LEGAL AND JUDICIAL APPROACHES TO GENDER-BASED VIOLENCE IN INTERNATIONAL HUMAN RIGHTS LAW

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Nálgun alþjóðlegra mannréttindadómstóla og alþjóðlegra mannréttindalaga á kynbundu ofbeldi

Þessi ritgerð hefur það að markimiði að gera grein fyrir kynbundnu ofbeldi einsog það birtist í alþjóðlegum mannréttindasamningum og fyrir alþjóðlegum mannréttindadómstólum. Undanfarna áratugi hafa orðið miklar breytingar á þessu sviði, kynbundið ofbeldi er í sífellt meiri mæli álitið brot á mannréttindum. Ríkjum heims ber því skylda til þess að koma í veg fyrir kynbundið ofbeldi, þegar það er mögulegt, rannsaka þessi ofbeldisverk og refsa ofbeldismönnum á fullnægjandi hátt. Þessar breytingar hafa í för með sér aukna mannréttindavernd kvenna. Almennir mannréttindasamningar hafa verið gagnrýndir fyrir að taka einungis mið af reynsluheimi karla, en nú er vernd gegn ofbeldi á konum í auknum mæli túlkuð úr þessum sömu samningum og nýir samningar, sem taka á þessu ofbeldi sérstaklega, hafa verið myndaðir.

Við samningu ritgerðarinnar hefur einkum verið byggt á ritum fræðimanna, dómum alþjóðadómstóla, alþjóðlegum mannréttindasamningum og löggjöf einstakra ríkja. Dómaframkvæmd Mannréttindadómstóls Evrópu hefur verið skoðuð sérstaklega vegna fjölda þeirra mála er varða kynbundið ofbeldi sem komið hafa til kasta þess dómstóls.

Sérstaklega er fjallað um heimilisofbeldi, nauðgun, nauðgun sem stríðsglæp og mansal. Mannréttindavernd gegn heimilisofbeldi hefur stóraukist jafnframt því sem lögð hefur verið vaxandi áhersla á jákvæðar skyldur ríkja í mannréttindasamningum. Þannig má nefna að skilgreining á nauðgun í alþjóðlegum mannréttindasamningum hefur breyst mikið til hins betra og býður nú upp á aukna vernd gegn þeim glæp. Er nú svo komið að litið er á kerfisbundnar nauðganir, beitt sem liður í hernaði, sem stríðsglæpi. Mansal á konum til kynferðislegrar misnotkunar fær vaxandi athygli, og hefur það leitt til þess að nýrra lausna er leitað á því vandamáli.

Legal and judicial approaches to gender-based violence in international human rights law

The object of this paper is to account for gender-based violence in international human rights law and before international human rights courts. Great change has been made in this field in the past decades; gender-based violence is perpetually more often viewed as a violation of human rights. States of the world are obliged to prevent this form of violence when possible, thoroughly investigate those violent acts, and punish the perpetrators in an adequate manner. This change incurs increased human rights protection for women. General human rights treaties have been criticized for only using men's experiences as a frame of reference, but now protection against violence against women is increasingly interpreted from these treaties and new ones, which specifically deal with this form of violence, have been formed.

When writing the paper, the writings of scholars, judgments of international courts, international human rights treaties and legislation of single states, are used for references. The European Court of Human Rights is addressed in particular, due to its large case law regarding gender-based violence.

The focus of the paper is on domestic violence, rape, rape as a crime of war and trafficking in women for sexual exploitation. Human rights protection against domestic violence has increased significantly at the same time as increased emphasis has been placed on positive obligations of states in human rights treaties. The definition of rape in international human rights law has changed for the better, and now offers an increased protection against that crime. Systematic rapes as a part of war are now considered war-crimes. Trafficking in women for sexual exploitation enjoys increased attention, and that has led to new solutions to the problem being sought.

1. Introduction

Gender-based violence is one of the most extensive abuses of human rights in the world today, and Western countries are no exception. Every member state of the Council of Europe reportedly has problems concerning this type of violence. Millions of persons are affected by it, irrespective of factors such as social status, cultural or religious background.[1] The problem can, therefore, not be ignored by European, or other Western states. It is not only a problem of the developing countries, but of those developed as well.

Continually more awareness has been raised in regard to the problem of gender-based violence in the world and awareness campaigns have been launched in various countries. One of the essential social mechanisms, which forces women into a subordinate position compared to men, is violence against women.[2] Trafficking in women, rape and other sexual assaults, systematic rape as a war crime, female genital mutilation (circumcision), and domestic violence, among other forms of assault and battering targeted against women, are now more generally accepted as threats to women's lives, and a violation of their human rights. [3] This has led to the issue being addressed by the international community, and solutions being sought.

Why waste time on debating whether or not to acknowledge gender-based violence as a human rights violation? Human rights are those rights, which belong to every human being, for the simple reason that he or she is a human being. The thought that lies behind recognizing certain rights as human rights, is an effort to explain why fundamental rights have been violated, and to find solutions to make sure such violations will not happen again in the future.[4] Recognizing gender-

[1] Van der Veur, Dennis, Buldioski, Goran and Schneider, Annette, *Gender matters: A manual on addressing gender-based violence affecting young people,* Council of Europe, Budapest, 2007, p. 7.
[2] United Nations, *Bejing Declaration and Platform for Action*, New York, 2001, p. 74.
[3] Gordon, Greg, "End violence against women", *Sunday Times South Africa,* 23 November, 2008, p. 24.
[4] Piechowiak, Marek, "What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification", *An Introduction to the International Protection of Human Rights.* Edited by

based violence as a human rights violation provides a more effective protection from this form of violations. The failure to directly recognize it weakens the enforcement capability. By making state protection against gender-based violence a human right, people are afforded adequate remedies, and this right becomes inalienable. The obligations on states are more clear-cut, and violations of this right are more evident. If there is a failure on the regional level, individuals who claim to have been violated against can seek redress on the international level through human rights institutions. Clearly the benefits of gender-based violence being recognized as a human rights violation, opposed to solely a violation of individual states' penal codes, are great.

Violence against women has been prioritized by international human rights law as an international concern and a cause for action. In many statements, resolutions, reports, and actions taken at the international human rights level, as well as on the regional, the value which has been given to dealing with gender-based violence can be seen.[5]

Some international human rights agreements address human rights of women in particular, such as the Convention on the Elimination of all Forms of Discrimination against Women[6] and the Declaration on the Elimination of Violence against Women[7]. But others, which do not address women's rights directly, are now also interpreted as to include a special duty for states to regard those issues in a certain way. For example, the European Court of Human Rights has made it clear in its judgments that Member States to the European Convention on Human Rights[8] are obliged to manage their law and deal with crimes and perpetrators of gender-based violence in a certain manner. States have obligations to intervene

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Hanski, Raija and Suksi, Markku, Institute for Human Rights, Åbo Akademi University, Finland, 1999, p. 3.

[5] Marshall, Jill, "Positive Obligations and Gender-based Violence: Judicial Developments", *International Community Law Review* 10, 2008, p. 154.

[6] Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 14 (1979).

[7] Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. (1993).

[8] Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 5.

when a woman is in danger of being a victim of gender-based violence, investigate the crimes and hold the offenders responsible for their wrongful acts.[9]

This paper proposes to answer what are the legal and judicial approaches to gender-based violence in international human rights law? To answer this question some aspects of gender-based violence will be explored. Is gender-based violence considered more severe before international tribunals now in comparison to how it was ones considered, and are states of the world adjusting their law and order so as to fully grasp the seriousness of the problem? What has changed regarding negative and positive obligations of states in international human rights law? How has the definition of rape changed in the last decades? What impact does it have on judicial practice regarding domestic violence that international human rights are continually moving further into the private field, as opposed to only the public spectrum? Is gender-based violence finally accepted as a violation of international human rights? The development in the last three decades in the field of gender-based violence has been immense, and this development will be accounted for in this paper, as well as the impact it has had in the field of international human rights.

An attempt will be made in this paper to answer these questions. It addresses the issue of gender-based violence in international human rights treaties and before international human rights courts and tribunals, with special emphasis on the European Court of Human Rights. The emphasis on the ECHR is due to its great success as a human rights court, and also because of the many cases regarding the issue the Court has dealt with. As sources writings of scholars, judgments of international Courts and Tribunals, and human rights conventions, will be used, as well as rules and regulations of individual states, when appropriate.

The focus of this paper will be on domestic violence, rape, rape as a crime of war, trafficking in women for sexual exploitation, and positive obligations of states regarding gender-based violence in particular. This focus is based on the following

[9] Judgment of the ECHR in the case of Opuz v. Turkey, 9 June 2009, para. 210.

arguments. Domestic violence is one of the most common forms of violence against women. The development of the definition of rape in the international human rights field is great and has a significant effect on the rights of women. The impact of positive obligations being interpreted in international human rights is major. And the extending of those rights to the private sphere is greatly effective in the jurisprudence of gender-based violence. The focus on trafficking in women for sexual exploitation is due to the seriousness of these violations, and the lack of domestic and international law dealing with them in an effective way.

2. What is gender-based violence?

What is it that separates violence based on gender from other forms of violence?

Author Hilary Charlesworth points out that gender-based violence is differentiated from other forms of violence due to the fact that it is aimed at persons, most often women, because of their gender, but is not a form of violence, which is aimed at persons randomly. Gender-based violence is a term used to place emphasis on the fact that women are subjected to this form of violence because they are women, i.e. because of their gender.[10] It has been categorized into five groups, although they are not exhaustive. Those groups are sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio economic violence, as explained by author Tina Johnson.[11] Within each of these groups of violence many types of violent behavior are featured.

Sexual violence appears in many different forms. Rape, forced prostitution, including trafficking in women for sexual exploitation, incest, and sexual harassment are all examples of sexual violence against women.[12] Marital rape is another example, meaning non-consensual sexual assault, in which the perpetrator is the victim's spouse or partner, and also sexual abuse and sexual

[10] Charlesworth, Hilary, "Asil Insight:The Declaration on the Elimination of All Forms of Violence Against Women", *American Society of International Law Newsletter*, June, 1994, p. 1.
[11] Johnson, Tina, "Gender-based violence"*, Commonwealth Judicial Journal* 15, 2004, p. 22.
[12] Ibid p. 22.

harassment within marriage or a relationship. Moreover, this can include sexual violence, committed by state representatives, or condoned by state.[13]

Physical violence is a general term, which covers domestic violence, such as wife battering and the killings of young girls or women because they are believed to have brought dishonor upon their families (honor killings).[14] An example of an honor killing is a story, which made the news recently all over the world. A sixteen years old girl in Turkey was buried alive by her father for talking to boys. What is most shocking about the story is that the girl had at least three times tried to seek help from the local authorities with no results.[15] This raises questions regarding positive obligations of states parties to the ECHR to safeguard human rights within their jurisdictions. Acts of physical violence also include forced abortion, or sterilization, infanticide in young girls, and also choosing to abort a fetus due to its sex, i.e. prenatal sex selection.[16]

Emotional and psychological violence includes acts, such as isolation or threatening behavior. Harmful traditional practices are for example female circumcision and socio economic violence includes taking away the earnings of the victim, making the women unable to work or denying her a separate income.[17] The subjects, which this paper focuses on, come under sexual violence and physical violence.

The definition of gender-based violence has slowly been processing to recognize the forms of violence lesbian women, gay men, bisexuals and transgender people face. This form of violence is, however, currently generally known as “gay bashing.[18]

[13] United Nations, *Bejing Declaration and Platform for Action,* p. 74.
[14] Johnson, Tina, “Gender-based violence”, p. 22.
[15] Times Online, *Turkish teenager buried alive because friendship with boys shamed family,* last visited 15 February at: http://www.timesonline.co.uk/tol/news/world/asia/article7015758.ece
[16] United Nations, *Bejing Declaration and Platform for Action,* p. 74.
[17] Van der Veur, Dennis, Buldioski, Goran and Schneider, Annette, *Gender matters: A manual on addressing gender-based violence affecting young people*, pp. 55-57.
[18] Ibid, p. 51.

2.1 Definitions of gender-based violence in international conventions

The terms “gender-based violence” and “violence against women” are usually both used in international human rights law, most of the time meaning the same thing. Men, of course, can also be victims of gender-based violence, but this paper will focus on the gender-based violence to which women are more often subjected. Both of these terms will therefore be used interchangeably in this paper.

Men can, for example, face gender-based violence in conflict situations, such as sexual violence, forced recruitment and sex-selective massacre and of course also be victims of domestic violence. It has been pointed out that efforts to address gender-based violence in international human rights law has, so far, focused mainly on violence against women, and by doing so ignored the gender-based violence man encounter. [19] Hopefully, this is just the beginning and the rights of men who are subjected to this form of violence will also be on the agenda of the international community in the future.

The Convention on the Elimination of all Discrimination against Women (CEDAW)[20] is a United Nations General Assembly adopted international human rights treaty, which is purely dedicated to gender equality.[21] Gender-based violence has been recognized by the Committee on the Elimination of Discrimination against Women as “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.[22] Gender-based violence, in a wider understanding of the concept, is directed against a woman because of her gender or affects women disproportionately to

[19] Carpenter, R. Charlie, “Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations”, *Security Dialogue* 37, 2006, p. 84.
[20] Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 14 (1979).
[21] Unifem, *About the Convention,* last visited 12 February, 2010, at: http://www.unifem.org/cedaw30/about_cedaw/.
[22] CEDAW, *General Recommendation 19*, UN GAOR, 1992, Doc. No. A/47/38, article 1. Last visited 12 February, 2010, at: http://www.dirittiumani.donne.aidos.it/bibl_2_testi/c_testi_interpr_ufficiali/c_comit_cedaw/racc19_violenza_engl.pdf

men.[23] CEDAW Article 1, which defines discrimination against women, has been asserted to include gender-based violence.[24] CEDAW has however been criticized for not including any specific provisions, which condemn violence against women. This is especially unfortunate because of the fact that so many women in all countries of the world experience violence every day.[25]

CEDAW was an effort to protect women's human rights from those violations, which men already enjoyed protection from in general human rights treaties. Gender-related harms such as rape, sexual slavery and domestic violence, are not covered directly by the Convention, since these abuses against women do not have their parallel against men, in some opinion. Legal protection against these vicious abuses is sometimes mocked as unjust preferential treatment because typically it is only women who are victims of them. Therefore, in the opinion of radical feminists, the CEDAW is aimed at the eradication of formal discrimination, and not at eradicating the many abuses women suffer from because of their gender. Some radical feminists see this focus on equal treatment as not capturing the subordination and dehumanization women come across because they are women in a men's world. The special protection against these harms women face because they are women is, therefore, in their opinion, not afforded by this Convention.[26]

The United Nations General Assembly has, however, adopted a Declaration on the Elimination of Violence against Women. That declaration specifically addresses violence against women, defining it as the following:

> …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,

[23] Ibid, article 6.
[24] Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 14 (1979), article 1.
[25] Rehman, Javaid, *International Human Rights Law,* Pearson Education Limited, England, 2003, p. 371.
[26] Etienne, Margareth, "Addressing Gender-based Violence in an International Context", *Harvard Women´s Law Journal* 18*,* 1995, pp. 147-149.

> coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[27]

This Declaration was an answer to all those discontented with CEDAW overlooking to define violence against women. It calls upon all states to condemn violence against women, with special emphasis on those countries where practices, which are harmful to women, are still tolerated.[28]

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women defines violence against women, on the grounds of their gender, in the following way: "Violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere".[29]

The Council of Europe adopted a recommendation of the Committee of Ministers to Member States on the protection of women against violence. The definition of violence against women in that recommendation reads as follows:

> …the term "violence against women" is to be understood as any act of gender-based violence, which 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 private life…[30]

No definition of the concept gender-based violence is to be found in The European Convention on Human Rights.[31] But violence, based on gender, has, however, been recognized to be covered by Articles 3, prohibition of torture; and 8, the right to privacy, of the Convention, depending on the severity of the violence. Article 14, prohibition of discrimination, has also been mentioned as covering rights which can be violated when gender-based violence has taken place.

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[27] Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. (1993), article 1.
[28] Ibid, article 4.
[29] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 'Convention of Belém do Pará', 9 June 1994, I.L.M. no. 1534.
[30] European Council, *Recommendation of the Committee of Ministers to member states on the protection of women against violence,* Rec(2002)5, appendix to recommendation, article 1.
[31] Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 5.

When it comes to the rights of women in the Vienna Declaration its main focus is displaying those rights as human rights. It addresses gender-based violence in the following way:

> Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.[32]

Defining gender-based violence as a form of human rights violation is a significant statement of the Vienna Declaration and can be seen to acknowledge the seriousness of this form of violence by stating it a concern of the international human rights field.

The Rome Statute of the International Criminal Court addresses violence based on gender "…when committed as a part of widespread or systematic attack directed against any civilian population…"[33] as a crime against humanity.

Many more human rights mechanisms address gender-based violence or violence against women. However, apart from CEDAW, the Rome Statute, and the regional Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, these human rights treaties are not binding in their nature, although their significance should not be underestimated.[34]

2.2 Consequences of gender-based violence

The consequences women, who have suffered gender-based violence, live with vary greatly. They can depend on the nature of the particular violence, how the women know the perpetrator, and where and in what circumstances the violence takes place. But this violence not only has effects on the woman herself, but also her family and those in her surroundings. It has been estimated that violence

[32] The Vienna Declaration and Programme of Action, GA Res. 48/121 (1993), article 18.
[33] The Rome Statute of the International Criminal Court, U.N.T.S. 90, entered into force 1 July, 2002, articles 7 and 7(h).
[34] Meyersfeld, Bonita C., "Reconceptualizing Domestic Violence in International Law", *Albany Law Review* 67, 2003, p. 395.

against women is as serious a cause of death as cancer and causes more ill health than traffic accidents and malaria combined.[35]

The World Health Organization (WHO) made an extensive research on health of women who had been victims of gender-based violence. Most of the injuries reported were minor, such as bruises, cuts, scratches, bites and punctures. However, in some of the countries, in which the research took place, more serious injuries were common, that is, injuries such as damage to eyes and ears and broken bones, or loss of consciousness as a result of battering. Women, who reported being victims of sexual, or other gender-based violence, reported being in worse health in general than those who had not suffered from gender-based violence. They were significantly more likely to say they were in poor or very poor health. Many also had problems with carrying out every-day chores, such as walking or buying groceries; they suffered pains, loss of memory, dizziness and vaginal discharge. The conclusion of the research was that those women suffered physical effects for a long time after being subjected to gender-based violence.[36]

Other researches have also shown women who have been physically, sexually or emotionally abused by their partner as being persistently linked to many negative health issues. These can be, for example, various constant pain syndromes, difficulties with pregnancy, and digestive and gynecological problems. They can also suffer from various mental illnesses, such as depression, anxiety and post-traumatic stress disorder.[37]

Women who are raped are at a higher risk of contracting sexually transmitted diseases (STDs) than people having consented sex. The reproductive tracts'

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[35] Pickup, Francine, Williams, Susan and Sweetman, Caroline, *Ending Violence Against Women, A Challenge for Development and Humanitarian Work,* Oxfam GB, United Kingdom, 2001, p. 96.
[36] World Health Organization, *WHO Multi-country Study on Women´s Health and Domestic Violence against Women,* WHO Library Cataloguing-in-Publication Data, Geneva, 2005, p.15. Last visited 29 March, 2010, at: http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf
[37] Ellsberg, Mary, "Intimate partner violence and women's physical and mental health in the WHO multi-country study on women´s health and domestic violence: an observational study", *The Lancet* 371*,* 2008, pp. 1166-1168.

surface[38] does normally offer some protection, but this surface is likely to be harmed with rape. Those women are, therefore, at a high risk of getting STDs, and this includes HIV or AIDS.[39]

2.3 The origins of gender-based violence

In general, scholars agree on the origins of gender-based violence lying in the interactions of the genders. Around the world those interactions are characterized by male domination and women's subordination. It has been emphasized in the writings of scholars that many different types of violence against women are based on oppression and inequality. That means that crimes against women are not considered as serious as crimes against men and this universal violence against women and young girls is, therefore, maintained.[40]

The United Nations have acknowledged that women are sensitive to violence which can be physical, sexual, or psychological. This violence is committed in private, for example, at homes, and in public environments, such as at places of work and within educational institutions. They have also confirmed that states can legalize this violence with their inaction, or in the form of bad political policy or ideology.[41]

Women's struggle for survival begins early. The death rate of girls in the ages between one and four is much higher than the death rate of boys in the same age group. In many countries young girls are starved, denied medical attention, or they are not cared for because the boys are preferred. In some countries, for example, India, Korea and China, this causes imbalance in the multitude of the sexes.[42]

Statistical information indicates domestic violence as the most widespread type of violence against women in the world. In the United States, for example, it has

[38] The surface is layered with epithelia, which is a tissue layer that lines interior and exterior body surfaces, such as the reproductive tract, and protects underlying tissues.
[39] Pickup, Francine, Williams, Susan and Sweetman, Caroline, *Ending Violence Against Women, A Challenge for Development and Humanitarian Work*, p. 97.
[40] Vlachová, Marie and Bison, Lea, *Women in an insecure world,* Geneva centre for the democratic control of armed forces, Geneva, 2005, p. 5.
[41] Ibid, p. 5.
[42] Ibid, p. 6.

been estimated that one in every four women suffers from violence in her home. In Peru over half of reported crimes are by reason of women who are victims of intimate partner violence. In India and Pakistan thousands of women are killed or driven to commit suicide by their partners, or parents-in-law, because of constant stimulus and torture. In many parts of Africa violence against women is simply acknowledged as conventional and majority of the violence is not reported or charged for.[43]

In a radical feminist view, the gender element of international crimes, which are based on sex, tends to be suppressed by international law. International law covering gender-based crimes would ideally deal with the violence female fetuses and young girls face, such as sex-selective abortions, female infanticide, and deprivation of nutrition on the bases of sex. Cultural practices, girls and women suffer from, such as sexual abuse in childhood; rape; battering; dowry burnings; being stoned to death for not behaving properly; honor killings; forced sterilization; prostitution as female sexual slavery; pornography; and, last but not least, trafficking in women for sexual exploitation would also be dealt with. All these acts are based on gender, committed by men, because they are men, against women, because they are women. In the perfect world these acts would be recognized as the gender-based violence they are, and as violations against women's human rights, in the opinion of radical feminist Catharine MacKinnon.[44]

In the past decades these gender-based crimes have been on the agenda of international human rights law. So to say that they have been suppressed by international law might not be fair. But more has to be done for this work to be sufficient. And wholly recognizing the gender element of these crimes is necessary to understand why they are committed, and what can be done to prevent them.

[43] Ibid, p. 6.
[44] MacKinnon, Catharine A., *Are women human? And other international dialogues,* The Belknap Press of Harvard University Press, Cambridge, 2006, pp. 192-195.

3. Gender-based violence in international human rights law

Gender-based violence, or violence against women, continually enjoys more attention in international human rights law. However, there is still a long way to go before cases regarding gender-based violence will receive the same treatment as other cases regarding violence before international courts. For example, with regards to burden of proof, it has sometimes been difficult to prove the occurrence of rape. Gender-based violence will, hopefully, at some point be regarded as discriminatory in general, making states obliged to adjust their laws and regulations to protect both men and women. Two international human rights treaties will now be discussed in particular, i.e. the ECHR for its many judgments regarding gender-based violence; and the ICC, for the many references to gender-based violence and violence against women in its statute.

3.1 Gender-based violence and the European Court of Human Rights

As discussed earlier, gender-based violence, or violence against women, is not directly addressed in the European Convention on Human Rights. This form of violence is, however, constantly gaining more recognition by the Court, which now interprets various convention obligations on states to protect women from this form of violence. This is a major progress in the protection of women's human rights in Europe.

When the European Convention on Human Rights was adopted in 1950, gender-based violence and sexual violence was not as much on the agenda of human rights bodies, as one could say it is today. This is probably one of the reasons why this form of violence is not clearly prohibited by the Convention. It does, in fact, not include any direct reference to abuse, which could be called women's specific. Gender-based violence also most often occurs in the privacy of a person's home, and the Convention was drafted with negative obligations of states as the primary object. The state was to stay clear of any unnecessary interference with its citizens. This has, however, not limited the Court in promoting women's rights in its recent case law. The Convention is of a dynamic nature, meaning that its

interpretation has evolved through the years. Therefore, the Court has now found an absolute prohibition of sexual and gender-based violence inherent in the Convention, and has inflicted positive obligations on Member States to protect women from this form of violence.[45]

The crime of rape has proven somewhat difficult to place under one specific Article of the Convention and it seems it may make some difference whether the perpetrator is a private individual or an agent of the state. I.e. Member States have a greater obligation to protect their citizens against violations from agents of the state, but they also have an obligation to deal with cases concerning rape committed by private individuals in a sufficient manner.[46]

In author Ivana Radačić's opinion the Court has not yet succeeded in acknowledging sexual violence as gender discriminatory. The Court has failed in noting the gender-based nature of rape and other sexual violence, and also in noting how vulnerable certain groups of women can be, such as women with disabilities living in institutions as in the case of X and Y v Netherlands[47]. It does note the vulnerability to sexual violence of detainees in the case of Aydin v Turkey[48], but not specifically female detainees.[49] Scholars disagree on the possibilities the Court had in these cases, and they will be discussed more thoroughly later in this paper.

Another failure of the Court is missing the opportunity to uphold that the previous and sequent sexual behavior of an alleged victim of rape is not relevant when assessing if rape has been committed. The Court had the chance to do so in the case of Aydin v Turkey. In the case the dissenters suggested that the applicant had lied about the rape to cover up the loss of her virginity. They also claimed that because she was able to get married and conceive a child soon after the incident,

[45] Radačić, Ivana, "Rape Cases in the Jurisprudence of the European Court of Human Rights", *European Human Rights Law Review,* No. 3, 2008, pp.359-360.
[46] Ibid, p. 362.
[47] Judgment of the ECHR in the case of X and Y v Netherlands, 26 March, 1985.
[48] Judgment of the ECHR in the case of Aydin v Turkey, 25 September, 1997.
[49] Radačić, Ivana, "Rape Cases in the Jurisprudence of the European Court of Human Rights", p. 365.

it indicated that she had made up the rape. The Court did not address this argument specifically, but it could have used this opportunity to state that this is not relevant to the prosecution of rape. See further discussion in Ivana Radačić.[50]

A few cases before the ECHR, which deal with gender-based violence, will now be recapitulated. They are categorized according to the Articles on which they are based. This categorization is, however, not complete, since many of the cases deal with more than one Article. The Articles, that are most often relied on in these cases are Articles 3 and 8. Article 14 is also examined in particular because it deals with discrimination. Some of these cases will be referenced again later in the paper, if they are also appropriate under other chapters.

3.1.1. Article 3 – Prohibition of torture

Torture is a fundamental violation of human rights. Equality between the sexes is a basic human rights value and many states guarantee equality in their laws, and it has been legally guaranteed internationally. Violence over a long time on the basis of sex, such as in the form of battering, pornography, or rape, has, however, not always been viewed as violation of human rights, although it is, in some instances, severe enough to easily fall under definitions of torture. If it is accepted that this gender-based violence is covered by human rights instruments, states have a positive obligation to protect their citizens from it and offer solutions for victims, and alleged victims, who feel their states have failed them, can seek help on another judicial instance. In the radical feminist view of Catharine A. MacKinnon, if abusing of women is not viewed as a human rights violation, it implies that women are not human, i.e. if states are not under any obligation by human rights standards to address this abuse. Human rights standards should be recognized as violated when torture is based on gender, just like when torture is based on anything else.[51]

Torture, in the general non-legal meaning of the word, does not only happen during war, in prison cells, or detention centers in the less developed parts of the

[50] Ibid, p. 373.
[51] MacKinnon, Catharine A., *Are women human? And other international dialogues,* p. 17.

world. Torture can happen in homes or work places in the western world. Torture, in its traditional legal understanding, has not been recognized widely enough so as to include the personal aspect of it. The social and legal responses for women who are tortured in their homes are not the same as, for example, men who are tortured during questioning in detention. Author Catharine A. MacKinnon explains torture, in the legal sense, as based on something that could be done to men as well as women. The form of gendered torture is, therefore, not as easily recognized as a human rights violation, and women do not, for that reason, as easily enjoy the same social and legal resources as men.[52]

Article 3 of the ECHR is a prohibition of torture and inhuman or degrading treatment or punishment. The prohibition is absolute and can not be lifted under any circumstances. The concept of torture is not defined in the Article itself. The Court has, however, adduced to the definition of The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[53] The definition reads thus:

> …torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions…[54]

This does, however, not have to mean that the Court is bound to follow this definition of torture. For example, it should be able to expand the definition so it also covers acts, which are not in committed by public officials. The European Court of Human Rights has stated that treatment can be considered inhuman if it was "…premeditated, applied for hours at a stretch and caused either actual

[52] Ibid, p. 21.
[53] Guðrún Gauksdóttir, *Mannréttindasáttmáli Evróp: Meginreglur, framkvæmd og áhrif á íslenskan rétt.* Edited by Björg Thorarensen, Davíð Þór Björgvinsson, Guðrún Gauksdóttir and Hjördís Björk Hákonardóttir, Háskólaútgáfan, Reykjavík, 2005, pp. 114.
[54] United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S. 85, 26 June, 1987, article 1.

bodily injury or intense physical and mental suffering…"[55]. It has further stated that treatment can be considered degrading when it is such "…to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".[56] Severe gender-based violence can meet with these requirements. And even reach the level of severity for the violence to be considered torture. Domestic violence, for example, is often applied for a long time and causes injuries and even death. Sexual violence arouses in victims feelings of humiliation and fear. So if states do not regard the seriousness of this violence, individuals should be able to seek help in human rights law.

The Court has made clear in its interpretation of Article 3 that the duress has to reach a minimum level of severity to fall under the scope of the Article.[57] Severe sexual violence has been interpreted by the Court to fall under the scope of the prohibition of torture, when committed by public authorities, in the case of Aydin v Turkey.

The facts of the case of Aydin v Turkey were that the applicant along with her father and her sister-in-law had been arrested by local authorities and taken to detention. During the detention she had suffered much duress, distress and humiliation. She had been blindfolded, beaten, stripped naked, spun around naked in a tire and hosed with pressurized water. During the three days she was detained she had also been raped by a member of the security forces. The applicant complained of a violation of Article 3, for the rape and ill-treatment she had suffered, and claimed it amounted to torture.[58] In its judgment the court places emphasis on the severity of sexual abuse, i.e. rape:

> ... Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not

[55] Judgment of the ECHR in the case of Juhnke v. Turkey, 13 May, 2008, para. 70.
[56] Ibid.
[57] Guðrún Gauksdóttir, *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt,* p. 112.
[58] Judgment of the ECHR in the case of Aydin v Turkey, 25 September 1997, para. 74-84.

> respond to the passage of time as quickly as other forms of physical and mental violence...[59]

The seriousness of rape is, therefore, wholly acknowledged by the Court, when committed by an official of the state. The Court found, in this case, the constraint and the rape the applicant suffered from, to amount to torture. However, the applicant also argued that the authorities had been in violation of Article 3 when they did not thoroughly investigate her complaints of torture. The Court did not accept this in itself to be a violation of Article 3, and examined this complaint under Articles 6 and 13 of the Convention.[60]

The fact that the Court acknowledges rape in custody as an especially cruel form of torture in this case, and the fact that it identifies detainees as an extremely vulnerable group, is a very well-met, gender-sensitive judicial articulation. However, some deliberation should be on the focus on whether or not the victim is a vulnerable person to determine the severity of the violence, and on the focus of the perpetrator being a state official. This means that the Court's reasoning in this case will probably not be used as to find a state in violation for torture when the case involves two private individuals, even when the state could have done more to prevent the violence, investigate more thoroughly or punish the perpetrator.[61]

The case of M.C. v Bulgaria[62] is another which raises questions regarding Articles 3 and 8 and the positive obligations they entail. This case has been viewed as a landmark in the Court's definition of rape and the work processes it obliges Member States to secure for victims of rape. The case involved a 14 year old girl who alleged she had been raped twice the same night, by two different men. After some investigation, the case had been closed by the prosecution because of lack of evidence of physical force, or threats of force being carried out by the alleged abusers.[63] The complaint made by the applicant was, therefore, based on the Bulgarian legal framework and insufficient practice, to protect women from sexual

[59] Ibid, para. 83.
[60] Ibid, para. 20, 76 and 88.
[61] Radačić, Ivana, "Rape Cases in the Jurisprudence of the European Court of Human Rights", p. 363.
[62] Judgment of the ECHR in the case of M.C. v Bulgaria, 4 December, 2003.
[63] Ibid, para. 64.

violence, and guarantee punishment in cases where such violence had taken place.

The Court placed emphasis on the fact that Member States have positive obligations to investigate, prosecute and adequately punish for rape.[64] In its reasoning the Court discusses how many states have historically placed weight on use of force in the act of rape, when looking for proof of the rape actually having occurred. It found that this had changed in most European countries. The proof of physical force by the abuser was, most often, no longer required. When researching the case law of Member States, the Court found that now the definition of rape lies in the lack of consent, and not so much in the physical violence involved. This, the Court stated, is very important to guarantee women protection against violence, such as rape, in the Member States.[65] The applicant in the case stated that the authorities had not sufficiently investigated her allegations of rape, because there had been no proof of physical force. The Court agreed with the applicant on that matter and found that the Bulgarian authorities had not investigated the case sufficiently, and had, therefore, violated their positive obligations under Articles 3 and 8 of the Convention. It found that the prosecution's approach to investigating sexual offences makes it possible for some rapes to go unpunished and by doing so the individual's sexual autonomy is not protected effectively.[66] It found that the legislation and criminal law system were not adequate to punish all forms of sexual violence, in this case rape.[67] The Bulgarian state was, therefore, found to infringe Articles 3 and 8, subject to degrading treatment, because the domestic law on sexual assault in the state concerned inadequately protected her rights, since they required proof that the victim had physically resisted the sexual assault.[68]

[64] Ibid, para. 153.
[65] Ibid, para. 159 and 162.
[66] Ibid, para. 166.
[67] Ibid, para. 185.
[68] Choudry, Shazia and Herring, Jonathan, "Righting domestic violence*", International Journal of Law, Policy and the Famliy* 20, 2006, p. 107.

The case of Juhnke v. Turkey involved a woman who, while in detention in Turkey, had allegedly been forced to undergo a gynecological examination. The woman claimed that the examination had been performed without her consent, by a male doctor. Gendarmes had taken off her clothes, made her lie down, and touched every part of her body. She claimed that those circumstances constituted a breach of Articles 3 and 8 of the Convention.[69] The Turkish Government stated that the purpose of the examination had been to protect the gendarmes from potential allegations of rape. This examination was done to provide evidence that could be used to refute defamatory allegations of sexual violence, if false accusations of such were to arise from the applicant. The Government also claimed that the examination had been conducted with the applicant's consent.[70] The Court found that being taken to a hospital for a gynecological examination does not reach the minimum level of severity which is required for Article 3 to be violated, i.e. if medical necessity is behind the decision to take the person to the hospital. However, if there is no medical necessity or the examination is not made with the purpose to obtain evidence in a case concerning a particular criminal offence, Article 3 might be violated.[71]

The Court did not find a violation of Article 3, since the applicant's allegations of the examination being against her will could not be supported. It did, however, find established that the applicant had tried to resist the examination, until she was persuaded to consent to it. Because the applicant was a detainee she was vulnerable at the hands of the authorities, and could there for not be expected to continue to resist the examination. The Court therefore found it more appropriate to address the case under Article 8 of the Convention. It found that the consent given by the applicant could not be concluded to have been informed and free. [72] Since the examination was not in accordance with law, and not necessary in a

[69] Judgment of the ECHR in the case of Juhnke v. Turkey, 13 May, 2008, para. 57.
[70] Ibid, para. 60 and 61.
[71] Ibid, para. 71 and 72.
[72] Ibid, para. 76-78.

democratic society, the Court found a violation of the applicant's right under Article 8 of the Convention.[73]

It is interesting to compare this case, Juhnke v. Turkey, with the case of Filiz Uyan v. Turkey, which both address gynecological examination of detainees. In the forenamed case the gynecological examination of the applicant had been conducted, but the Court still did not find a violation of Article 3. In the latter case, which will be discussed hereafter, the gynecological examination was never conducted because of the applicant's refusal, but the Court still found a violation of Article 3.

The other complaint of a violation of Article 3, involving a gynecological examination, came recently before the ECHR. The applicant of the case, Filiz Uyan v. Turkey, complained that during a visit to a hospital for an ultrasound scan she had been subject to inhuman and degrading treatment. When the incident happened, the woman was serving a twenty-two years' imprisonment. The applicant was escorted by three male officers and one female to the hospital. When the consultation was supposed to take place, the officers would not remove her handcuffs and not leave the room. The applicant refused to be examined under these conditions, and at last the investigation was discontinued. She then accused the officers of misconduct, arbitrary treatment and insult. Later she also filed a complaint against the doctor, who had received a warning for professional misconduct. Other accusations of the applicant had not been prosecuted.[74]

The applicant complained to the ECHR of a violation of her rights under Article 3, as well as Article 13, and the Court consented to an examination of the case under Article 3. The Court did not think that whether or not the doctor did, in fact, conduct the medical examination had any effect, the victim allegedly suffered as a result of this.[75]

[73] Ibid, para. 82.
[74] Judgment of the ECHR in the case of Filiz Uyan v. Turkey, 8 January, 2009, para. 4-18.
[75] Ibid, para. 27-28.

The Court stated that Article 3 imposes an obligation on states to protect the physical health of prisoners, and this is an obligation from which no derogation is allowed. It found that even though the medical examination itself had not taken place because of the applicant's denial, the applicant must have suffered distress and humiliation because of the security conditions and with that her personal dignity had been undermined. It, therefore, concluded that there had been a violation of Article 3 of the Convention.[76]

Two judges gave a dissenting opinion to this judgment, stating that the treatment the applicant had been given was not severe enough to be covered by Article 3.[77]

This judgment demonstrates how serious the Court is in not overlooking treatment given to persons on grounds of their gender. There is no doubt that the distress and humiliation the applicant suffered from was due to her being a woman, and male officers being present during her doctor's examination, and even more so, because this was a gynecological examination. The conclusion is somewhat different than the one the Court reached in the case of Juhnke v. Turkey. In that case the gynecological examination took place, even though the consent of the applicant had not been free and informed, and was probably degrading and humiliating for the applicant, as stated in the partly dissenting opinion of two judges of the Court.[78] In the latter case, the examination did not take place. Although the applicant without doubt suffered from the act, it does raise questions regarding Article 3. If the treatment the applicant in the case of Filiz Uyan v. Turkey was subjected to is severe enough to fall under Article 3 of the Convention, the treatment the applicant was faced with in the case of Jehnke v. Turkey, should also have been regarded severe enough to be dealt with under that Article.

3.1.2. Article 8 – Protection of private and family life

Cases have come before the Court regarding state's obligatory protection of persons from sexual abuse under Article 8. The applicants in one of those cases,

[76] Ibid, para. 34-35.
[77] Ibid, dissenting opinion.
[78] Judgment of the ECHR in the case of Juhnke v. Turkey, partly dissenting opinion.

X. and Y. v The Netherlands[79], were a young handicapped girl and her father on her behalf. The facts of the case were, in short, that the girl had been living at a privately run home for mentally handicapped children where the son-in-law of the home's directress had forced her to have sexual intercourse with him. The incident had hurtful consequences for the girl. Her father tried to press charges against his daughter's offender, but was not able to do so because his daughter had reached sixteen years of age, and, therefore, had to do that for herself. Because of her mental disability she was, however, not able to do so. Only if the victim itself had taken action would charges of rape be applicable, according to domestic legislation. In the instant case no one consequently had the legal authority to file a complaint.[80] They, therefore, decided to take the case to the ECHR, arguing that the state had violated a positive obligation found in Article 8 of the Convention. The Court stated:

> ...although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to obtain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life...[81]

As explained by author A. R. Mowbray, in this case the Court demanded state intervention, since the parties to the dispute were an adult who had abused his power over a mentally disabled, much younger person. The girl was in no way competent to take care of herself and to protect her own interests. Criminal law protection for vulnerable persons, such as this girl, was, therefore, an absolute requirement.[82]

The Commission did not find a direct link between the gap in the law of the Netherlands and the field which is covered by Article 3, and, therefore, did not declare the application in this case applicable for consideration under Article 3. The Court did not find it necessary to examine the violation under Article 3 given

[79] Judgment of the ECHR in the case of X. and Y. v. The Netherlands, 26 March, 1985.
[80] Ibid, para. 7-13.
[81] Ibid, para. 23.
[82] Mowbray, A. R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights,* Hart Publishing, Oxford, 2004, p. 129.

that it found a violation of Article 8.[83] The reason for this decision of the Court might be that this case came before the case of Aydin v Turkey and the Court might not, at that time, have been convinced that sexual violence, such as rape, fell under the scope of Article 3. Also, in this case, the perpetrator was a private individual, as opposed to a state officer in the other. That can be seen as having a reductive influence on the seriousness of sexual violence and the responsibilities states have in securing its citizens from that violence, when viewing the Court's case law, in the opinion of author Ivana Radačič.[84] If a case, such as this one, were to come before the Commission now, it could be declared applicable under Article 3, since the interpretation of the Convention is dynamic, and there have been some changes made by the Court regarding gender-based violence.

Another case concerning Article 8 came before the Court eleven years later, the case of Stubbings and Others v The United Kingdom. Four women complained that the interpretation of domestic law in the United Kingdom by the House of Lords had denied them their right to an effective civil remedy. They argued this to be a violation of Articles 6, 8, and 14 of the ECHR.[85] The facts of the case were that all four women had been sexually abused as children by different men, but had not appreciated the nature of their abuse until many years later. By that time, according to civil law, they could not seek damages for the alleged assaults since the claims were dismissed as time-barred, due to statutory limitation. They, therefore, stated that they were deprived of an effective civil remedy against their alleged abusers. In their opinion, the authorities had failed to protect their right to respect for private life, as secured by Article 8.[86] The Court again placed emphasis on that states are under positive obligation to secure a person's respect for private

[83] Ibid, para. 34.
[84] Radačić, Ivana, "Rape Cases in the Jurisprudence of the European Court of Human Rights", p. 364.
[85] Judgment of the ECHR in the case of Stubbings and Others v The United Kingdom, 24 September, 1996, para. 2.
[86] Ibid, para. 43.

and family life. It, however, also stated that the way to secure this right falls within a state's margin of appreciation.[87]

The Court found that in this case the obligatory protection of Article 8 had been afforded by law. The United Kingdom regards sexual violations seriously and these criminal offends are subject to severe maximum penalty, and those criminal charges could still be brought, provided sufficient evidence. The Court, therefore, concluded that there had been no violation of Article 8, because the state did afford protection enough against sexual abuse of children.[88] Civil remedies are subjected to a certain time-limitation, but the Court did not consider Article 8 to require state to provide unlimited civil remedies, where criminal law sanctions are available to victims.[89]

The conclusion in Stubbings and Others v The United Kingdom is by no means that there is no positive obligation under Article 8 for states to protect persons from gender-based violence. The Court rather states that the state had fulfilled its positive obligation under Article 8 in this instant case, because it was within its margin of appreciation how to do so. The women did have remedies available to them through criminal law sanctions, and the state was not obliged to provide unrestricted civil remedies.

3.1.3. Article 14 – Prohibition of discrimination

Article 14 of the ECHR is different from the other Articles in the way that it complements them and can not be argued solely, i.e. it has to be argued parallel to another Article. It is not an independent prohibition of discrimination, but a prohibition of discrimination when applying the rights of the Convention. Three issues regarding the Article have to be addressed before it can be applied. The complaint has to be within the sphere of one of the substantive provisions of the Convention, the applicant has to be able to compare him or herself with a group of people who are treated more favorably, and if there is difference in treatment of

[87] Ibid, para. 63.
[88] Ibid, para. 65-67.
[89] Ibid, para. 66.

the applicant and the control group the state needs to demonstrate that it is based on justifiable grounds. If it can not, there is a violation of the Article.[90]

Article 1 of Protocol No. 12 to the European Convention of Human Rights[91] does however offer a general prohibition of discrimination. According to the Article, any right set forward by law, should be guaranteed without discrimination based on, for example, sex. Concerning Article 14 the applicant has to demonstrate a differential treatment when the rights of the Convention are applied. Article 1 of the Protocol, however, requires the applicant to demonstrate differential treatment in the application of any right of national law. The protection against discrimination it offers is, therefore, broader than the one afforded by Article 14.[92] The Protocol entered into force 2005, and its effects regarding gender-based violence is yet to emerge. It could have a great significance on women's fight for gender equality, now women can complain to the Court when they are faced with discrimination in their national law.

Violence against women goes against the prohibition of discrimination on the basis of gender and is a serious form of discrimination. The principle of non-discrimination is plainly enshrined in international law, and violence against women should, therefore, be viewed as a breach of international law. This principle has, however, not been used in relation to violence against women in practice.[93]

Violence against women, viewed as discrimination based on gender, can make the application of the victim stronger before the Court. Article 14 of the ECHR is a prohibition of discrimination, and can, therefore, be argued, if domestic violence, rape, or other forms of gender-based violence is seen as a discriminatory type of violence. If the applicant can, for example, establish domestic violence as being

[90] Ovey, Clare and White, Robin C. A., *Jacobs and White, The European Convention on Human Rights,* Oxford University Press, New York, 2006, p. 413.
[91] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177, 2001.
[92] Ovey, Clare and White, Robin C. A., *Jacobs and White, The European Convention on Human Rights,* pp. 430-431.
[93] Pickup, Francine, Williams, Susan and Sweetman, Caroline, *Ending Violence Against Women, A Challenge for Development and Humanitarian Work*, p. 51.

based on the gender of the applicant, she can argue a violation of Article 14, as well as a violation of one of the substantive Articles of the Convention. The applicant can, for example, argue that her right to private life has been infringed in a way, which discriminates against her on the grounds of her sex. The arguments for this could be, for example, that domestic violence, which happens proportionally more often to women than men, is regarded less serious than assaults, which happen proportionally more often to men than women. The state then has the opportunity to justify the discrimination with objective and reasonable grounds, which probably would not exist if this was the case. If the respondent then argues an infringement of his Article 8 rights as well, his argument could be regarded as weaker, since against the women, two Articles have been violated, as explained by authors Shazia Choudry and Jonathan Herring.[94] The ECHR has, however, been reluctant to note the discriminatory factor of gender-based violence in its judgments.

3.2 Gender-based violence and the International Criminal Court

The preamble of the Rome Statute of the International Criminal Court (ICC) sets forth its fundamental aim, namely that: "…the most serious crimes of concern to the international community as a whole must not go unpunished…"[95]

At the international level, gender-based crimes as crimes against humanity and war crimes, and sexual violence have, for a long time, been ignored to a certain level. Inadequate investigations and prosecutions of rape and other sexual violence have put its mark on international human rights, and solutions to this violence were sought when the final version of the Rome Statute was discussed. The initial drafts of the statute did not give as much attention to gender-based and sexual violence as the current statute does. But when this final version was drafted, the necessities of the gender-references which are now a part of the statute were accepted by most delegates. The provisions which are being discussed here can be seen as signs of the drafters' intent that special attention

[94] Choudry, Shazia and Herring, Jonathan, "Righting domestic violence", p. 112-113.
[95] The Rome Statute of the International Criminal Court, U.N.T.S. 90, entered into force 1 July, 2002, preamble.

should be given to sexual violence and gender- based violence. Among those Articles, which indicate the special nature of this form of violence, is for example Article 54, which requires that while investigating and prosecuting before the Court, the Prosecutor should "…take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children…"[96]. The statute further requires states to keep in mind when electing the Court's judges: "…the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women…"[97]. These provisions have, nonetheless, been found not adequate to guarantee an effective investigation and prosecution of this form of violence before the ICC. The Office of the Prosecutor has been criticized for failing to include charges of sexual violence in indictments, even though there are allegations of such violence, and for the lack of an effective strategy when investigating sexual violence.[98]

When assessing whether a case should be trialed before the ICC the principle of complementarity is used. When the national justice system is either unable or unwilling to investigate and prosecute on its own, the Court is permitted to step in. But since the statute explicitly states the responsibility of a particular attention being given to sexual violence and gender-based crimes, state's laws, procedures, and policies, which lead the way when investigations and prosecutions of those crimes are carried out should be given special attention by the Prosecutor, in the opinion of Susana SaCouto and Katherine Cleary. They further argue that this should be the procedure even when states seem capable and have a functioning legal system and there seems to be a will to prosecute at least some perpetrators, which would be prosecuted by the ICC. States can actually be trying to improve their judicial system and have a great will to prosecute those crimes, but if this is only what is looked at, and their actual responses to gender-based crimes and sexual violence are disregarded, many

[96] Ibid, article 54(1)(b).
[97] Ibid, article 36(8)(b).
[98] SaCouto, Susana and Cleary, Katherine, "Prosecuting sexual and gender-based crimes before international/ized criminal courts: The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court", *American University Journal of Gender, Social Policy and the Law* 17, 2009, pp. 337-341.

crimes would not come to the attention of the ICC and, therefore, be left inadequately punished.[99]

The ICC has significantly improved its protection against gender-based violence and sexual violence. The duty to protect women against this violence is clear in the statute, but these cases still seem to be viewed as requiring higher level of proof by the Chambers. The special Tribunals adopted for the former Yugoslavia and Rwanda are other examples of this success of the ICC regarding gender-based violence, and will be discussed further, later in this paper. In some cases, however, the Prosecutor has seemed reluctant to prosecute for gender-based crimes even though witnesses and other evidence appear to have more than justified charging on those grounds.[100] In other cases, it seems the Chamber has not been willing to convict individuals for gender-based violence, due to reasons, such as the acts being of a manner likely originating from a higher authority then the accused, even though, some infer, the evidence has seemed more than enough to convict.[101]

The Rome Statute has gone even further than the special Tribunals because it has broken the legal association between crimes against humanity and war crimes. Rape and sexual violence have, before the Tribunals, been prosecuted as crimes against humanity in the context of armed conflict, but this definition has reached even further in the Rome Statute, so that sexual and gender crimes can constitute crimes against humanity when committed in circumstances of peace, when they are committed as a part of a widespread or systematic attack, and this will at some point have significant implications.[102]

Giving gender-based violence the weight it is given in the Rome Statute should be acknowledged for what it is, i.e. a huge step forward in the campaign of recognizing gender-based violence as a human rights violation.

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[99] Ibid, p. 342-345.
[100] See for example the initial charges of the Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 2 September, 1998.
[101] See for example the Prosecutor v. Galic, Case No. IT-98-29-T, 5 December, 2003.
[102] Pickup, Francine, Williams, Susan and Sweetman, Caroline, *Ending Violence Against Women, A Challenge for Development and Humanitarian Work,* p. xiii.

4. Positive obligations of states

Many, including feminists, have criticized international human rights protection for traditionally only protecting individuals from violations of their human rights, committed by their own states. However, protection from violations of non-state actors is now increasingly covered by international human rights law, and this is done trough positive obligations of states. Gender-based violence is one of the human rights fields in which increasingly more violations by non-state actors are being included and interpreted as human rights violations. Judicial developments demonstrate that state accountability for gender-based violence exists in practice through court decisions. States have an obligation to prevent violations; to control private actors, with legislation, for example, investigate crimes, prosecute perpetrators and punish them. If they do not, international bodies have concluded that the states will be liable for their failure. Reasonable steps to prevent violations of human rights are required by governments, not only with legislation, but also by making sure the legislation is being enforced.[103]

Author Jill Marshall points out, when re-interpreting international law, the fundamental objectives of the area of that law needs to be seen. When dealing with international human rights law, those fundamental objectives are safeguarding and developing human freedom and dignity. Women, as well as men, need to be accorded the respect to live their lives with integrity and freedom, and law and other institutions should recognize that each person is special. Equality is not respected and women are not treated fully as human beings if violations, which women suffer from, are not seen as human rights violations, not taken seriously by law, ignored, or silenced. To secure women the protection, which international human rights law accord, positive obligations of states have to be interpreted in this law as well as negative obligations of states.[104]

[103] Marshall, Jill, "Positive Obligations and Gender-based Violence: Judicial Developments", pp. 143-144 and 148.
[104] Ibid, p. 167.

4.1 The public and private spheres

The narrow focus, which human rights law used to have, made events within the private sphere, such as inside homes, fall beyond its jurisdiction. Human rights law took focus on the public sphere and separated the private sphere from its field. This caused states not to be obliged by human rights law to take action against violence, when it happened within the household, although most of them did criminalize gender-based violence. Women were, as a result of this, not strongly protected from violence under international human rights law. Violence, which women are most likely to suffer from, such as rape, domestic violence and incest, happens within the home and the perpetrators are most often someone they know, e.g. their husbands, parents, other partners, or sons. This violence, which happens within the home, especially by a husband against a wife, has even been seen as natural, and this is linked to the distinction between the public and the private sphere. The family has been regarded as an institution, to which consideration should be given and, therefore, placed outside of public action. This distinction has caused women, who suffer, for example, torture in their home to be excluded from the protection offered by international human rights law.[105]

Human rights protection is now moving further into the private sphere, and is also covering the abuses of private individuals against other individuals. The state now has an obligation to do what it can to prevent violations of persons' human rights under many human rights treaties. The requirement of the perpetrators being state officials is not absolute any more, and those rights are being interpreted to stretch further into persons' homes, as opposed into only in the public realm.

4.2 Positive obligations of public international norms

It is completely consistent with public international norms to compel states to enact positive law to protect civil, political and social rights of women. This sorf of requirement exists in, for example, The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the International

[105] Pickup, Francine, Williams, Suzanne and Sweetman, Caroline, *Ending Violence Against Women, A Challenge for Development and Humanitarian Work,* pp. 47-48.

Covenant on Civil and Political Rights[106] and the Inter-American Convention to Prevent and Punish Torture[107]. Member States are required to adopt specific legal measures to meet the obligations of the treaties. This is, however, very unpopular by contracting states to such treaties. They are not comfortable with bringing these international provisions into their national jurisdictions, which requires them to ensure domestic enforcements of the positive law. Member States feel that their national sovereignty is threatened by duties to punish, which are enacted by those treaties. Sovereignty of states is a principle which underlies public international law, and states are not afraid to raise their legal sovereignty to reject and criticize undesired observations of the status of human rights of women within their states, as well as undesired observations of other nature, as explained by Margareth Etienne.[108]

A clear example of positive obligations in international human rights law can be found in CEDAW. The Convention states that gender-based violence is a discrimination covered by it. In its general recommendation No. 19 on violence against women the CEDAW Committee states in Article 2 that contracting states to the convention are obliged to:

> …take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[109]

The Committee also recommends steps, which states should take in this respect, i.e. to eliminate discrimination against women. This is an example of clear positive obligations on states. States are made responsible for the acts of private individuals, if those acts are a consequence of the state's failure, and the

[106] International Covenant on Civil and Political Rights, U.N.T.S. 171, 23 March, 1976.
[107] Organization of American States, *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67, last visited 30 March at: http://www.unhcr.org/refworld/docid/3ae6b3620.html
[108] Etienne, Margareth, "Addressing Gender-based Violence in an International Context", *Harvard Women´s Law Journal* 18*,* 1995, p. 153-154.
[109] CEDAW Committee, *General Recommendation No. 19 Violence against women,* 11th session, 1992, article 9.

Committee gives specific steps, which states should follow, if they want to fulfill their obligations under the Convention.

4.3 Positive obligations of the ECHR

The obligations the substantive Articles of the ECHR impose on states are for the most part negative obligations. That is, the state shall refrain from doing anything to cause an individual any harm. However, these Articles also include positive obligations which, states have to oblige to fulfill. In regards to Article 8, for example, two types of positive obligations can arise. To secure the rights covered by the Article a state can be obliged to take some action, for example, change the laws or the work process of the authorities of the state so as to secure respect for the rights covered by the Article. The other scenario, which can emerge, is when a state is obliged to intervene to protect an individual whose private and family life is being interfered with by another individual.[110]

4.3.1. Positive obligations in the case law of the ECHR

Positive obligations of contracting states to the ECHR, were upheld in the case of Osman v United Kingdom, which is a leading judgment in the case law of the ECHR in regards to positive obligations of state.[111] Although that case does not involve gender-based violence, it is a confirmation of those positive obligations, which are inherent in the ECHR. The Court stated in that case that:

> …it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk…[112]

[110] Ovey, Clare and White, Robin C. A., *Jacobs and Whit: The European Court on Human Rights,* p. 243.
[111] Judgment of the ECHR in the case of Osman v United Kingdom, 28 Octorber, 1998.
[112] Ibid, para. 116.

As explained by author Patricia Londono[113], these arguments may serve as a precedent in cases relating to gender-based violence, such as the recent case of Opuz v Turkey.[114]

This was the first case in which a female applicant was successful in bringing an application before the ECHR under Articles 2 and 3 regarding domestic violence.[115] This judgment, from 2009, will hopefully have a positive influence for women charging authorities for being in violation of their rights under these Articles, when affected by domestic violence.

The applicant in the case was a woman, whose husband had killed her mother. The applicant and her mother were married to father and son. They had suffered many physical offences and threats by the two men. Both women had been medically certified by a doctor as to have suffered from life-threatening injuries. They had filed multiple charges against their husbands, but each of them had been withdrawn as the husbands were released from custody. According to the criminal code of Turkey, the complaints of the victims were necessary to pursue the cases. The husband, however, had been charged for two very severe assaults, one with a knife and the other when he ran the women over with a car. Those charges resulted in a fine, imposed on the offender. The applicant and her mother had not been offered any help. The applicant's mother had filed a complaint with the public prosecutor's office and claimed that her son in law had issued death threats towards her. The husband was taken in for questioning, but then released. Less than two weeks later he had shot and killed the applicant's mother.[116]

The applicant stated that the authorities had violated Article 2 of the Convention, which provides the right to life. They had failed to safeguard the life of her mother.

[113] London, Patricia, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", *Human Rights Law Review* 9*,* 13 October, 2009, p. 661.
[114] Judgment of the ECHR in the case of Opuz v Turkey, 9 June, 2009.
[115] Londono, Patricia, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", p. 665.
[116] Judgment of the ECHR in the case of Opuz v Turkey, 9 June, 2009, para. 7-54.

She also claimed a violation of Article 3. The authorities had neglected to secure her from her husband's violent and abusive treatment. And thirdly, she claimed that Article 14 had been violated when read in conjunction with Articles 2 and 3. She insisted that she and her mother had been discriminated against on the basis of their gender.[117]

The Court stated, with regard to positive obligations of states, that:

> ...the failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State...[118]

In their defense, the Turkish authorities stated that if they had tried to separate the husband from the applicant, they would have been in violation of their right to family life, as guaranteed under Article 8 of the Convention. The Court, however, concluded that there were certain factors, which had to be acknowledged by the authorities before deciding whether or not to pursue prosecution, such as the seriousness of the offence. The authorities have to strike a balance between Articles 2, 3 and 8, when they decide on a course of action.[119]

Human rights, as well as other law, have been criticized for not being gender neutral. They are, by legal feminists, said to have been written by men, and are, therefore, based on their perception of life. For example, the right to family or private life has been criticized for preventing authorities from investigating the suppression of women within their homes.[120] This feminist perspective is certainly applicable to the reasoning of the judgment, taking into account the Turkish authorities' defense, i.e. that they were trying to prevent a violation of Article 8 and the Court's argument that a balance has to be stricken between the Articles.

In its judgment the Court adduces decisions of the CEDAW Committee, when it underlines that: "...in domestic violence cases perpetrators´ rights cannot

[117] Ibid, para. 118, 154 and 177.
[118] Ibid, para. 136.
[119] Ibid, para. 137-138.
[120] Charlesworth, Hilary: „What are women's international human rights?" *Human Rights of Women, national and international perspectives.* Edited by Rebecca J. Cook, University of Pennsylvania Press, Philadelphia, 1995, p. 71-73.

supersede victim´s human rights to life and to physical and mental integrity".[121] This can be seen as a vote of confidence in the work of the CEDAW Committee and an acknowledgement of its work in upholding women's human rights. Another conclusion, which can be drawn from this, is that the Court is acknowledging that in domestic violence cases, procedural guarantees cannot be depended on when a person's right to mental and physical integrity, as well as the right to life, are at risk. These guarantees may have to be altered to some extent to secure the complainant's protection, as explained by author Patricia Londono.[122]

Even if the victim withdraws her complaint and does not want to press charges against her abuser, the prosecution authorities should, in some instances, be obliged to press public charges. In this case, this should have been considered by the authorities, given the fact that the women withdrew their charges after the husband had been released from custody. The authorities should have realized that threatening behavior on behalf of the husband, directed at the women, was very likely to have occurred.

Positive obligations of states can also arise in relation to Article 14. If the discrimination arises by a failure of the state to ensure non-discrimination, the state can have a duty to correct the discrimination through positive action.[123] In this case the Court depended on the work of, for example, the UN Commission on Human Rights[124], the Inter-American Commission on Human Rights[125] and the CEDAW Committee. These human rights bodies have all come to the conclusion that violence against women is a form of discrimination.[126] The Court used its reasoning as a part of its decision, that in this case the applicant and her mother had suffered gender-based violence. The Court found that the practice of the authorities created a climate that was conducive to domestic violence, and thereby

[121] Judgment of the ECHR in the case of Opuz v Turkey, 9 June, 2009, para. 147.
[122] Londono, Patricia, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", p. 663.
[123] Ovey, Clare and White, Robin C. A., *Jacobs and White, The European Convention on Human Rights,* p. 414.
[124] UN Commission on Human Rights, Res. 2003/45, 23 April 2003, E/CN.4/RES/2003/45.
[125] Inter-American Convention on Human Rights, 9 I.L.M. No. 673, 1970.
[126] Londono, Patricia, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", p. 666.

discriminated against women.[127] This judgment of the Court, therefore, is very important in the quest for gender-based violence being acknowledged as a human rights violation under international human rights law.

In the case X and Y v Netherlands, which was discussed earlier, the Court clarified some aspects of positive obligations of states under Article 8: “These obligations may involve the adoption of measures designed to secure respect of private life even in the sphere of the relations of individuals between themselves”.[128] With these words the Court notes that the obligations of the Article may not only lie in non-interference of state, but also in the state using some measures to protect these rights of individuals when endangered by other individuals. In this case, the Court found that the criminal law had left the applicant unprotected and, therefore, found a violation of Article 8.

In Aydin v Turkey the Court found that the state had been obliged under Article 13 to provide the applicant with an effective remedy, payment of compensation if appropriate, and an investigation, which is thorough and effective enough to find the perpetrator and finally punish him adequately. Included in a thorough investigation is noted a proper medical examination by independent professionals with competence in cases of rape, which had not been provided in this case. [129] The medical examination, which had been conducted, had, for the most part, evolved around establishing whether or not the woman had lost her virginity, and if she had lost it, when that had happened. The Court criticized this and noted that this medical examination should have been conducted to establish whether or not the woman was a rape victim.[130]

It is, however, not usual for the Court to give such specific instructions of how to fulfill positive obligations under the Convention. This is a positive step, which

[127] Judgment of the ECHR in the case of Opuz v Turkey, 9 June, 2009, para. 198.
[128] Judgment of the ECHR in the case of X and Y v Netherlands, 26 March, 1985, para. 23.
[129] Judgment of the ECHR in the case of Aydin v Turkey, 25 September, 1997, para. 103.
[130] Ibid, para. 107.

moves the Court closer to establishing standards, which all Member States must follow in order to secure effective protection for women against rape.[131]

M.C. v Bulgaria was another case where the Court found that the state had not fulfilled its positive obligations under the Convention. Under the domestic law and prosecutorial practice the use of force by the perpetrator and a violent resistant by the victim seemed to be necessary for the case to be prosecuted. The applicant claimed that lack of consent should be what defines rape, but not the use of force during the act. The Court found in favor of the applicant and noted that states have a positive obligation under Articles 3 and 8 of the Convention to make sure their criminal-law provisions are effective in punishing rape, and make sure that those laws are applied in practice. The Bulgarian authorities had failed to investigate thoroughly the case and placed too much emphasis on evidence of physical resistance.[132]

This case law, which shows continually more positive obligations of states interpreted from the Convention, is a very positive step in the fight against gender-based violence. This form of violence does not often happen in the public, such as many other forms of violence, and is most often committed by private actors. Therefore, interpreting international human rights law to entail states to include specific work processes and law in their domestic legal systems, has a significant meaning in this battle for gender equality in the fight against human rights violations.

5. Rape

The definition of rape has changed over the last few years. At no other time in history have women enjoyed more sexual autonomy and self-determination than they do today. For example, in Grágás, the statute book of Iceland from the commonwealth age, the interests that were protected by the law in cases of rape were not the interests of the women, but rape was rather considered a criminal

[131] Radačić, Ivana, “Rape Cases in the Jurisprudence of the European Court on Human Rights”, p. 367.
[132] Judgment of the ECHR in the case of M.C. v Bulgaria, 4 December, 2003, para. 153.

offence against the father or husband of the victim. The woman was seen as property of the family, and raping a woman was compatible to other destruction of property.[133]

Fortunately, in most parts of the world, this is not the case anymore. Modern rape law reforms have resulted in empowering women's rights. The Icelandic penal code, for example, now addresses rape and the charges for committing rape, in Article 194 thus: "Anyone who by means of violence or threats of violence forces a person to have carnal intercourse or other sexual intimacy shall be subject to imprisonment for no less than 1 year and up to 16 years…".[134]

However, when sex becomes rape is not always clear, and in many judgments it seems to be difficult defining when sex stops being just sex and becomes rape. Determining whether sex was voluntary or criminal can prove difficult, when the alleged victim and the alleged perpetrator are not unanimous in their stories. And even if both individuals are in agreement of what happened, the definition of what is rape can be hard to find.

The most common definitions of rape either require proof of the sex being against the victim's consent, or a proof of force or threat thereof by the perpetrator. It can, however, be difficult to certify if there was consent by the claimed victim. Does the consent have to be verbal? Or is the woman giving consent if she does not say no to having sex? Even though the way women dress or how much they've had to drink is not considered as risk taken by the women any more, it still seems easier to convict a man when the victim is a responsible woman who does what she can to minimize her risk of getting raped. In fact, it often seems the woman has to be

[133] Þorbjörg Sigríður Gunnlaugsdóttir, "Nauðgun frá sjónarhóli kvennaréttar", University of Iceland, department of law, Reykjavík, 2005, p. 32.
[134] Icelandic penal code, No. 19/1940, (Almenn hegningarlög nr. 19/1940), article 194. English translation accessible at: http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/1145

nearly unblemished to be taken seriously as a victim of rape, as cited by Jane Campbell Moriarty.[135]

The question whether or not a woman has been raped has been the main issue in many cases on the domestic level, and some of them have found their way before international human rights courts. On the international level, the findings of local authorities of not being able to proof that a criminal offence has taken place and, therefore, the decision not to proceed with the case, can be a reason for the plaintiff to complain to international courts. Also, when findings of judges entail pronouncing the alleged perpetrator not guilty has encouraged victims to complain to international courts when they feel the investigation of the alleged offence was not adequate. Rape has also been perpetually more successfully trialed as a war crime before the United Nations International Criminal Tribunals of Yugoslavia and Rwanda. A few of those international judgments concerning rape will be reviewed and their implications in the field of international human rights law will then be discussed. First, there will be a short discussion of rape as a war crime.

5.1 Rape as a crime of war

When laws of war were written, rape was regarded as being an inevitable consequence of war.[136] Mass rapes and other violent acts against women have for a long time been used as weapons of war and intimidation. Over twenty thousand women were reportedly raped by members of both the Serb and Croatian armies during the Balkan war, for example. This fact, that rape is being used as a weapon of war, but not being trialed as such, has been scarified by women's groups and other international human rights groups.[137] The Statues of the United Nations War Crimes Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) are a great success in the development of giving those crimes the weight that they deserve. They represent a shift in the mindset of the international human rights community.

[135] Moriarty, Jane Campbell, "Rape, Affirmative Consent to Sex, and Sexual Autonomy: Introduction to the Symposium", *Akron Law Review* 41, 2008, pp. 841-844.
[136] Goldstone, Richard J., "Prosecuting Rape as a War Crime", *Case Western Reserve Journal of International Law* 34, 2002, p. 279.
[137] Etienne, Margareth, "Addressing Gender-based Violence in an International Context", p. 139-141.

The Chamber of Rwanda handed down a conviction for rape as a crime against humanity for the first time in the history of humanitarian law. And it even held further that rape could also constitute the crime of genocide. This demonstrates one of the most important successes of these Tribunals, i.e. their development of international humanitarian law in relation to the treatment of gender-based crimes and especially systematic mass rape.[138]

Rape in general is a human rights abuse, which mostly women suffer from because of their gender, whether the offence is committed in war-time or not. When it comes to war, atrocious practices have sometimes been viewed as necessary, and war-torn circumstances have been used to justify them. But the statutes of the Tribunals for the former Yugoslavia and Rwanda acknowledge that women's bodies are not battlegrounds and can, therefore, not be used to fight wars, and rape can, consequently, not be used as a weapon. Nevertheless, rape has not been recognized as a violation of women's rights as human beings.[139]

Gender-based crimes during armed conflict have not been noted in international humanitarian law, until in the last three decades. This is a grand progress in international criminal law, as advances have been made in both the recognition of these crimes as well as the prosecution of them. The concern they have shown, to ensure that gender-related crimes would be prosecuted can be said to be a unique characteristic of the ICTY and ICTR.[140] This is probably due to the advancements of international law before the establishing of these criminal tribunals, and also the extremely violent behavior women had to suffer by men in the wars, which are being trialed at these very Tribunals.

The United Security Council condemned rape in war for the first time in a resolution, where it expresses a grave alarm at organized and systematic detention and rape of women within the territory of the former Yugoslavia, and

[138] Goldstone, Richard J., "Prosecuting Rape as a War Crime", pp. 277-279.
[139] Etienne, Margareth, "Addressing Gender-based Violence in an International Context", p. 142-143.
[140] Goldstone, Richard J., "Prosecuting Rape as a War Crime", p. 278.

especially in the Republic of Bosnia and Herzegovina.[141] This was one of the resolutions, which resulted in the United Nations establishing of the ICTY. This reaction against sexual violence was a triggering point in establishing the Tribunal.[142]

The statute for the ICTY refers to rape as a crime against humanity for the first time, in Article 5[143]. The ICTR statute took the definition a step further in its Article 4 by referring to "…rape, enforced prostitution, and any form of indecent assault…", as violation of Article 3 common to the 1949 Geneva Conventions.[144] The body of international humanitarian law has been advanced by these Tribunals. Rape, sexual violence, and sexual slavery are now defined as forms of international crime and these gender-based crimes can now be prosecuted by judicial bodies.[145]

Another significant and interesting aspect of the Tribunals is their Rules of Procedure and Evidence. Admissibility of evidence in cases of sexual assaults is dealt with in Rule 96. [146] Several noteworthy departures from many countries' domestic practices are represented by this rule. The corroboration of the testimony of a victim of sexual violence is not required by the Tribunals. The distrust, which has proven to be linked to female complainants, is thereby cut out. The admissibility of prior sexual conduct of the victim is excluded by the rule. The misconception that a woman with a sexual history is an unreliable witness is thereby dispensed of and the possibility that relationships of women before the war are used to justify rape is thereby prevented. The third significant issue being dealt with by Rule 96 is ruling out consent as a defense if the victim had experienced violence, been threatened, or had some reason to fear violence, duress, detention or psychological aggression by the perpetrator. Using consent

[141] Security Council, Res. 827, last visited 30 March at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement
[142] Goldstone, Richard J., "Prosecuting Rape as a War Crime", p. 278.
[143] ICTY, statute, article 5, last visited 30 March at: http://www.icls.de/dokumente/icty_statut.pdf
[144] ICTR, statute, article 4(e), last visited 30 March at: http://www.un.org/ictr/statute.html
[145] Goldstone, Richard J., "Prosecuting Rape as a War Crime", p. 279.
[146] International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence,* U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June, 1995, article 96, last visited March 30 at: http://www1.umn.edu/humanrts/africa/RWANDA1.htm

as a justification when a violent act, such as rape, is committed during war should of course not be permissible. The circumstances of war in themselves are coerced, as explained by author Richard J. Goldstein.[147]

Before those very Tribunals the prosecution of rape as genocide has, however, proven difficult. The reason for that is hard to see. Mass rapes, which are committed as a part of the same campaign, by the same people, against the same people who are at war, assisting and concurring to the same mass murders that have been recognized as genocide. How these rapes can fail to be genocidal has outraged many survivors of the conflicts and caused them to lose faith in the Tribunals.[148]

The work of the U.N. Tribunals has been advanced by the Rome Statute for the International Criminal Court. Outrages on personal dignity under Article 8(2)(b)(xxi) are no longer assumed to cover gender-related crimes. Rape, sexual slavery, forced pregnancy; forced sterilization, as well as other forms of sexual violence, are now subsumed under crimes against humanity in Article 7[149]. They are also enumerated as war crimes relating to both international armed conflicts and non international armed conflicts. Gender-based crimes are, therefore, now given the recognition they have been denied for so many years, because the Rome Statute for the ICC holds the normative standard of international criminal law.[150]

5.1.1 The prosecution of rape as a war crime

To display the cruelty of rape as a war crime before going deeper into the judgments, a quotation from the judgment of the International Criminal Tribunal for the former Yugoslavia against Anto Furundzija is appropriate: "…Accused B hit Witness A and forced her to perform oral sex on him. He raped her vaginally and

[147] Goldstone, Richard J., "Prosecuting Rape as a War Crime", pp. 283-284.
[148] MacKinnon, Catharine A., *Are women human? And other international dialogues,* p. 241.
[149] The Rome Statute of the International Criminal Court, U.N.T.S. 90, entered into force 1 July, 2002, article 7.
[150] Goldstein, Richard J., "Prosecuting Rape as a War Crime", p. 285.

anally, and made her lick his penis clean…"[151] This goes on to show the humiliation and duress women, who are victims of rape as a war crime, have to suffer. This example is nothing unprecedented and this kind of violence is being systematically used in war.

In this case of the Prosecutor v. Anto Furundzija, the defendant was charged with torture under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia, a violation of Article 3 common to the Geneva Conventions, and outrages upon personal dignity, including rape, a violation of Article 4(2)(e) of the 1977 Geneva Protocol Additional to the Geneva Conventions.[152]

Furundzija was a local commander of a special unit of the military police of the Croatian Defense Council. Through testimony of witnesses the fact emerged, that while interrogating women, Furundzija had engaged in criminal activity, such as threatening violence, beating the women and forcing them to have oral and vaginal intercourse with him.[153]

The trial chamber found a sufficient link between the armed conflict of the Croatian Defense Council and the Army of Bosnia and Herzegovina and the offences allegedly committed by the accused.[154] This is important because this establishes a cause for an indictment of a war crime and thus, satisfies the jurisdictional requirement of Article 3 of the Statute. The Trial Chamber goes on to consider the scope of Article 3 and states: "…It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule…"[155] This includes that the offences of torture and outrages upon personal dignity, in this case rape, are covered by Article 3.

[151] Judgment of the ICTY in the case of *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T,10 December 1998, para. 87.
[152] Ibid, para. 2.
[153] Ibid, para. 264.
[154] Ibid, para. 65.
[155] Ibid, para. 132.

The Trial Chamber did not find a definition of rape already provided in international law. The Chamber, however, attempted to arrive at an accurate definition of rape based on the criminal law principle of specificity. It noted a major discrepancy in the criminalization of forced oral penetration, a fact which in this case underlies the charges.[156] With general principles of international criminal law as guidance, the Chamber found that the principle underlying international humanitarian law and human rights, the protection of human dignity, in fact provided grounds for categorizing forced oral penetration, such as, in this case, rape, there under. It speaks of forced oral penetration by the male sexual organ as: "…a most humiliating and degrading attack upon human dignity…" and goes on to talk of the protection of human dignity of all persons, what ever gender they may belong to.[157]

Furundzija was found guilty on both counts he was charged with and sentenced to ten years for co-perpetration of torture, and 8 years for aiding and abetting in outrages upon personal dignity, including rape.[158]

Jean-Paul Akayesu was trialed before the International Criminal Tribunal for Rwanda (ICTR) in 1997 and 1998. He was charged with 13 counts relating to genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions, rape, and other inhuman acts constituting crimes against humanity and other outrages upon personal dignity. Several witnesses testified before the Chamber and expressed allegations of rape and sexual violence.[159]

It was shown beyond a reasonable doubt by the Prosecutor that acts of sexual violence, mutilations and rape had been forced upon numerous Tutsi women. This had often been done repeatedly by more than one perpetrator and often in public. A witness at the hearings testified of Tutsi women having been raped systematically, i.e. if they met an assailant, he would rape them. It was proven that

[156] Ibid, para. 174 and 182.
[157] Ibid, para. 183.
[158] Ibid, IX. Disposition.
[159] Judgment of the ICTR in the case of The Prosecutor v. Jean-Paul Akayesu, 2 September, 1998, Case No. ICTR-96-4-T, counts 13-15. Last visited March 20 at: http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm

when some of these attacks occurred, the accused, Akayesu, was present. It was also demonstrated that he had encouraged these violent acts with his presence, attitude and expression. The chamber found these acts to constitute encouragement to the rapes proven to have been committed.[160]

The chamber discussed its definition of rape with these words:

> …The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive…[161]

The Chamber went on to note that sexual violence and rape is not limited to physical invasion of the human body, and may also constitute doings, which do not necessarily have to involve penetration or physical contact.[162] This demonstrates that the Chamber of this case does not see physical force of the perpetrator a necessary part of a violation for it to be defined as rape.

The Chamber also expresses its opinion thus, that rape and sexual violence constitute genocide if they are committed with the intent to destroy a particular group, in this case the Tutsi people. It finds rape and sexual violence an infliction of grave bodily and mental harm on the victim, and even one of the worst ways of inflicting harm, since the victims were subjected to the worst public humiliation, i.e. mutilated and raped several times, which resulted in the physical and psychological destruction of the women, their families and the community.[163]

The Chamber convicted Akayesu under Article 3(g) of the Statute of the ICTR for his encouragement of rape and other inhumane acts in Rwanda, which constitute a crime against humanity.[164]

In the case of Prosecutor v. Kunarac, Kovac and Vukovic, three men accused of rape and torture came before ICTY, the judgment of the trial chamber was final in 2001 and the judgment of the appeals chamber in 2002. Both rulings convicted

[160] Ibid, 5.5 Sexual Violence.
[161] Ibid, para. 598.
[162] Ibid, para. 688.
[163] Ibid, para. 731.
[164] Ibid, para. 696.

the men guilty and sentenced them to 28 years, 20 years and 12 years of imprisonment.[165]

The Court concluded that the men, who were members of the Bosnian Serb armed forces, had used rapes as an instrument of terror, and as a method of ethnic cleansing. The rapes were intended to serve a certain role in the warfare. They were supposed to weaken the bonds of the community and family and drive civilians from their homes. The main point was to humiliate and degrade Bosnian Muslims, and this extreme violence was perpetrated by one ethnic group, which despised the ethnic group against which the violence was aimed. The three men had all participated in the organized raping of Bosnian Muslim women. They were found guilty of crimes against humanity, breaches of the Geneva Conventions, and violations of customary international law of war. Witnesses gave testimony and described the horrible ordeal they had been forced to experience. They had been forced to leave their homes to go to places where they had to remove their clothes and were raped, in some cases by many men[166], as explained by author Christopher Scott Maravilla.[167]

The three men were convicted for the crimes of rape under Article 3 and torture under Article 5 of the ICTY´s enabling statute and under Article 3 of the Geneva Conventions. [168]

The ICTY Appeals Chamber noted in its judgment, and thereby establishes its opinion, that rape constitutes torture:

> …some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act… Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. Severe pain or suffering, as required by the

[165] Judgment of the ICTY, in the case of the Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 22 February, 2001, et al. (IT-96-23 & 23/1), para 10, 18 and 22.
[166] Ibid, para. 37.
[167] Maravilla, Christopher Scott, "Rape as a war crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia´s Decision in Prosecutor v. Kunarac, Kovac and Vukovic on International Humanitarian Law", *Florida Journal of International Law* 13, 2001, pp. 322-326.
[168] Judgment of the ICTY in the case of the Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 22 February, 2001, para. 556.

> definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[169]

5.1.2. The implications of trialing rape as a war crime

In the case of the Prosecutor v. Anto Furundzija the Trial Chamber tried to find a definition of rape under international law. It did, however, not completely succeed, and the Chamber in the case of Kunurac, Kovac and Vukovic can be said to have taken up that discussion where the other Chamber left off, and finished the definition. However, very importantly, the Chamber in the Furundzija case did certify that forced oral penetration does constitute rape. It speaks of the humiliation and the attack against one´s dignity this act of cruelty brings with it.

On the other hand, the Chamber of the Furundzija case can be said to take the definition of rape a step back from the one which was adopted by the Chamber of Akayesu. The showing of vaginal or anal penetration by a penis or object without the consent of the victim is a requirement here as opposed to the finding in Akayesu that rape can not be defined by description of objects and body parts. The same goes for the improvement, which was made by adding forced oral penetration, i.e. the penetration, according to the definition, has to be by a penis.[170] Rape should feature some sexual element. The requirement of penis, when the subject is oral penetration, is therefore reasonable, at least in some instances. However, when the subject is vaginal or anal penetration, the penetration of other objects than just the penis could make the act sexual, and therefore constitute rape.

In the enabling statues of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, rape as a war crime was included for the first time. The significance of the case of Kunurac, Kovac and Vukovic before the ICTY has proven great in international humanitarian law. The principle that rape constitutes a war crime was first adopted into customary international law in that case. This was also said to contain rapes,

[169] Judgment of the ICTY in the case of the Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 22 February, 2001, para. 150-151.
[170] MacKinnon, Catharine A., *Are women human? And other international dialogues,* p. 239.

which have been committed by soldiers by them-selves, if the rape is a general attack on the civilian population. This case is the first in which the systematic rape of women during armed conflict is considered a war crime. This is a very important statement, i.e. it goes on to show that rape against civilians during an armed conflict will not be tolerated by customary international law.[171]

A definition of rape was also adopted in this case of Kunurac, Kovac and Vukovic by the Trial Chamber. The Chamber reviews how rape is defined in criminal law of major legal systems of the world. It found that the correct definition of rape, based on its research of those major legal systems was:

> (i) the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) by coercion or force or threat of force against the victim or a third person.[172]

This definition is based on what was discussed earlier, that when the penetration is oral, the object might have to be the penis of the perpetrator for the act to amount to rape. However, if the penetration is vaginal or anal, other objects than the penis could be used for the act to constitute rape.

Thereby, if those elements are proved, the act constitutes rape in international criminal law. The Chamber in this case did not support the definition, used in the case of Furundžija, which requires the use of force, or threats thereof, for the crime to amount to rape. [173]

Other important aspect of the case of Kunurac, Kovac and Vukovic is the Chamber's ruling of the rapes being a violation of Article 3 of the Geneva Conventions. It found the crimes to be outrages upon personal dignity and thus, a violation of Article 3(c).[174] By doing so, it makes clear that rape of women is of the

[171] Maravilla, Christopher Scott, "Rape as a war crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia´s Decision in Prosecutor v. Kunarac, Kovac and Vukovic on International Humanitarian Law", pp. 322-323.
[172] Judgment of the ICTY in the case of the Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 22 February, 2001, para. 437.
[173] Ibid, para. 348.
[174] Ibid, para. 498.

nature of actions, which are viewed as crimes of war, even though it may not have been specifically written into the Conventions.[175]

This case was also the first one, which found sexual slavery to come under the definition of slavery as a crime against humanity, which had before only been thought to cover forced labor.[176]

The conviction of Akayesu lined the path for prosecutions before international tribunals for sexual crimes, for example, the prosecution of Kunurac, Kovac and Vukovic which have been discussed above. In that case an important step was taken to consider crimes, which involve gender-based violence and rape under international law. Before these prosecutions, rape had been viewed as a by-product of war, which could not be avoided. Rape is a violation of the Geneva Conventions, but not necessarily thought of as a crime against humanity under international law. Therefore, it had not been defined under international law.[177] These judgments can, therefore, be viewed as groundbreaking in the fight against gender-related violence and forming a definition of rape in international law.

Even though rape had not been particularly defined in international law before these judgments, it can be found to come under the prohibition of torture and enslavement, which are a part of previous conventions and norms of international law. So, even though before these judgments, rape had not been recognized to be a crime against humanity, one could still argue that it had had its place there all along. The moral benefits of criminalizing the act of rape are great. Those acts can never be justified when considering that they can never be done in self-defense. By condemning these cruel acts, with no exceptions being given at times of war, the morality of the international community can be said to be raised. It is the responsibility of the international community to express that these acts will never be tolerated. This is a step toward changing international behavior so that horrific

[175] Maravilla, Christopher Scott, “Rape as a war crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia´s Decision in Prosecutor v. Kunarac, Kovac and Vukovic on International Humanitarian Law”, p. 326.
[176] McHenry III, James R., “The Prosecution of Rape Under International Law: Justice That Is Long Overdue”, *Vanderbilt Journal of Transnational Law* 35*,* 2009, p. 1273.
[177] Ibid, p. 1300.

events such as those in Bosnia and Rwanda may never happen again, as explained by author James R. McHenry III.[178]

The international community was shocked when news of the events in Rwanda and Bosnia spread. Almost everyone can therefore agree that preventing events like these from ever happening again is very important. This is one step in that direction.

5.2 Rape before international human rights courts, when it is not a crime of war

Cases involving rape have also been trialed before international human rights courts, when they do not occur in time of war. Those cases are, of course, very different. The act of rape is not trialed as a war-crime or a crime against humanity. Individual states are accused of failing to; protect their citizens from rape, adequately investigate the crimes or punish the perpetrators.

A case involving rape came before the Inter-American Commission of Human Rights. The applicant, Raquel Martí de Mejía, had been raped two times by an official of the Peruvian army in her home country Peru. Her husband had also been killed. She filed a complaint for the repeated sexual assaults under Article 5, the right to humane treatment; and article 11, the right to privacy, of the American Convention on Human Rights. In this case the Inter-American Commission found that the rapes, perpetrated by the security force, violated her human rights in regard to torture.[179] The Government was found to have failed "…the general obligation to respect and guarantee the exercise of these rights (the rights under Article 5 and 11) contained in the Convention".[180]

Cases involving rape before the ECHR have already been discussed in this paper, such as Aydin v Turkey and M.C. v Bulgaria. In both of these cases the applicants were successful in demonstrating that their domestic authorities had not

[178] Ibid, pp. 1300-1301 and 1304-1309
[179] Raquel Martí de Mejía v. Peru, Case 10.970, Report No. 5/96. Last visited 23 March at: http://www.cidh.org/women/Peru10970.eng.htm
[180] Ibid, VI Conclusions 2(a).

adequately protected them from rape, investigated the cases, prosecuted the perpetrators nor ended with punishing them.

5.2.1. The implications of trialing rape before international human rights courts

The case of M.C. v. Bulgaria, which was trialed before the ECHR and has been discussed previously in this paper, dealt with rape. This case has some significance to international law dealing with the crime of rape. In the case the Court emphasizes that consent to sex is not given just by there being no physical resistance on behalf of the victim. The victim was a very young girl, and that may have had some influence in the Court's finding. The Court acknowledges the frozen-fright, which many women, who have been victims of sexual assault, have claimed to have experienced. In it the victim looks for a psychological dissociation from the assault. In stead of fighting back, the woman becomes completely still. The Court notes that it may be easier to indict the perpetrator when there are, for example, traces of physical violence on the victim, but the issue of non-consent is still the subject-matter which should be investigated. The judgment, therefore, gives an international definition of rape, and even sexual crimes in general, which does not have its central focus on physical force, but on lack of consent.[181]

It has great effect that persons who have been raped, not only women but men as well, can seek justice from international human rights courts, when they feel their states have failed them. The way these cases are dealt with, within each state, is influenced by human rights treaties and bodies. They can therefore channel the work processes of single states and human rights of individuals are more adequately protected.

5.3 Rape as a jus cogens norm?

The definition of crimes against humanity under international law has clearly expanded. Rape is being trialed as a war crime, sexual enslavement as slavery,

[181] Pitea, Cesare, "Notes and Comments-Rape as a Human Rights Violation and a Criminal Offence: The European Court´s Judgment in M.C. v. Bulgaria", *Journal of International Criminal Justice* 3.2, 2005, pp. 451-458.

and rape as torture, or genocide. This does not identify women under international law as the weaker gender, or the gender in more need of protection. This simply aims at closing the gap in international humanitarian law, which existed, most likely, because of the experiences of the drafters and policy makers of these laws, which more often than not were likely to be men.[182] It should not be forgotten that men, as well, are often victims of rape during war. This makes international humanitarian law an even stronger instrument in protecting civilians, and can actually be said to make men and women equal in the eyes of the international community, that is, now both genders are more actively protected by these laws. Hopefully rape will over time become one of the crimes, which are asserted as jus cogens norms in international law, i.e. these crimes, which have an absolute prohibition and from which there is no derogation. These cases trialed for rape before international courts do surely bring forth strong arguments for rape to be categorized as one of the most inhuman crime, and most people can agree upon them.

Article 53 of the Vienna Convention defines the modern concept of jus cogens norms as:

> …a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[183]

There are some indications that acts of sexual violence, such as rape, already fall under the definition of peremptory norms, or jus cogens norms. Rape has been interpreted as an act of torture by the European Court of Human Rights and the Inter-American Court of Human Rights. And there is an agreement in the international community that torture characterizes as a component of jus cogens obligations. Similarly, rape has been demonstrated as a part of genocide, which is another certain component of jus cogens norms. This chapter has also displayed

[182]Sellers, Patricia Viseur, "Sexual Violence and Peremptory Norms: The Legal Value of Rape", *Case Western Reserve Journal of International Law* 34, p. 294-295.
[183] Vienna Convention on the Law of the Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January, 1980, article 53.

rape as an evidence of enslavement under an ad hoc criminal tribunal, which is also an example of a definite jus cogens norm.[184]

Article 27 of the fourth Geneva Convention must be interpreted as a part of customary international law, due to the Geneva Conventions being recognized as such, as explained by author Patricia Viseur Sellers.[185] This Article 27 mentions prohibition of rape in particular. It reads thus: "…Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault…"[186]

On the other hand, many international human rights instruments do not mention rape at all in their legal texts. The International Covenant on Economic and Social Rights[187], the International Covenant on Civil and Political Rights[188], the Universal Declaration of Human Rights[189] and even the Convention on Elimination of All Forms of Discrimination against Women do not address the crime of rape. This seems to be the rule of most international human rights treaties, with at least one other exception though, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Article 2 of the Convention[190] addressed rape when it happens in the family or in the community as a violation of person's human rights.[191]

6. Domestic violence

The statistics of domestic violence are staggering. A reported 1 in every 4 women experiences domestic violence in her lifetime. 50% of murders of women involve

[184] Sellers, Patricia Viseur, "Sexual Violence and Peremptory Norms: The legal Value of Rape", pp. 294-295.
[185] Ibid, p. 297.
[186] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, U.N.T.S. 287, 12 August, 1949, article 27.
[187] International Covenant on Economic and Social Rights, U.N.T.S. 3, 3 January, 1976.
[188] International Covenant on Civil and Political Rights, U.N.T.S. 171, 23 March, 1976.
[189] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[190] Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Para"*, 9 June 1994, article 2, last visited 23 March at: http://www.unhcr.org/refworld/docid/3ae6b38b1c.html
[191] Sellers, Patricia Viseur, "Sexual Violence and Peremptory Norms: The Legal Value of Rape", pp. 301-302.

domestic violence, i.e. the women are killed by their partners who have previously been violent towards them. In some incidents the police have even been notified of the violence and, therefore, might have been able to prevent the murders.[192]

A fight, a single or an occasional accident does not constitute domestic violence. An ongoing pattern of abuse and violence, repeated victimization where the victim is vulnerable, represents domestic violence. The victim is usually vulnerable because she shares a home with the abuser, and even loves him. Specific laws on domestic violence exist in some European countries, but very few. Most countries deal with it under general laws on assault of the penal code. These laws, however, do not always take into consideration the special nature of domestic violence. It is a type of ongoing violence within the home, where single attacks might not be regarded serious. It does, therefore, not fit well under general laws on assaults. Domestic violence is serious when the facts, that it is ongoing and the abuse is unbearable for the victim, are taken into account. The results from this can be that it is impossible to charge for a criminal offence, or the maximum penalty may not be nearly severe enough to punish for the offence, protect the victim, or to work as a deterrent.[193]

Women all over the world experience domestic violence. General human rights treaties have been criticized for protecting the violence, which goes on in private homes, from interference from public authorities. These general human rights treaties, such as the ECHR and the United Nations Human Rights Declaration, protect the right to private and family life. This right has been said to protect men from being prosecuted for violent behavior in their own home.

Human rights have, in that sense, been used to maintain a legal approach to domestic violence, which does not entail an intervention. But this does not have to be the case. As explained by author Shazia Choudhry, states also have an obligation to protect their citizens from inhuman and degrading treatment, such as

[192] Kelly, Liz, *Violence against women and children. Vision, Innovation and Professionalism in policing, VIP Guide,* Council of Europe Publishing, Strasbourg, 2003, p. 60 and 171.
[193] Ibid, p. 59.

torture and domestic violence. The right to respect private and family life can actually be seen as justifying intervention to homes where violence takes place, rather than preventing it.[194] She points out that it has been held that the law should be hesitant to intervene when domestic violence is thought to be taking place because of the right to privacy. Furthermore, if a victim of domestic violence does not want the abuser to be prosecuted, the victim's wishes should be respected because of the right to autonomy. Moreover, it is only in the most extravagant cases where the abuser should be moved from the home, because of the significance of property rights.[195]

Shazia, furthermore, argues that under the ECHR, states have an obligation to protect victims, and even if the victim states that she does not want criminal prosecution to take place, the state must take reasonable and effective measures on behalf of that victim's protection. The victim can, in fact, not give consent to the violence, because the protection given by Article 3 of the Convention is absolute. As reasoning, she states that true autonomy must lie in the protection from harm. The victim may, in fact, be afraid of the abuser and, therefore, not be willing to press charges against him. The state may have interests in sending the message to the society that violence will not be tolerated, and protection of children can also be used to justify state intervention, even without the victim's consent. It is a well known fact that children who grow up in homes where violence takes place can suffer as a result thereof.[196] It may be difficult to prosecute for an assault when the victim does not cooperate. The victim is the leading witness in the case, and without it, there might not be a lot to base the case on. However, authorities should be obliged to do what they can to convince the witness to cooperate, secure her a safe place to stay, and if it comes to that, try to find other witnesses to the assaults, as well as other evidence.

Extreme acts of domestic violence have been compared to official torture. This comparison is made to demonstrate that even though domestic violence takes

[194] Choudhry, Shazia and Herring, Jonathan, "Righting domestic violence", p. 95.
[195] Ibid, pp. 96-97.
[196] Ibid, pp. 104-105.

place in homes, it does not have to mean it is any less painful, cruel, or humiliating for the victim. The fact that the victim and the abuser are in a close relationship may even make the violence even more excruciating. Historically, domestic violence was considered an accepted behavior, and this is still the way some societies view domestic violence. The few laws, which are made to deal with domestic violence, are rarely implemented, and when so, they are sometimes ineffective. The regard to constitutional respect for privacy can make it difficult to find out whether violence is taking place inside homes. This distinction between the private torture of domestic violence and public violence has made the severity of domestic violence a rank lower than violence, which occurs in the public. If severe violence within homes was to be considered as torture, such as under the Convention against Torture, grave domestic violence would finally get the status of seriousness in law it deserves. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment encourages states to take effective measures to prevent official torture. If this were to cover torture within domesticity it would move violence against women out of its category where it is sheltered from intrusions from the government to a category with which is being dealt by international human rights law, as explained by author Bonita C. Meyersfeld.[197]

Article 1 of the Convention against Torture defines torture in the understanding of the Convention. This definition requires the torture to be executed by a public official, or someone acting with official capacity.[198] The torture, furthermore, has to take place within a public realm. This definition fails to address the experience women have of torture, such as severe domestic violence.[199] Thankfully, some international human rights bodies now regard grave violence against women as amounting to torture.

[197] Meyersfeld, Bonita C., "Reconceptualizing Domestic Violence in International Law", p. 398-399.
[198] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 1.
[199] Pickup, Francine, Williams, Suzanne and Sweetman, Caroline, *Ending Violence against Women, A Challenge for Development and Humanitarian Work,* pp. 48-49.

If violence against women is considered to belong outside the jurisdiction of international law, single states will reflect that perspective and consider certain abuses of women to fall out of the scope of the state's protection. According to the preamble of the Universal Declaration of Human Rights, human rights violations are defined as: "…barbarous acts which have outraged the conscience of mankind…".[200] Why gender-based violence such as forced prostitution, rape and domestic violence are considered under the discretion of single states while other acts, equally unjustifiable are considered human rights violations, is unclear.[201]

6.1 Domestic violence in international judgments

The power of the Optional Protocol of the CEDAW, which creates a way for individuals to complain directly to the committee when their rights protected by the Convention are violated, should not be undervalued. This has created a gateway for women, for example, when faced with domestic violence, to complain and make their voices heard in the international community. An example of this is the case of AT v Hungary[202]. In this case, domestic violence as a human rights violation was realized in law by the CEDAW Committee. The applicant was a Hungarian woman who had suffered domestic violence for four years from her husband and father of her three children. One of the children was extremely mentally disabled. Her husband had threatened to kill her and rape the children. The legal system in Hungary did not able her to restrain the abuser from her home nor able her to seek shelter because no shelter was equipped to take in such a severely disabled child.[203] CEDAW was the relevant human rights body in this instance. Under the Optional Protocol, it had gained powers to hear individual complaints.[204] The Articles, under which the applicant complained, provide that

[200] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), preamble.
[201] Etienne, Margareth, "Addressing Gender-based Violence in an International Context", p. 393-394.
[202] Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Communication N.2/2003, Ms. A.T. v. Hungary,* 26 January, 2005.
[203] Ibid, para. 2.1
[204] Marshall, Jill, "Positive Obligations and Gender-based Violence: Judicial Developments", p. 159.

states undertake to embody equality in their legislation and ensure its practical realization.[205]

The applicant had instituted civil proceedings against her husband before a Hungarian court, but its final decision had, because of lack of evidence for the claims of violence and the husband's right to property, allowed the man to return to their home to live.[206] The applicant was not given any help from the authorities, nothing was done to protect her children, the law offered no protection orders, such as a restraining order, and the woman was not offered a refuge anywhere, because of the special needs of one of her children.[207]

The woman felt that Hungary had failed in offering her the protection against domestic violence she needed. Thereby it had neglected its positive obligations under the Convention and its General Recommendation No. 19. The CEDAW Committee stated on this occasion: "Women's human rights to life and physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy…"[208] With this the Committee concluded that Hungary, in court proceedings, had not given domestic violence cases as high a priority as was necessary to secure women's rights against violence.

6.2 The ECHR regarding domestic violence

In cases of domestic violence the right to protection and family life of the victim under Article 8 and the right of the abuser under the same provision, will sometimes clash. The victim has a right to have her bodily integrity protected and the abuser can claim to have a right to respect of his private and family life. When this is the case, Article 17 of the ECHR can be used clarify the circumstances. That Article states that no rights guaranteed under the Convention can be used to justify violating the rights of others. In that sense, the abuser could not claim his

[205] Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 14 (1979), articles 2(a)(b)(e), 5 and 16.
[206] Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Communication N.2/2003, Ms. A.T. v. Hungary,* 26 January, 2005*,* para. 2.4.
[207] Ibid, para. 3.1-3.2.
[208] Ibid, para. 9.3.

right under Article 8 to afford him the right to remain in his home or to be free from involvement by the authorities. Because domestic violence has such high levels of repeated offending, it could even be argued that the threat the abuser poses is inevitable or imminent and taking away his Article 8 rights is, therefore, in defense of the victim.[209]

The European Court of Human Rights has acknowledged how serious and widespread the problem of domestic violence is. In its judgment in the Case of Opuz v Turkey it speaks of it as a general problem and states that it concerns all the Member States of the ECHR.[210] In this case, the Court can also be found to acknowledge violence against women, domestic violence, as an issue of inequality of the sexes.[211] In effect, the Court can not overlook the seriousness of domestic violence. In 1997 Europe had the highest domestic homicide figure ever reported there. That year over fifteen thousand women were killed by their current or ex-husbands. Countless miscarriages and damages to unborn children in the womb every year can also be linked to domestic violence.[212]

The case of Opuz v Turkey is explained by author Londono as to have considerable implications of the way in which authorities of Member States to the ECHR deal with domestic violence. The Court requires Member States to take a hands-on approach in these cases, and they are obliged to bring criminal proceedings against the person responsible for the violence, whether or not the victim is willing to bring criminal charges.[213]

The subsequent case of Bevacqua and S. v Bulgaria confirmed this line of reasoning by the Court. The applicant of the case was a woman who had suffered abuse from her husband and tried to divorce him. In her request for divorce she had noted that she suffered verbal abuse and battering from her husband and that

[209] Choudhry, Shazia and Herring, Jonathan, "Righting domestic violence", pp. 107-108.
[210] Judgment of the ECHR in the case of Opuz v Turkey, 9 June, 2009 para. 132.
[211] Londono, Patricia, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", p. 667.
[212] Russian Federation in Kelly, Liz, *Violence against women and children. Vision, Innovation and Professionalism in policing, VIP Guide,* p. 62.
[213] Londono, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", p. 667.

he did not contribute to the budget of the household. The applicant claimed their son was in danger because of the husband's violent behavior, but she was not taken seriously by the authorities.[214]

An expert gave an opinion at the divorce proceedings, stating that the son was afraid of his father because of the battering of his mother, and that he preferred to live with his mother. The divorce was finalized and the applicant was given custody and her husband visiting rights. When the applicant went to her former husband to pick up her belongings, her former husband became aggressive towards her and battered her. She went to a forensic doctor, who noted bruises on her face, right arm and armpit and left hip in a file. She then complained to the prosecution authorities, but they did not institute criminal proceedings and held that she could bring private prosecution, because of the injuries being light bodily injuries.[215]

The applicant alleged that Bulgaria had failed to adequately protect her from her husband and to initiate proper legal proceedings in an adequate manner and relied on Articles 3, 8, 13 and 14 of the Convention. The Court considered the complaints to come under being examined in light of the positive obligations under Article 8, respect for private and family life.[216] It recalled its findings in the case of X and Y v the Netherlands when it stated:

> While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves…[217]

The Court held that these positive obligations of the state may include an obligation to uphold and pertain in practice an adequate legislation to protect persons from violence by private individuals, in this case domestic violence. The Court also noted the vulnerability of individuals, who are victims of domestic

[214] Judgment of the ECHR in the case of Bevacqua and S. v Bulagria, 12 June, 2008, para. 5-20.
[215] Ibid, para. 21-38.
[216] Ibid, para. 54-55.
[217] Ibid, para. 64.

violence, and stated the need for active protection by the state, which has been emphasized in many international instruments.[218]

As regards domestic violence, the Court, therefore, found that Bulgaria had an obligation under the Convention to do everything in its power to protect the applicant from the threats and battering she had suffered. Domestic violence is a threat to many women, and legislation has to be adequate to deal with those incidences. When women do come forward and complain about domestic violence, the help they need has to be available. In this case, no shelter fitted the women and her children, but it was in the hands of the authorities to verify that women have a place to go to when trying to get out of an abusive relationship, especially when there are children involved.

To secure equality of spouses, among other things, The European Council adopted in 1984 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (now ECHR). Article 5 of the Protocol provides:

> Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution...[219]

The Protocol only deals with matters of private law character, between the spouses themselves. The protection it offers is, therefore, not as wide and general as for example the protection of the CEDAW, it does not deal with violations of criminal, administrative or labor law, and it can not be argued by applicants who have not yet married. The period preceding marriage is excluded by the wording of the Article, where it is made clear that only those who can be categorized as spouses are protected by the Article.[220] It can therefore not be seen as a successful effort in securing equality between spouses in their home.

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[218] Ibid, para. 65.
[219] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 117, 1984.
[220] Merrils, J. G. and Robertson, A. H., *Human rights in Europe,* Manchester University Press, Manchester, 2001, pp. 269-270.

7. Trafficking in women for sexual exploitation

Trafficking in women for sexual exploitation is now considered a serious problem relating to international and organized crime. The international law and policing agendas have been addressing this issue perpetually more in the last few years. Some countries seem to be countries of origin, where the women come from, and others countries of destination, where the women are trafficked to. The sending countries suffer from poverty, while the receiving countries are relatively prosperous. Where many women are trafficked from, limited employment opportunities and a growing economic marginalization of women usually portray the society. Where the demand for those women is the most, organized sex industry often exists.[221]

Specific legislation on trafficking in women for sexual exploitation exists in some European countries. Most countries, however, rely on legislation, which is directed against pimps and procurers, used to target traffickers, who use women for sexual exploitation. This has been criticized for the low maximum sentences they often entail, which do not grasp the seriousness of this human rights violation. As an example, one could mention that the maximum sentences for trafficking women are seldom as long as for trafficking drugs.[222] Traffickers continue their activities without being punished because of this lack of anti-trafficking legislation, or the lack of such legislation being enforced, and in some places because of corruption of government officials and law enforcement institutions.[223]

Iceland is an example of a country which has adjusted their legislation regarding human trafficking to make it more efficient. This has been done through the penal code[224], and act on foreigners[225]. An action plan against human trafficking was

[221] Kelly, Liz, *Violence against women and children. Vision, Innovation and Professionalism in policing, VIP Guid,* pp. 105 and 107-108.
[222] Ibid, p. 106-107.
[223] Amiel, Alexandra, "Integrating human rights perspectives into the European approach to combating the trafficking of women for sexual exploitation", *Buffalo Human Rights Law Review* 12(5), 2006, p. 5.
[224] Icelandic penal code, No. 19/1940, (almenn hegningarlög nr. 19/1940).
[225] Icelandic act on foreigners, No. 96/2002, (útlendingalög nr. 96/2002). English translation accessible at: http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/105

introduced in Congress 2008-2009.[226] The aim of the action plan is to further investigate and prevent human trafficking in Iceland, increase preventative measures and education regarding the issue, and protect and assist the victims of human trafficking. Last but not least, it emphasizes actions to indict those who organize trafficking.[227] Human trafficking is addressed in Article 227(a) of the Icelandic penal code. The Article attempts to cover as many aspects of trafficking in human beings as possible. This means that anyone who enables trafficking can expect to be sentenced for it, and the same maximum sentence, up to eight years, is given for any form of participation. This includes: "…Procuring, removing, housing or accepting someone who has been subjected to unlawful force… [and] accepting payment or other gain…".[228]

To further include every aspect of human trafficking it was added to the Article in 2009 that:

> …the same penalty shall be applied to anyone becoming guilty of the following acts, one or more, for the purpose to facilitate for human trafficking:
>
> 1. Falsification of travel- or identity documents,
> 2. Handling of interposition of those documents or providing for them,
> 3. Retaining, removing, damaging or destroying travel- or identity documents belonging to another individual.[229]

The Article now includes all imaginable individuals who participate in human trafficking. It doesn´t only include the pimps and procurers, but all those who profit from human trafficking for sexual exploitation. Up to 8 years of imprisonment may, however, not be a penalty severe enough to punish for these violations in every occurrence.

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[226] Ministry of Social Affairs and Social Security, *Report of the Minister of Social Affairs and Social Security, Ásta R. Jóhannesdóttir, on the action plan against human trafficking,* Reykjavík, 2008, last visited 28 April, 2010 at: http://www.felagsmalaraduneyti.is/media/09FrettatengtFEL09/Skyrsla_um_adgerdaaatlun_gegn_mansali.pdf

[227] Ibid, p. 2.

[228] Icelandic penal code, No. 19/1940, (almenn hegningarlög nr. 19/1940), article 227(a).

[229] Ibid. „Sömu refsingu skal hver sá sæta sem gerist sekur um eftirtalda verknaði, einn eða fleiri, í því skyni að greiða fyrir mansali:
1. Að falsa ferða- eða persónuskilríki.
2. Að annast milligöngu um slík skilríki eða útvega þau.
3. Að halda eftir, fjarlægja, skemma eða eyðileggja ferða- eða persónuskilríki annars einstaklings.", (translation by author).

No accurate statistics exist on the scale of trafficking in women anywhere in the world. The government of the United States, however, estimates that between 600,000 and 800,000 persons, women, men, and children, are trafficked across international borders every year.[230] The problem is, therefore, clearly a big one and affects many. It should be kept in mind that those figures only represent those which are trafficked, but trafficking has impacts on many more, such as the families of the victims of trafficking.

There is, however, strong evidence that estimate trafficking in women has increased globally. Many possible reasons for this have been mentioned, such as the increasing gap in wealth within and between nations, the international growth of the sex industry and the globalization, which makes moving of persons, businesses and capital between countries much easier. Questions regarding why women are vulnerable to trafficking and attempts to answer them have been made. Author Liz Kelly lists them as: “Poverty, conflict and social dislocation, gender inequality, family loyalties and responsibility, social exclusion, myths about “the West” and desire for a better life”.[231]

To prevent trafficking many countries now have stricter boarder controls and entry requirements, but this just creates a market for stolen identities and facilitated transportation, such as security guards being bribed to let women cross boarders, where brokering in relation to employment and accommodation awaits them. The situation has even progressed to women being literally sold and bought. There are even markets where they are made stand naked and people can come and make a bid for them, for example in Bosnia and Herzegovina.[232]

When those women have been trafficked to their country of destination, most of them have lost all control over their situation. Many are raped, they are forced to pay debt for their travel, they are forced to prostitution where they have no control

[230] U.S. Dep´t of State, *Trafficking in Persons Report,* 2005, p. 6. Last visited 25 March at: http://www.state.gov/documents/organization/47255.pdf
[231] Kelly, Liz, *Violence against women and children. Vision, Innovation and Professionalism in policing, VIP Guide,* p. 107.
[232] Ibid, p. 108.

over who their clients are, or what they get paid, they are threatened and suffer physical abuse. This condition has been recognized as sexual slavery by international Non Governmental Organizations (NGO´s), and the United Nations.[233] The prohibition of slavery is one of the norms, which are recognized as jus cogens, and is thereby absolute, which demonstrates even more the seriousness of trafficking in women for sexual exploitation.

The Council of Europe Convention on Action against Trafficking in Human Beings[234] defines trafficking in human being as:

> …the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs…[235]

Clearly trafficking covers more issues than gender-based violence. It is, however, gender-based violence through trafficking, which is discussed here, namely trafficking in women for prostitution and sexual exploitation.

7.1 Trafficking of women for sexual exploitation within Europe

In the late 1980s and early 1990s the European borders opened, and following was a considerable increase of human trafficking within Europe. Some war-torn and politically unstable European countries were at that time suffering because of their failing economies, weakened rule of law, poverty and increased unemployment. In these countries in Eastern-Europe, a large supply of trafficking victims has emerged, and these victims have been trafficked to the western richer part of Europe, especially those countries where the sex industry is large. The women have been led to believe that a better life awaits them in the West.[236]

[233] Ibid, pp. 109-110.
[234] The Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197.
[235] Ibid, article 4(a).
[236] Amiel, Alexandra, “Integrating human rights perspectives into the European approach to combating the trafficking of women for sexual exploitation”, p. 5-8.

With the Schengen Agreement most European countries agreed to remove their internal border controls. This entails lifting of travel restrictions, which have made it less difficult to enter the European Union, and once a person has entered the zone of the Schengen Agreement, he or she can move freely within it. International trafficking networks benefit from this, because it makes it more difficult for the police and customs officers to look for illegal transit between Member States. Many women are, therefore, moved between countries without the authorities taking notice.[237]

7.2 International human rights instruments dealing with trafficking in human beings

Trafficking denies its victims practically all rights protected by international human rights law. So, above all, it is a human rights issue. States must protect trafficking victims and provide effective remedies for them. By not investigating, preventing and punishing human rights violations, states are failing and violating their international obligations. So far, these crimes have, however, mostly been dealt with under criminal law, and not by human rights law.[238]

The Rome Statute of the International Criminal Court includes enslavement as a crime against humanity, that is enslavement which occurs “in the course of trafficking in persons, in particular women and children” and “enforced prostitution” is also considered a crime against humanity.[239]

In 2000 the General Assembly of the United Nations adopted the United Nations Convention against Transnational Organized Crimes.[240] Protocol II of the Convention, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)[241], entered into force in 2003.

[237] Ibid, p. 9-11.
[238] Ibid, p. 7.
[239] Rome Statute of the International Criminal Court, U.N.T.S. 90, entered into force 1 July, 2002, article 7(2)(c) and 7(1)(g).
[240] United Nations Convention against Transnational Organized Crimes, A/RES/55/25, 15 November 2000.
[241] Protocol II to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplimenting the United Nations Convention against Transnational Organized Crimes, to Prevent, Suppress and Punish Trafficking in Persons, A/RES/55/25, 15 November 2000.

This was the first instrument to adopt a definition of trafficking, which was internationally agreed upon. These documents have, however, been criticized for not being broad enough in their approach to human trafficking. For a violation to fall under the scope of these documents it has to meet the requirements of a transnational component or an organized criminal group and it has to involve trafficking across borders. Trafficking does, however, not always fulfill those requirements.[242] This means that the same legislation is to be used against trafficking in arms and drugs and it is assumed that measures against these organized crimes can work against trafficking in human beings, as well. Labeling trafficking as a criminal law offence can limit the prosecution of these crimes to organized crimes, which can get them confused with other policies aimed for, for example, border control, suppressing migration, or criminalization of sex crimes and prostitution. However, when combating trafficking, it needs to be victim-centered. The maximum penalty for trafficking is usually a relatively short prison term, and not severe enough to serve as a deterrent, which is another problem with the criminal approach to trafficking. Also, when sentencing traffickers, the maximum penalty is seldom used and the rates of prosecution for those offences are very low. See further discussions in Alexandra Amiel.[243]

The Council of Europe Convention on Action against Trafficking in Human Beings was Europe's response to its recognition of the fact that legislative action, which prohibits human trafficking, is not working well enough to stop these crimes. The Convention was adopted after the Committee of Ministers of the European Council had issued a recommendation urging the Member States to prevent trafficking, protect victims and prosecute perpetrators of human trafficking. Member States to the Council of Europe are disreputable as the starting point or transit of persons.[244] Trafficking in human beings is naturally prohibited by the ECHR, but

[242] Sembacher, Anke, "The Council of Europe Convention on Action Against Trafficking in Human Beings", *Tulane Journal of International and Comparative Law* 14, 2006, pp. 438-441.
[243] Amiel, Alexandra, "Integrating human rights perspectives into the European approach to combating the trafficking of women for sexual exploitation", pp. 27-30.
[244] Sembacher, Anke, "The Council of Europe Convention on Action Against Trafficking in Human Beings", pp. 437-438.

this Convention complements those previous rights, and makes known that Member States might not be doing all that can be done to eliminate these crimes.

The preamble of the Convention states that trafficking in human beings is a human rights violation and an "offence to the dignity and the integrity of the human being".[245]

7.2.1. Case law regarding prohibition of trafficking

A recent case before the ECHR, Rantsev v Cyprus and Russia, from January 2010, deals with trafficking. The applicant in the case was the father of a girl, who died in March 2001 under extraordinary circumstance, when she fell out of a window of a private home in Cyprus. The girl had moved to Cyprus from her home country, Russia, to work as an artist in a cabaret. The owner of the cabaret had applied for her visa and work permit. A few days after arriving in Cyprus she decided to leave her work. Her employer wanted her deported so he searched for her and took her to a local police station. The police would, however, not arrest her because she did not appear to be illegal in the country. The cabaret owner was asked to collect her and bring her back the next morning for further inquiries of her immigration status. He took her to a room on the second floor of a house, which belonged to another employee of the cabaret. She was found dead in the street below the apartment the next morning.[246]

The investigation in Cyprus led to the conclusion that she had died in an accident, while attempting to escape from the apartment through the balconies. No evidence was thought to suggest criminal liability for her death.[247]

The applicant complained under Articles 2, 3, 4, 5, and 8 about the failure of the Cypriot police to take measures to protect his daughter, the failure to investigate her death; the failure of the Cypriot authorities to punish those responsible for her death and ill-treatment; and for the failure of the Russian authorities to investigate

[245] The Council of Europe Convention on Action against Trafficking in Human Beings, preamble.
[246] Judgment of the ECHR in the case of Rantsev v Cyprus and Russia, 7 January, 2010, para. 15-28.
[247] Ibid, para. 41.

his daughter's alleged trafficking. The applicant's complaints under Articles 2, 3, 4 and 5 were declared admissible by the Court.[248]

The Court noted that it considers:

> …trafficking in human beings, by its very nature and aim of exploitation, [to be] based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions…[249]

With these words the Court found that trafficking itself is prohibited under Article 4 of the Convention, which prohibits slavery, servitude and forced labor. Cyprus had, therefore, been in violation on two accounts, i.e. it had failed to realize an appropriate legal and administrative framework to fight against trafficking, and, secondly, there was a failure of the police to take appropriate measures to protect the girl from trafficking, although she had been in circumstances, which gave a credible suspicion that she had been a victim of trafficking. Russian authorities were also held in violation of Article 4 for its failure to investigate the alleged trafficking of the girl.[250]

This judgment demonstrates how seriously the ECHR regards cases dealing with trafficking. Member States are clearly obliged, in the Court's opinion, to prevent, investigate, and punish trafficking. The judgment is somewhat of a milestone in the combat against human trafficking, and it can also be seen as elucidating state obligations in the battle against transnational crimes, such as trafficking.

Trafficking in women for sexual exploitation continues to be a problem, which the international community needs to find a solution to. Clearly, the way these cases are being dealt with now is not sufficient as a deterrent, since the magnitude of these crimes continues to grow.

[248] Ibid, para. 3 and 212.
[249] Ibid, para. 281.
[250] Ibid, para. 342-343.

8. Discussions and conclusions

The United Nations World Conference in 1993 adopted the Vienna Declaration and Programme of Action. This document declared women's rights to be human rights.[251] Women's rights activists have been fighting a long time for women's rights to be acknowledged as human rights. This statement of the Declaration affirms that there has been a great success in their struggle. As a result one should go further in viewing violence against women as a violation of their human rights. At the same time, the opinion that violence against women or gender-based violence is just a part of a married life, war-torn circumstances, or even interactions between the sexes, is, hopefully, fading.

International human rights bodies are beginning to acknowledge that human rights, which offer protection for men, do not always offer the same level of protection for women. Violations of women's human rights do not always happen in the same circumstances, same places, or by the same perpetrators, as the most common violations of men's human rights. This understanding has forced human rights bodies to confront the rights of women on the basis of interpretation of already existing human rights treaties, and also by adopting resolutions, or new treaties, which especially address violence against women.

One of the biggest successes of international human rights law, when dealing with gender-based violence, is the view that they do not only cover negative obligations of states, but that they also place positive obligations upon them. This obliges states to actively prevent gender-based violence from happening within its jurisdiction. States can be found responsible for acts of private individuals, if the states are in a position to prevent them or if they do not adequately punish for them. This is important when dealing with gender-based violence because the state itself has never been the biggest threat to women, so negative obligations of states regarding violence, i.e. the obligation of state to keep from inflicting any harm on its citizens, are not what women needed the most. Women have needed these positive obligations since the persons they are endangered by are for the

[251] Vienna Declaration and Programme for Action, G.A. res 48/121, U.N., 1993, article 18.

most part private individuals, and in some cases even individuals they know personally and are in close relationships with.

The protection against gender-based violence, offered by international judicial practice, has increased considerably with human rights law moving further into the private sphere. No longer is the protection only afforded in public places, such as prisons or custody, but also in people's homes, places of work, and educational institutions. Domestic violence, for example, will, therefore, not be tolerated as a private act of the family anymore. A state can be obliged to intervene when a woman's health is in danger because of violence she suffers in her own home. The right to privacy and family life of the perpetrator does not offer immunity to violate the same rights of the woman. The woman's right to family life, if she chooses not to press charges against the perpetrator, or continually drops the charges, may even be overruled because the woman cannot disclaim her human rights and these violations will not be tolerated in a civil society. Authorities should, therefore, provide evidence in another way to indict the perpetrator, if the woman is not willing to give testimony to the events her-self.

International human rights treaties have increasingly been interpreted so as to include this protection against domestic violence. Severe incidents of domestic violence have even been found to be treatment which amounts to torture. States of the world must in their legislation account for the nature of this form of violence and the severity it can reach. Legislation regarding assaults does not always sufficiently cover domestic violence because the nature of common assaults and domestic violence is not the same. An assault can be over within a few minutes, but women sometimes live with domestic violence for many years. The constant fear of the violence, threats of violence, threats regarding other family members such as children, verbal abuse, and many incidents of battering must be accounted for. Men who abuse their partners for a long time are not sufficiently punished if they are found to have violated the same laws as those who attack another individual on one occasion.

Individual states of the world have approached gender-based violence with mixed results. Some states have adopted specific legislation to address this form of violence and these laws are an essential part of the protection against gender-based violence. In some cases gender-based violence is, however, not addressed adequately. In some states the sentences, given for crimes such as rape, are at a minimum, and laws intended to deal with violence are written with reference to single assaults and are not always fit to deal with persistent violence, such as domestic violence. The sentences for severe domestic violence on the one hand, and for torture, in the legal understanding of the word, on the other hand, are very different. The seriousness of domestic violence is not fully acknowledged by law, even though the consequences, pain and suffering of the victim are grave. By viewing these violations as human rights violations, the obligation of states to regard the seriousness of the violence is realized.

The definition of rape in both international human rights law and domestic laws has changed dramatically during the past decades. Women's empowerment over their own body is now reflected in those definitions. The definition of rape in most countries no longer requires the use of direct physical force by the perpetrator. Instead the focus is now on lack of consent. However, women who claim to have been raped continue to struggle to prove lack of consent when there is no bodily harm, which demonstrate defense to the assault by the victim. The European Court of Human Rights has explored these definitions in the case of M.C. v Bulgaria, and found that almost every country of the European Council now upholds the definition, which requires lack of consent for an act to constitute rape. It also acknowledged that women can have different responses to violence than men, and may sometimes experience a condition called frozen-fright, in-stead of fighting back.

Myths regarding rape such as that the woman "asked for it", or that she should not have drunk that much, or dressed this way, are still alive. Tales of women who make up stories of them being raped because they feel embarrassed, have also made the prosecution in those cases more difficult. However, when it is being

investigated whether rape has taken place or not, the incident itself has to be what is looked into. Every witness possible should be interrogated, and all irrelevant facts, such as the woman's previous or subsequent sexual history, should be excluded.

The prosecution of rape as a war crime is a huge step forward for all women who have been raped during war. No longer will this form of violence against women go unpunished because it is viewed as an unavoidable part of war. The severity of this violence is now acknowledged, and the women who survive these rapes can now make their voices heard before the whole international community.

The demand that gender-based violence should be viewed as a human rights violation has certainly paid off. For the purpose of treating men and women as equals before international human rights law, the same law was supposed to apply to both genders on an equal basis. Now, however, the awareness that these laws do not equally protect both genders is becoming more general. The international community is starting to listen to interest groups who have been pointing out for a long time that violence against women is very different from violence against men, and the same laws can, therefore, not protect women in the same manner as they protect men. However, there is still some way to go.

Positive changes in domestic laws of some states regarding trafficking in human beings have been adopted, such as the ones in Iceland, which were discussed in the paper. Some international human rights laws regarding trafficking have although not proven efficient enough. Trafficking in women for sexual exploitation has very little in common with trafficking in drugs and weapons. Laws which address trafficking in drugs and weapons, such as the UN Convention against Transnational Organized Crimes, can, therefore, not be expected to adequately protect women from being trafficked for sexual exploitation. In the domestic laws of some states, trafficking in human beings is not explicitly addressed and those responsible for moving women between countries to exploit them sexually do not receive a sentence strict enough. The individuals responsible are often convicted for being pimps or procurers, but that does not offer a sentence as severe as the

violation they have committed. Those states must, therefore, improve their legislation in regards to this problem. Education for police officers, security guards at airports, and even flight attendants is important, as well as for all others who are in a position to be able to spot victims of trafficking. A clear process for those incidents in each country is important, so that when a woman is in a position to seek help, help can be provided for her.

Equality of the genders in international human rights law regarding violence has increased significantly in the past decades. Signs of this can be seen, for example, in the case load of the European Court of Human Rights, and in the statutes of the criminal Tribunals for former Yugoslavia and Rwanda. However, there is still a long way to go. Women are still experiencing gender-based violence every day in every single state of the world. The international community must not give up on finding solutions for these women until this problem ceases to exist. It is important that every state tries to adjust their legislation to fight against this violence. The international community must, however, also unite the states of the world, so that they can learn from each other and confront issues, which spread across countries, together, such as trafficking. Hopefully this positive progress regarding gender-based violence will not stop now, but continue until equality of the genders in international human rights law is reached.

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