sexual abuse, rape, gang rape, exploitation and forced marriages, as a tactic to terrorize both civilians and the state[137]. Likewise, sexual violence in the South Sudanese state of Central Equatoria has been reported to be employed for the purpose of intimidation and punishment, as well as an ethnically based strategy aimed at remodeling the demographics of the region[138]. In Nigeria, Boko Haram militants have been using sexual violence primarily against women and girls in the northeastern part of the country as one of the tactics of the group´s terror campaign against the state, including rape, sexual slavery, trafficking and forced marriages[139]. Some scholars have argued further that the high number of forced pregnancies form part of a plan by Boko Haram to produce offspring that will continue the insurgency[140].

Most generally, the act in question will likely meet the so-called Kunarac standards, namely that it is carried out by a combatant, that the victim is a non-combatant and/or a member of the opposing party, that the crime is committed as part of or in the context of the perpetrator´s official duties and, more significantly, that *"the act may be said to serve the ultimate goal of a military campaign"*[141]. In the Central African Republic, women and girls reported armed groups using sexual violence as punishment, usually following a perceived affiliation with a rival faction[142]. Likewise, in Ukraine, the Office of the United

[136] UN Human Rights Council (UNHRC), "Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts", 22 August 2019, A/HRC/42/CRP.4, para. 2.
[137] De Brouwer, A., De Volder, E. & Paulussen, C., "Prosecuting the nexus between terrorism, conflict-related sexual violence and trafficking in human beings before national legal mechanisms. Case Studies of Boko Haram and Al-Shabaab", *Journal of International Criminal Justice,* vol. 18, 2020, p. 511.
[138] UNSC, "Conflict-related sexual violence. Report of the Secretary-General" (2020), 3 June 2020, S/2020/487, para. 47.
[139] De Brouwer, A., De Volder, E. & Paulussen, C., *op. cit.,* p. 506.
[140] Lord-Mallam, N. & Sunday, A., "Terrorism and Conflict-Related Sexual Violence in Africa: Northeastern Nigeria in Focus", *Covenant University Journal of Politics and International Affairs,* vol. 6, No. 1, 2018, p. 84.
[141] *Ibid,* para. 59.
[142] Human Rights Watch, "They Said We are Their Slaves: Sexual Violence by Armed Groups in the Central African Republic", 5 October 2017, p. 45.

Nations High Commissioner for Human Rights (OHCHR) *"identified a pattern of sexual violence perpetrated in places of detention against individuals perceived to be part of, or affiliated with, armed groups, in order to punish and humiliate them and/or extract confessions from them"*[143].

As posited above, this list of elements is not exhaustive, but rather illustrative of what factors may be considered in order to assess the existence, or lack thereof, of a sufficient nexus between an act and an armed conflict. That is, a court may infer a sufficient nexus even if those standards are not met, because they find other factors that account for the relationship between the act and the armed conflict. Either way, the point is that sexual violence when utilized as a tactic of war or a tactic of terrorism will inevitably meet the threshold and hence amount to a violation of international humanitarian law, given its connection to the armed conflict taking place. The victim will tend to be a non-combatant, and the perpetrator a combatant, though an act carried out by a non-combatant could still be considered sufficiently connected if they have a relationship with one of the factions, or their act can be said to be in general furtherance of military objectives, as happened in the above-mentioned *Vasiljevic case*[144]. In the same line, the fact that the sexual violence is carried out against women combatants instead of non-combatants should not, on its own, disqualify the nexus between the act and the armed conflict. Most tellingly, sexual violence carried out as a tactic of war or of terrorism will inevitably be in, at least intended, furtherance of war advancements, and that on its own could serve to infer a necessary nexus.

[143]UNHRC, "Report of the Office of the United Nations High Commissioner for Human Rights. Conflict-Related Sexual Violence in Ukraine (14 March 2014 to 31 January 2017)", 16 March 2017, A/HRC/34/CRP.4; para. 65.
[144] ICTY, Prosecutor v. Mitar Vasiljevic, *op. cit.*, para. 57.

V. Which acts of sexual violence amount to "grave breaches of International Humanitarian Law? Sexual violence as a war crime.

According to customary law applicable both to international and non-international armed conflicts, *serious* violations of IHL constitute war crimes[145]. In other words, not every act that is considered a violation of IHL via the fulfilment of the necessary nexus to the armed conflict will amount to a war crime, only those deemed "grave" or "serious". In the Rome Statute of the ICC, the notion of "war crimes" includes grave breaches of the 1949 Geneva Conventions[146], serious violations of article 3 common to the four Geneva Conventions[147], in case of non-international armed conflict, and other serious violations of the laws and customs applicable in either international or non-international armed conflict[148]. The statutes of *ad hoc* or hybrid tribunals follow the same premises. The Statute of the ICTR establishes the jurisdiction of the court to prosecute violations of article 3 common to the Geneva Conventions and of Additional Protocol II[149]. Similarly, the Statute of the SCSL establishes that the court has the power to prosecute *"persons who committed or ordered the commission of"* serious violations of article 3 common and Additional Protocol II[150]. Moreover, it enables the court to prosecute other serious violations of international humanitarian law[151].

The Statute of the ICTY, on its part, establishes the jurisdiction of the court to prosecute grave breaches of the Geneva Conventions [152]and violations of the laws and customs of war[153]. In interpreting article 3 of the Statute listing the violations of the laws or customs of war over which it has jurisdiction, the Appeals Chamber clarified in the *Čelebići case* that it included *all* laws and customs of war, not only those listed[154]. Moreover, in the *Tadic case,* the court specified the conditions for Article 3 to apply, also known as the

[145] International Committee of the Red Cross (ICRC), "Rule nº. 156: definition of war crimes". *Customary International Humanitarian Law, Volume I: Rules,* 2005.
[146] Rome Statute of the ICC, article 8(2)(a) on War Crimes.
[147] *Ibid,* paragraph (c).
[148] *Ibid,* paragraphs (b) and (e).
[149] ICTR Statute, article 4.
[150] SCSL Statute, article 3.
[151] *Ibid,* article 4.
[152] Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), 25 May 1993, article 2.
[153] *Ibid,* article 3.
[154] ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landzo (aka "Zenga"), Case No. IT-96-21-A (Appeals Chamber), 20 February 2001, para. 131.

"Tadic conditions": *"(i) the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or international law, the individual criminal responsibility of the person breaching the rule"*[155].

The relevance of a violation of international humanitarian law being deemed "serious" lies not only in the individual criminal liability it triggers, but also in that it entails certain obligations on the part of states. Specifically, states party to the Conventions are required to *"(...) enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article"*[156]. Moreover, they are obliged to *"search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts",* though they may also *"hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case"*[157].

The Geneva Conventions and Additional Protocol I provide for a, rather short, list of grave breaches, which does not explicitly include rape or any other form of sexual violence[158]. However, it is implicitly included in the consideration of other acts as grave breaches, including torture or inhuman treatment, or the causing of great suffering or serious injury to body and health, applicable both in international and non-international armed conflict. Subsequently, the Rome Statute has established sexual violence as an independent grave breach of the Geneva Conventions.

[155] ICTY, Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, para. 94.
[156] GC I, article 49; GC II, article 50; GC III, article 129; GC IV, article 146.
[157] *Id.*
[158] GCI, article 50; GC II, article 51; GC III, article 130; GC IV, article 147; AP I, articles 11 and 85.

1. International Armed Conflicts (IACs)

Article 50 of the First Geneva Convention provides for an exhaustive list of offences that, if committed against persons or property protected under the Convention[159], amount to grave breaches. It includes *"willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"*[160]. Article 50 is common to the four Geneva Conventions, and is reproduced exactly in the Second Geneva Convention[161]. However, the Third and Fourth Conventions contain additional grave breaches, including *"compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial"*[162], *"unlawful deportation or transfer or unlawful confinement of a protected person"*[163] and the taking of hostages[164].

In line with the prohibition of sexual violence under IHL set forth in Chapter 2, rape and any other form of sexual violence amount to grave breaches, if committed against protected persons, when these acts fall into the categories of torture or inhumane treatment, or willfully causing great suffering or serious injury to body or health. This is, of course, provided that they fulfill the necessary nexus with the armed conflict. The commentary of 2016 to the First Geneva Convention, whose provisions regarding the issue at hand are replicated by commentaries to the other Conventions, confirms such an interpretation. It posits that rape amounts *per se* to torture if the perpetrator inflicts the severe pain or suffering for one of the prohibited purposes[165], namely *"obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person"*[166]. Moreover, it argues, the severe pain or suffering need not be exclusively motivated by

[159] Namely, sick, wounded and shipwrecked persons not taking part in hostilities, prisoners of war and other detainees, civilians and civilian objects.
[160] GC I, article 50.
[161] See GC II, article 51.
[162] GC III, article 130; GC IV, article 147.
[163] GC IV, article 147.
[164] *Id.*
[165] International Committee of the Red Cross (ICRC), "Commentary to the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", Geneva, 2016, para. 2966.
[166] *Ibid,* para. 2972.

one of the purposes mentioned[167] and mentions the *Kunarac case*, in which the Appeals chamber found that *"even if the perpetrator´s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct"*[168].

Regarding sexual violence, and in addition to the fact that it could potentially amount to torture, the commentary highlights that criminal tribunals have found that it amounts to inhuman treatment[169]. Consequently, it ought to be considered a grave breach of the Geneva Conventions. Indeed, in the *Prlić case*, the Trial Chamber held that *"any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim"* could constitute inhuman treatment under article 2(b) of the Statute, on grave breaches of the Geneva Conventions[170].

The consideration of sexual violence as inhuman treatment and, potentially, torture or willful causing of severe pain or suffering is quite broad, and thus allows many instances of conflict related sexual violence to amount to serious violations of international humanitarian law. In the same line, Protocol I contains some provisions relevant to sexual violence as a tactic of war or of terrorism. Article 85 establishes a series of acts that are considered grave breaches of the Protocol when committed willfully and causing death or serious injury to body or health, namely *"making the civilian population or individual civilians the object of attack"*[171], *"launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (...)*[172]*"* and *"making a person the object of attack in the knowledge that he is hors de combat"*[173]. However, the fact that these acts have to be carried out causing "death or serious injury to body or health" renders these provisions quite redundant, because the activities listed

[167] *Ibid,* para. 2975.
[168] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.,* para. 153.
[169] ICRC, "Commentary to the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", *op. cit.,* para. 2984.
[170] ICTY, Prosecutor v. Prlić et al., *op. cit.,* para. 116.
[171] AP I, article 85(3)(a).
[172] *Ibid,* paragraph (b).
[173] *Ibid,* paragraph (d).

are already covered by the generic provisions on grave breaches common to the Geneva Conventions.

2. Non-International Armed Conflicts (NIACs)

Neither common Article 3 nor Additional Protocol II contain any explicit grave breach provisions. Moreover, they do not provide for the criminalization nor prosecution of the violations of international humanitarian law applicable to armed conflict of a non-international nature, nor do they place any obligations upon the state thereon. However, in non-international armed conflicts, rape and other forms of sexual violence are prohibited, either implicitly or explicitly, both in common article 3 and in Additional Protocol II[174]. Arguably, to the extent that an act of rape or of sexual violence amounts to a serious violation of such provisions, they could amount to war crimes committed in non-international armed conflict[175].

In the *Tadić case*, the ICTY argued that *"the acts proscribed by common Article 3 constitute criminal offences under international law"*[176] and that, in any case, *"common Article 3 is beyond doubt part of customary international law"*[177]. This way, serious violations of common Article 3 could be prosecuted either as grave breaches of the Geneva Convention, following the applicability of Article 1 common to non-international armed conflicts[178], or as a violation of the "laws or customs of war" under article 3 of the Statute, applicable to both international and non-international armed conflicts. Following this argument, acts of rape and sexual violence that amount to serious violations of common Article 3, could amount to war crimes when committed in non-international armed conflict. Moreover, in the *Čelebići case,* the Trial Chamber concluded that the laws and customs of war referred to in Article 3 of the Statute *"include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions,*

[174] See Chapter 2, "Sexual violence under treaty and customary International Humanitarian Law", section 2, "Non-International Armed Conflicts (NIACs)".
[175] Gaggioli, G., *op. cit.,* p. 528.
[176] ICTY, Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), *op. cit.,* para. 71.
[177] *Ibid,* para. 72.
[178] *Ibid,* para. 71.

and the 1977 Additional Protocols to these Conventions"[179]. Thus, violations of Additional Protocol II deemed "serious" may also amount to war crimes in non-international armed conflict.

Indeed, although the ICTY Statute does not explicitly include rape and sexual violence as war crimes over which the court has jurisdiction when committed in non-international armed conflict, this has not impeded the court from considering them as such[180]. In the *Kunarac case*, the accused were convicted for violations of the laws and customs of war under article 3 of the Statute in the form of rape, and other acts of sexual violence as torture or outrages against personal dignity[181], following the systematic abuses and mistreatment by the Bosnian Serb Army on civilian Muslim women and girls in the context of the non-international armed conflict in Bosnia and Herzegovina between 1992 and 1993[182]. Similarly, in the *Čelebići case,* the accused were found guilty of violations of the laws or customs of war, under Article 3 of the Statute, and recognized by Article 3(1)(a) of the Geneva Conventions, for torture and cruel treatment following the acts of sexual violence against prisoners of the Čelebići prison-camp[183].

In contrast, the ICTR Statute, in its article 4, on violations of Article 3 common and Additional Protocol II, has explicitly criminalized *"outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"*[184]. In the *Bagosora case,* for instance, one of the accused was found guilty of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II in the form of various acts of sexual violence as outrages upon personal dignity, among other charges[185]. In the *Semanza case*, in contrast, episodes of sexual violence were considered acts of torture[186], and thus also amounting to serious

[179] ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landzo (aka "Zenga"), Case No. IT-96-21-T (Trial Chamber), 16 November 1998, para. 305.
[180] Gaggioli, G., *op. cit.,* p. 528.
[181] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.,* para. 4, 9-10.
[182] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.*, para. 3.
[183] ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landzo (aka "Zenga"), Case No. IT-96-21-T (Trial Chamber), *op. cit.*, counts 18 to 20 and 21 to 23.
[184] ICTR Statute, article 4(e).
[185] ICTR, Prosecutor v. Bagosora, *op. cit.,* para. 36.
[186] ICTR, Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T (Trial Chamber), 15 May 2003, para. 523.

violations of Article 3 common and Additional Protocol II, as posited by Article 4(a) of the Statute.

Similarly, the SCSL Statute also explicitly criminalizes outrages against personal dignity, rape, enforced prostitution and any form of indecent assault as violations of Article 3 common to the Geneva Conventions and Additional Protocol II[187]. In the *Taylor case,* the Trial Chamber considered that *"sexual slavery, including the abduction of women and girls as "bush wives", a conjugal form of sexual slavery, is humiliating and degrading to its victims and constitutes a serious attack on human dignity, falling within the scope of outrages upon personal dignity"*[188]. Moreover, the court considered that the acts of rape and sexual violence carried out in Freetown, the Western Area and the Kono and Kailahun Districts that it had found to amount to crimes against humanity, also constituted war crimes under outrages upon personal dignity[189].

3. Explicit provision by the Rome Statute (ICC)

The Rome Statute of the ICC has explicitly listed rape and other forms of sexual violence as an independent category of war crimes without the need for a qualification as torture or inhuman treatment, or willfully causing great suffering, or serious injury to body or health. Indeed, it has criminalized as war crimes *"other serious violations of the laws and customs applicable in international conflict, within the established framework of international law, namely any of the following acts: (...) (xxii) committing rape, sexual slavery, enforced prostitution, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"*[190]. It also contains an identical provision criminalizing the same offenses as war crimes in non-international armed conflict[191].

In its *Elements of Crimes,* the ICC has provided for a precise definition of the war crimes of rape, sexual slavery and enforced prostitution mentioned in the Rome Statute. Moreover, it has included the war crimes of forced pregnancy, enforced sterilization and

[187] SCSL Statute, article 3(e).
[188] Special Court for Sierra Leone (SCSL), Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T (Trial Chamber), 18 May 2012, para. 432.
[189] *Ibid,* para 1195.
[190] Rome Statute of the ICC, article 8(2)(b)(xxii) on war crimes.
[191] *Ibid,* article 8(2)(e)(vi).

sexual violence as separate crimes[192]. For the war crime of sexual violence, however, it has further clarified that the offense must be *"of a gravity comparable to that of a grave breach of the Geneva Conventions"*[193]. This entails that, for an act of sexual violence to amount to a war crime, there is a gravity threshold that must be met[194]. Therefore, although the inclusion in the Rome Statute of sexual violence as a separate crime serves to avoid the need for qualification, either as torture, inhuman treatment, great suffering or serious injury to body or health, there is still a requirement of sufficient gravity that must be met, which leaves room for judicial interpretation.

[192] ICC, "Elements of Crimes", 2011, article 8(2)(b)(xxii)- 4, 5 and 6; also, for non-international armed conflict, article 8(2)(e)(vi)-4,5 and 6.
[193] *Ibid,* article 8(2)(b)(xxii)-6, paragraph 2; also, for non-international armed conflict, article 8(2)(e)(vi)-6.
[194] Dörmann, K., "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law,* vol. 7, 2003, p. 394.

VI. Conflict-related sexual violence amounting to other international crimes.

War crimes are not the only international crime that can be committed during armed conflict. Crimes against humanity and genocide can be committed both in peacetime and during armed conflict[195]. Therefore, sexual violence that does not amount to war crimes, for not meeting either the nexus criteria or the gravity threshold of a serious violation of international humanitarian law, may still amount to these other two international crimes, given that the remaining requisites are met.

1. Sexual violence as a crime against humanity.

The Statute of the ICTY establishes the jurisdiction of the court to prosecute *"the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious grounds; (i) other inhumane acts"*[196]. The ICTR Statute contains a similar provision, though it does not require that the act be committed in armed conflict, in compliance with customary law, and includes the need that the attack be *"widespread or systematic"* and directed against any civilian population *"on national, political, ethnic racial or religious grounds"*[197]. This last requirement circumscribes crimes against humanity more narrowly than posited by customary international law[198]. The SCSL Statute, on its part, does not require that the act be committed in armed conflict, or that it be directed against civilian population on specific grounds[199]. It does require, however, that the offence be part of a widespread or systematic attack. Moreover, it explicitly includes as offenses possibly amounting to crimes against humanity not only rape, but also *"sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence"*[200]. The Rome Statute to the ICC contains a similar provision and

[195] ICRC, "Commentary to the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", *op. cit.,* para. 2907.
[196] ICTY Statute, article 5, on crimes against humanity.
[197] ICTR Statute, article 3, on crimes against humanity.
[198] Mettraux, G., *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2006, p. 153.
[199] SCSL Statute, article 2, on crimes against humanity.
[200] *Ibid,* paragraph (g).

explicitly includes as offenses that may give rise to crimes against humanity *"rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"*[201]. In this sense, it is narrower than the provision included by the SCSL Statute, given that the former encompasses "any other form of sexual violence" and does not include a minimum gravity threshold.

As is apparent from the above-mentioned provisions, there are several general or *chapeau* requirements for an act to amount to a crime against humanity: there must be a widespread or systematic attack[202] directed against any civilian population[203], and the underlying offense in question must be part of said attack. In case law, "widespread" refers to *"the large-scale nature of the attack and the number of victims",* whereas "systematic" refers to *"the organized nature of the acts of violence and the improbability of their random occurrence"*[204]. Except for the underlying offense of extermination, an attack directed against a small number of victims, or even against a single one, may still constitute a crime against humanity if it is part of a widespread or systematic attack directed against a civilian population[205]. Any civilian population could be the target of the attack, there being no requirement that the victims be linked to any particular party to the conflict[206]. Also, it is required that *"the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern"*[207]. However, the motives driving the commission of a certain act are largely irrelevant, and a crime against humanity *"may be committed for purely personal reasons"*[208].

[201] Rome Statute of the ICC, article 7(g).
[202] At the ICTY, this requirement was not included in the Statute, but was later put forward in case law. See, for example, International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.*, para. 93.
[203] With the exception of the ICTR, which requires that the attack is directed against one civilian population because of one of the discriminatory purposes listed in article 3 of its Statute.
[204] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.,* para. 94.
[205] ICTR, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-A (Appeals Chamber), 28 November 2007, para. 924.
[206] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.*, para. 423.
[207] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.*, para. 85.
[208] *Ibid,* para. 103.

Provided that these requirements are met, a series of listed underlying offenses may amount to crimes against humanity. As posited above, whereas the SCSL and Rome statutes explicitly include rape and other types of sexual violence, the ICTY and ICTR statutes only explicitly include rape. However, both tribunals have produced extensive case law regarding rape as well as other types of sexual violence as crimes against humanity. For one, under the clause *"other inhumane acts",* they have prosecuted sexual violence perpetrated upon dead human bodies, forced undressing of women in public, forcing women to march or perform exercises naked, sexual violence, humiliation or harassment[209]. Moreover, in the *AFRC case,* the chamber ruled that forced marriage was covered by the "other inhumane acts" clause and that as such was distinct from sexual slavery as a crime against humanity[210]. It argued that, in the specific case of Sierra Leone, forced marriage is not *predominantly* a sexual offence as victims of forced marriage are not necessarily subjected to non-consensual sex, but it nonetheless amounts to crimes against humanity because *"the imposition of a forced conjugal association is as grave as the other crimes against humanity"*[211].

An act of rape may, undoubtedly, constitute rape as a crime against humanity. However, rape and other types of sexual violence may also constitute torture, persecution and enslavement as crimes against humanity. In is noteworthy that *"enslavement, even if based on sexual exploitation, is a distinct offence from that of rape"*[212]. In the *Kunarac case,* the accused, all members of either the Bosnian Serb army or of Serb forces, were convicted for crimes against humanity in the form of rape, torture and enslavement because of the regular abduction of Muslim women and girls, their rape and imposed servitude in the private homes of their captors[213]. Regarding the crime of persecution, it entails the denial or infringement of a fundamental right carried out deliberately with the intention to discriminate on one of the listed grounds[214], that is, political, racial and religious, as well as ethnic at the ICTR and SCSL. In the *Brđanin, Case,* the court clarified

[209] SCSL, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor (the AFRC Accused), Case No. SCSL-2004-16-T (Appeals Judgement), 22 February 2008, para. 184.
[210] *Ibid,* paras, 175-179.
[211] *Ibid,* para. 178.
[212] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A (Appeal Judgement), *op. cit.*, para. 186.
[213] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T&IT-96-23/1-T (Trial Chamber), *op. cit.* para. 883, 886 and 888.
[214] ICTR, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, *op. cit.*, para. 985.

that, according to settled jurisprudence, an act not enumerated as a crime in the Statute, and even not considered a crime in international law, may give rise to the crime against humanity of persecution if it is *"of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts"*[215]. In that case, the Trial Chamber found that incidents of sexual assault, including a Bosnian Croat woman forced to undress herself in front of Serb soldiers, a Bosnian Muslim woman having a knife run along her breast and demands that detainees have sexual intercourse with each other, *"evaluated in their context (...) are serious enough to rise to the level of crimes against humanity"*[216]. Likewise, the ICTR held at the *Kajelijeli case* that *"[c]utting a woman´s breast off and licking it and piercing a woman´s sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity"*[217].

2. Sexual violence as genocide.

The 1948 Genocide Convention defines genocide as *"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"*[218]. Moreover, under the Convention, not only the commission of genocide *per se* is criminalized, but also the conspiracy, the direct and public incitement, the attempt and the complicity to do so[219]. The ICTY, the ICTR and the Rome statutes contain similar provisions [220]. The SCSL, however, has no jurisdiction to prosecute the crime of genocide. In accordance with articles IV and VI of the Genocide Convention, anyone may commit genocide, regardless of hierarchical position, relevance and form of

[215] ICTY, Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A (Appeals Chamber), *op. cit.,* para. 296.
[216] ICTY, Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T (Trial Chamber), 1 September 2004, para. 1013.
[217] ICTR, Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T (Judgement and Sentence), 1 December 2003, para. 936.
[218] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, article II.
[219] *Ibid,* article III.
[220] ICTY Statute, article 4; ICTR Statute, article 2; Rome Statute of the ICC, articles 6 and 25.

their contribution to its perpetration, membership to the victimized group, motives, civilian or military status, or whether they were acting in private or official capacity[221].

Genocide requires for a state of mind composed of two distinct *mens rea,* the one relating to the underlying offense, for instance the intent to cause serious bodily or mental harm to members of the group, and the one related to the *chapeau* elements of the crime, the genocidal *mens rea*[222] or specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Indeed, the intent of the perpetrator must be to *destroy* the group, not only to make members of the group suffer or discriminate against them. The perpetrator must *"intend to destroy at least a substantial part of the protected group"*[223]. Moreover, *"the existence of a plan or policy is not a legal ingredient of the crime"*[224], though it may be useful in the context of proving the genocidal intent.

Even though rape and sexual violence have not been explicitly enumerated as an act of genocide, some relevant case law has recognized sexual violence as amounting to genocide under various sub-elements of the definition. In the *Akayesu case,* for instance, the court produced the first genocide conviction for sexual violence[225], based on sub-element (a), killing members of the group, and (b), causing serious bodily or mental harm to members of the group. The court argued that rape and sexual violence *"constitute genocide in the same way as any other act as long as they were committed*" with genocidal intent[226]. They *"certainly constitute affliction of serious bodily and mental harm on the victims and are even (...) one of the worst ways of inflict harm on the victim"*[227]. Moreover, it concluded that *"the acts of rape and sexual violence (...) 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 members in the process"*[228].

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[221] Mettraux, G., *op. cit.,* pp. 207-208.
[222] *Ibid,* 208.
[223] ICTY, Prosecutor v. Radislav Krstic, Case No. IT-98-33-A (Appeals Chamber), 19 Abril 2004, para. 12.
[224] ICTY, Prosecutor v. Goran Jelisi, Case No. IT-95-10-A (Appeals Chamber), 5 July 2001, para. 48.
[225] Rogers, S., "Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court", *George Washington International Law Review,* vol. 48, No. 2, p. 278.
[226] ICTR, Prosecutor v. Jean-Paul Akayesu, *op. cit.,* para. 731.
[227] *Id.*
[228] *Ibid,* para. 733.

Likewise, in the *Kayishema case,* the chamber observed that rape may constitute a condition of life calculated to bring about destruction of the group, and thus amount to rape under sub-element (c). It argues that it *"includes methods of destruction which do not immediately lead to the death of the members of the group",* like starvation, the denial of medicine and rape[229]. It has been argued that in order for rape to constitute a condition of life calculated to bring about physical destruction it must be committed repeatedly, over a substantial period of time and without the intent to kill the victim by any other means[230]. For instance, a condition of life which may clearly seek the physical destruction of a group is the intentional infection of members of such group with HIV/AIDS through rape[231].

Also, sexual violence may constitute a measure intended to prevent births within the group. For one, psychological and physical trauma can lead to women being unwilling or unable to have normal affective, sexual or childbearing experiences[232]. Moreover, in certain societies, victims of sexual violence are outcast and isolated, and the child born of a man not belonging to the group may not be considered as a member to it[233]. In Yugoslavia, for instance, the intent of the perpetrators of forced pregnancies was arguably to "dilute" the Muslim population[234]. In short, as long as the act of sexual violence is committed with genocidal *mens rea*, and it can be subsumed in one of the sub-elements provided for in the legal definition of genocide, then it may amount to a crime of genocide.

[229] ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T (Judgement), 21 May 1999, para. 116.
[230] Rogers, S., *op. cit.,* p. 283.
[231] *Id.*
[232] Short, J. M. H., "Sexual violence as genocide: the developing law of the international criminal tribunals and the international criminal court", *Michigan Journal of Race & Law,* vol. 8, No. 2, Spring 2003, p. 511.
[233] *Id.*
[234] Campanaro, J., "Women, War and International Law: The Historical Treatment of Gender-Based War Crimes", *Georgetown Law Journal,* vol. 89, No. 8, p. 2571.

VII. Conclusions

Sexual violence perpetrated during armed conflict, whether international or internal, is prohibited under both treaty and customary international law, though the former only explicitly prohibits rape and enforced prostitution. However, other types of sexual violence are implicitly included in the prohibitions against cruel treatment and torture, outrages against personal dignity, indecent assault, and in the provisions intended to ensure respect for persons and honor. Moreover, and even if sexual violence is used as a tactic of war or of terrorism, its criminalization seems well-suited with the prohibition of sexual violence *as such,* rather than with the provisions regarding the means and methods of warfare. However, not all sexual violence committed during armed conflict amounts to a violation of IHL. Instead, for an act of sexual violence to be considered a violation of IHL, it needs to fulfill the jurisprudential requirement of "necessary or sufficient nexus" and be closely related to the hostilities taking place. Arguably, any sexual violence used to advance either military or terrorist objectives is intrinsically linked to the war advancement, and thus inevitably fulfills the nexus requirement and amounts to a violation of IHL.

Provided that an act of sexual violence fulfills the nexus requirement, it will amount to a serious violation of IHL, and consequently to a war crime, under the Geneva Conventions, if it is committed against protected persons, which includes not only civilians but also prisoners of war and is considered to fall into the categories of either torture, inhumane treatment, or willfully causing great suffering of serious injury to body and health. Most recently, however, the Rome Statute to the ICC has explicitly listed rape and other forms of sexual violence as an independent category of war crimes, and so it is not required that they amount to torture or any other conduct deemed a "grave breach". However, it is noteworthy that, for the "generic" crime of sexual violence, that is, sexual violence other than rape, sexual slavery or enforced prostitution, it requires a certain gravity threshold. Lastly, even if sexual violence perpetrated as a tactic of war or of terrorism does not amount to a war crime, it may still amount to either a crime against humanity or to genocide, provided that the remaining requisites are met, and depending on the specific jurisdiction.

Under IHL, the prohibition of sexual violence during armed conflict seems clear, and its criminalization appears, though nuanced, somewhat comprehensive. This contrasts significantly with its recurrence on the ground. Some have pointed to the lack of enforcement, deriving into impunity for perpetrators and, consequently, to the loss of the deterrent effect that is key to criminal law. Indeed, there is an urgent need to improve the implementation of IHL regarding sexual violence. Moreover, the protection of women and girls against sexual violence should not, neither during armed conflict nor in peacetime, be limited to prosecution and punishment by the courts. Instead, it should rely on available knowledge about the dynamics and root causes of sexual violence, as well as on comprehensive provisions aimed not only at the prevention of sexual violence in the first place, but also at the achievement of gender equality and female participation in all spheres of life. In this sense, although this dissertation is circumscribed to a small sample of violence that women around the globe face daily, it should not be interpreted as being isolated or unrelated to gender social dynamics that predate, permeate and outlive armed conflict. Instead, all violence against women and girls should be addressed comprehensively through the combined framework provided for by the WPS Agenda and the Istanbul Convention, which account for and aim to eliminate the dynamics and institutions that perpetuate gender inequality and, ultimately, gender-based violence.

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