ABSTRACT

Sexual violence has become an increasingly visible aspect of armed conflict. Over the last decade, feminists have critiqued the lack of attention given to sexual violence in international humanitarian law and have made important contributions to the developing area of international criminal law by bringing a gender perspective to that field. This thesis examines whether characterizing rape as torture is the best way to respond to the injustices suffered by women during armed conflict. Charging rape as torture offers substantive benefits; yet, such a characterization risks leaving the sexual and gender aspects of the crime invisible. First, I examine the development of recognizing rape as torture by reviewing jurisprudence from the ICTY, ICTR, and regional human rights courts. Second, in order to measure the potential benefits of characterizing rape as torture in national legal systems, I examine reports of custodial rape from Sri Lanka and analyze provisions in Sri Lankan law which could be used to deal with such cases. I conclude that characterizing rape as torture offers significant legal advantages; however, in order to properly recognize the experiences of women who have suffered rape during armed conflict both rape and torture should be charged. The central element in the crime of rape is that a physical invasion of a sexual nature occurred under coercion, whereas the central element in torture is that an act of severe pain or suffering took place.
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INTRODUCTION

A. Rape as a Method of Torture

Sexual violence during armed conflict is not a new phenomenon. Yet, only in the last decade has there been a significant push to make a clear prohibition on all forms of sexual violence during war time. Important changes are now taking place with regards to the norms prohibiting sexual violence in armed conflict. This is seen in the provisions in the Rome Statute of the International Criminal Court dealing with sexual violence, as well as from jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This thesis deals with the increasing visibility of the use of rape as a method of torture and examines how this form of sexual violence is dealt with in international law.

Sexual violence during armed conflict has various aims. For instance, as a weapon of war rape may be used to gain power over a detainee; to terrorize a civilian population into fleeing their homes; to destroy a particular ethnic group by forcibly impregnating women of that group; to humiliate the victims; to humiliate enemy men by raping “their” women; and to make male victims suffer by treating them like women. In other instances, rape occurs in the guise of prostitution in military brothels or is permitted as a means of boosting the soldiers’ morale.¹ An important question is if all or only some acts of rape or sexual violence during armed conflict amount to torture.²

² There is no standard definition of rape and sexual violence in international law. For the purposes of this thesis I will use the definitions of rape and sexual violence from the Rome Statute. Rape is the penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body where the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress,
The Medical Foundation for the Care of Victims of Torture, an organization which supports torture survivors seeking asylum in the U.K., recently published a study on rape as a method of torture which included patients who had survived sexual torture from nearly 50 countries.3 Despite the fact that rape as a method of torture has been reported as occurring in such a large number of countries, it remains largely ignored, in part, because the stigma associated with rape means it is underreported and, more significantly, because international law, constructed as it is on male assumptions and priorities, has failed to adequately and clearly prohibit it. Rape during armed conflict will often objectively meet the definition of torture and, yet, it has been largely ignored since rape, whether committed in war or in peacetime, is generally treated as a private matter. One international law scholar, Simon Chesterman, has commented, “Rape remains an ambiguous war crime because it also marks the scar between the private and the public in times of conflict; it is at once an intimate violation of a woman and a grotesque display of public domination.”4

This thesis examines the emerging trend of characterising rape during armed conflict as torture in international human rights jurisprudence and international criminal

detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. Sexual violence is an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent. See Rome Statute Elements of Crimes, ICC-ASP/1/3(II-B) (entered into force 09/09/2002). Where sexual violence is of comparable gravity to rape then the arguments in this thesis apply in the same way to both rape and sexual violence. The comparable gravity approach is used in the Rome Statute: sexual violence can be a war crime or a crime against humanity where the violence is of comparable gravity to rape, sexual slavery, enforced prostitution, forced pregnancy or forced sterilization and where the other elements of the crime are proved. Chapter 1 provides more discussion about the definitions of rape and sexual violence.

3 Micheal Peel, ed., Rape as a Method of Torture (London: Medical Foundation for the Care of Victims of Torture, 2004), 44, 63.
jurisprudence. Hiliary Charlesworth and Christine Chinkin, two international law scholars, have written that as feminists their goal is “to investigate the ways in which international law has brushed aside the injustices of women’s situations around the world and … to redraw the boundaries of international law so that it responds to these injustices.” This thesis tackles both goals. One aim is to highlight how international humanitarian law has failed to adequately prohibit rape and another aim is to examine whether characterizing rape as torture best redraws the boundaries of international law in a way which responds to the injustices. Characterizing rape during armed conflict as torture provides better protection and more legal remedies than characterising it as rape. Further, such a characterization changes the discourse about sexual violence by emphasizing the political nature of rape, as well as the severe pain and suffering it causes. Yet, this is achieved at the cost of forcing women’s experiences of rape into a legal category, torture, which was built on men’s experiences and, consequently, does not adequately reflect the gendered nature of such crimes. I argue that the benefits of characterizing sexual violence and rape as torture ultimately outweigh the drawbacks, although this is not to say that the instances of rape during armed conflict should be charged only as torture. The central element in the crime of rape is that a physical invasion of a sexual nature occurred under coercion, whereas the central element in torture is that an act of severe pain or suffering which is inflicted for a purpose, including a purpose based on discrimination. Rape is characterized by both of

\[5\] In all of the cases where rape was found to be torture the rape was perpetrated by a state official and occurred while the victim was in some kind of detention. This is significant as the involvement or acquiescence of a state party is an element of torture in international human rights law. As will be discussed in chapter 1 the elements of torture are different in international human rights law and international humanitarian law. The state element is not an element of torture in international humanitarian law. Therefore, my argument that rape during armed conflict is torture in international humanitarian law is not limited to rape in detention or rape committed by state agents. However, rape will only be torture in international human rights law if it was done with the consent or acquiescence of a public official or other person in an official capacity.

these elements, not one or the other, and to adequately recognize the nature of this crime and the experiences of the victims it must be charged as both rape and torture.

B. Academic Debates

Feminists have largely supported characterizing rape as torture. One argument in favour is simply that women experience rape as torture and therefore it should be recognized as such by the legal regime. A related argument is that such a characterization breaks down the public/private divide international law; as Evelyn Mary Aswad writes, "Viewing rape and torture as different offenses or experiences perpetuates the myth that rape is a private, sexual act rather than a political weapon and reinforces notions that a woman's dignity, including her right to mental and bodily integrity, is less worthy of protection than is a man's." Rhonda Copelon, a law professor who has written on the topic of gender crimes committed during armed conflict, argues that it is important to use the category of torture in cases of rape and sexual violence in order to "remove the ambiguity surrounding the gravity of rape and similar forms of gender violence". Copelon also criticized the ICTY statute for listing torture and rape as separate offences arguing that rape should be seen as a form of torture rather than as a separate crime.

Although Copelon advocates rape and torture being the same offence, she argues against collapsing rape and genocide in instances of genocidal rape. During the reports of

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7 Most authors who argue that rape is torture have limited their argument to cases where there is state involvement possibly because, until recently, it was assumed that the state element of torture existed in international humanitarian law.
11 Ibid.: 258.
mass rape in the former Yugoslavia, Copelon, as well as other feminists, worried that the rapes were only newsworthy because of their ethnic cleansing dimension. Copelon writes that “just as historically the condemnation of rape in war has rarely been about the abuse of women as a crime of gender, so the mass rape in Bosnia has captured world attention and remains there largely because of its association with “ethnic cleansing,” or genocide.” Her concern was that women in Bosnia would not receive justice unless they could connect their rape to genocide. She argued that gender needed to be surfaced in the midst of focus on genocidal rape. However, Copelon does not discuss how the gender element remains surfaced when rape is characterized as torture. Jessica Gunhammer, like Copelon, believes that rape in the former Yugoslavia had to be framed as an illegal weapon of war and as ethnic cleansing in order for it to be newsworthy since rape during armed conflict is not in and of itself news. Gunhammar argues that by stressing the many thousands of women who were raped the atrocities were conceptualized as ‘mass rape’; she writes “this made the rapes qualitatively and quantitatively different from ‘normal’ peacetime or wartime rape.” Like Copelon, Gunhammar argues that by stressing the collective and ethnic dimensions of rape, the individual, gendered, and sexual aspects of the crimes is lost. Yet, Gunhammar recognizes that a similar analysis applies to characterizing rape as torture and that while the individual aspect of the crime is present the sexual, gendered aspect is lost.

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13 This was in response to Catherine MacKinnon’s position that the sexual atrocities in Bosnia-Herzegovina should not be discussed as rape or genocide but must be seen as rape as genocide. She argued that presenting the mass rapes in Bosnia as just another instance of aggression by all men against all women was a feminist whitewash. For MacKinnon the rapes in Bosnia were done by some men against certain women for specific (genocidal) reasons. See p. 187-188 in Mass Rape.
14 Jessica Gunhammer, "Rape as Torture?" Index on Censorship 2005, 37.
15 Ibid., 37-38.
16 Ibid., 38.
As I have suggested above, charging acts of rape or sexual violence during armed conflict as both torture and rape or sexual violence would ensure that the sexual, gendered aspect of the crime remains visible. Some scholars have argued that separating rape from torture is dangerous because if rape is seen as a separate crime then it will be more difficult to charge it as torture as well. Deborah Blatt argues that “semantically separating rape and torture pushes the identification of rape into the “not torture but something else” category, thereby diminishing women’s protection from torture.”

17 Blatt’s approach will ultimately keep rape invisible in international law since her approach allows us to stop discussing rape and simply talk about torture. Feminists should push for wartime rapes to be recognized within existing legal categories and at the same time push for a strengthening of the prohibition against rape in international law.

Sexual violence is used for a variety of aims and, accordingly, it will often fall into a number of legal categories other than rape and sexual violence. For example, where rape is genocide it should be charged as such and likewise when a victim has been held as a sex slave then a charge of slavery should be made. Criminal charges should reflect these various aims. However, every act of rape during armed conflict is both rape and torture because the elements for both crimes will almost always be present, particularly given that ICTY jurisprudence suggests that state involvement is not an element of torture in international humanitarian law. To argue that rape during armed conflict is not necessarily torture is to suggest that some rapes are committed without a purpose which in turn suggests that rape and sexual violence is just something soldiers do during war. Therefore, every act of rape should be charged as both rape and torture, in addition to any other crime that the

rapes may have been a part of. Cumulative charging is not without precedent in international criminal law and the ICTY held that in the case of Kunarac that there could be cumulative charges of torture and rape for the same act of rape. This will be discussed in detail in chapter 2.

Finally, it must be mentioned that while new methods of torture, such as rape and sexual violence, are increasingly being recognized, the absolute prohibition against torture is being challenged by the U.S. government. The absolute prohibition is being undermined in two ways. The first way is by simply qualifying the definition of torture so that various treatments, most notably sensory deprivation techniques, do not amount to torture. This is being done by the Bush Administration.\(^1\) The second approach is to simply declare the prohibition against torture is not absolute. This discussion is taking place among American academics. The most well-known advocate of re-evaluating the absolute prohibition is Alan Dershowitz, a professor at Harvard Law School, who has put forward the ‘ticking time bomb’ argument, which states that torture should be permitted in a situation where a terrorist refuses to divulge information necessary to defuse a bomb that is about to kill hundreds of innocent civilians. Dershowitz argues that in such a case an agent who used torture could defend himself against criminal charges by invoking "the law of necessity."\(^1\)

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\(^1\) This was done in the Bybee Memo which was written by the U.S. Justice Department and was delivered on in August 2002. The memo qualified the definition of torture in several ways. It argued that to constitute torture under U.S. federal law the physical pain must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. Assistant Attorney Bybee did not believe that sensory deprivation techniques produced pain or suffering of the necessary intensity to meet the definition of torture. The memo also argued that the acts must have been specifically intended to inflict, severe pain or suffering which would allow an interrogator who torture to later claim that his aim was to obtain information, not to inflict pain. See Alfred W. McCoy, \textit{A Question of Torture: Cia Interrogation, from the Cold War to the War on Terror} (New York, New York: Metropolitan Books, 2006), 121-122.

C. Sri Lanka as a Case Study

Another aim of this thesis is to consider whether characterizing rape in detention as torture would help victims obtain redress within national legal systems. This investigation is premised on the assumption that municipal law, like international law, is gendered and therefore inadequately protects women’s rights. Obtaining redress within national legal systems is important as the success of international humanitarian and human rights norms is ultimately measured in whether norms are accepted and promoted by individual nation states and other non-state actors in armed conflict. To achieve this end, I will use a case study, Sri Lanka, to evaluate how cases of sexual torture are dealt with under domestic law.

There are a number of factors which make Sri Lanka a good case study. First, concerns about the rape of Tamil women by security forces and police personnel have been raised by a number of different groups including Amnesty International, the U.N. Special Rapporteur on Torture, the U.N. Special Rapporteur on Violence against Women, as well as international and Sri Lankan academics and human rights groups. So, although there has been no comprehensive academic analysis of the problem, the significant number of reports by non-governmental organizations and the handful of cases in the Sri Lanka legal system provide a basis to make some tentative conclusions about the problem of sexual torture in Sri Lanka and how it is dealt with in Sri Lanka’s legal system.

Second, women have taken active roles in the conflict as peace activists, as combatants and as nationalists. Most survivors of sexual torture are Tamil women, many of whom are Liberation Tigers of Tamil Eelam (LTTE) combatants or persons perceived to

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20 Concerns about the sexual torture of Tamil men has not been widely discussed by human rights organizations, the media or academics, although in a study of 184 Tamil men done by the Medical Foundation for the Care of Victims of Torture, 21% reported having been sexually abused in custody. See M. Peel and others, "The Sexual Abuse of Men in Detention in Sri Lanka," The Lancet 355 (2000): 23.

21 Women constitute approximately one third of the Liberation Tigers of Tamil Eelam.
have ties to the LTTE. The fact that women play active roles in the conflict means that the issue of how women are affected by the conflict is more visible than it might otherwise be.

Finally, Sri Lanka makes an interesting case study from a legal perspective because there is considered to be a strong culture of judicial independence in Sri Lanka. The judiciary, in particular the Supreme Court and the Court of Appeal, have become increasingly more active in intervening in cases where there has been state violence. Furthermore, Sri Lanka is a likely place for emerging norms within humanitarian and human rights law to take root as numerous well-known international legal scholars and jurists hail from Sri Lanka, including Radhika Coomaraswamy, the former U.N. Special Rapporteur on Violence against Women, Asoka de Zoysa Gunawardana, a former ICTR judge and a former judge of the Appeals Chamber, Joseph Asoka Nihal De Silva, ICTR judge, and A. Raja N. Fernando, president of the Special Court for Sierra Leone.

D. Framework of Analysis

Chapter one examines the prohibition against rape in international humanitarian law and provides an account of how the characterization of rape as a crime against a woman’s honour has undermined the perception of the severity of sexual violence. An explanation of the various ways that torture is prohibited in international law will serve as a point of comparison for the prohibition of sexual violence. Chapter two discusses the evidence of an emerging willingness in international humanitarian and human rights law to recognize rape as torture with reference to jurisprudence from regional human rights bodies and

international criminal tribunals. Chapter three is the case study of Sri Lanka. The first part of this chapter describes the extent of and the pattern of the problem of sexual torture in Sri Lanka and the second part will explain the statutory provisions in Sri Lanka that could be used to deal with cases of sexual torture and provide an analysis of whether the provisions adequately provide legal redress for survivors. Chapter four provides an analysis of the Sri Lankan provisions and provides a discussion of the fundamental rights petition provision provided within the Sri Lankan constitution.
CHAPTER 1: RAPE AND TORTURE IN INTERNATIONAL LAW

A. Introduction

It is vital to understand the status of rape and torture in international law in order to understand why it would be desirable to have a norm which permits rape in certain circumstances to be considered torture. This chapter begins with a description of how rape has been prohibited in international humanitarian law. Despite the fact that there are some provisions that deal with rape in humanitarian law, the actual status of the prohibition is unclear, particularly with regards to whether rape can be considered to be implicitly covered in the grave breach system of the Geneva Conventions. A further issue dealt with is the definition rape. This is followed by a description of the status of torture in international law. The strong prohibition against torture in treaty law and international customary law demonstrates that the norm prohibiting torture is undisputable.

B. Rape in Humanitarian Law

Before the 1949 Geneva Conventions, there were a number of documents of the law of armed conflict which contained provisions relating to women.24 One of the most influential documents was the Lieber Code which was drawn up in 1863 during the American Civil War as a field manual. Rape is prohibited in two articles of the Lieber Code: article 37 states that the United States will protect “religion and morality…; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations” and article 44 makes all wanton violence a grave offence and includes rape

among the list of acts of violence. \textsuperscript{25} These two articles reflect two different conceptions of rape: rape as violence and rape as an attack on a person’s morality. It is the latter characterization of rape which has been most prominent in documents relating to humanitarian law in the 20\textsuperscript{th} century.

Rape was also prohibited after World War One when the commission established by the victors to look at breaches of the law by Germany designated rape as a war crime. Despite this designation no prosecutions resulted from the Commission’s work. \textsuperscript{26} After World War Two, the Nuremberg Charter did not expressly mentioned crimes of sexual violence \textsuperscript{27} and no specific prosecutions for sexual violence were brought at the Nuremburg Trials despite suggestions that the rapes of Russian and Jewish women were part of a systematic Nazi campaign of terror and genocide. \textsuperscript{28} While there were some prosecutions for sexual violence as part of other charges at the Tokyo Tribunal, these instances are obscured by the fact no charges of rape, enslavement or enforced prostitution were ever brought against those responsible for the abuse of 200,000 women held by the Japanese Army as sexual slaves. \textsuperscript{29}

The 1949 Geneva Conventions contained more provisions relating to women than previous documents, there are provisions relating to women as mothers, as prisoners of war and internees, and as persons vulnerable to sexual assault. The Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War deals with sexual assault and

\textsuperscript{25} The Lieber Code of 1863, 24 April 1863. \\
\textsuperscript{27} Rape was listed as a constituent act of crimes against humanity in article 2(1)(c) of the Control Council No.10 which was enacted after the Nuremberg Charter as the basis for the trial of non-major war criminals. See p.79 Gardam and Jarvis, Women, Armed Conflict and International Law, 206-207. \\
\textsuperscript{28} Brownmiller, Against Our Will: Men, Women, and Rape, 69. \\
\textsuperscript{29} Gardam and Jarvis, Women, Armed Conflict and International Law, 206-207.
reads “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any other form of indecent assault.” The critique of this provision is twofold. First, it characterizes rape as a crime against a woman’s honour and, second, it does not put rape in the category of most serious prohibited acts in the 1949 Geneva Conventions, grave breaches.

The concept that rape is an honour crime was hardly unique to the 1949 Geneva Conventions. As noted above, the Lieber Code made such a link although the word honour is not actually used. The connection between rape and honour is above all a cultural concept as in many cultures honour is associated with a woman’s sexuality. Rhonda Copelon, a scholar on gender and war crimes, has argued that “traditionally, rape has been condemned as a violation of a man’s honor and exclusive right to sexual possession of his woman/property, and not because it is an assault on a woman.” This is particularly true where rape occurs during armed conflict as “in this context, violence against women who are seen as being the property of the males in a rival group becomes a means of defiling the honour of that social group.”

While the Geneva Conventions do not frame rape in terms of an honour crime against the male relatives or the social group of the victim, the concept of honour remains because rape is considered a crime against a woman’s honour. This linking of rape and women’s honour is the reason why rape has not been understood as a crime of violence.

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30 Geneva Convention relative to the protection of civilian persons in time of war (IV), 12 August 1949, 75 U.N.T.S. 267, art. 27(2) (entered into force on 21 October 1950).
33 Radhika Coomaraswamy, Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, para. 60.
which violates the physical integrity of a person. The characterization of rape as a crime against honour must be firmly rejected because it fails to acknowledge the serious pain and suffering caused by rape and also because it stigmatizes rape survivors by suggesting their honour and moral integrity has been defiled. The idea that rape was something other than violence persisted even up until 1977 when the Additional Protocol II was adopted. Article 4(2)(e) of Additional Protocol II states that “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” are prohibited at any time and in any place.34 Listing rape as an outrage against personal dignity suggests that rape is indecent rather than violent and that rape hurts a person’s dignity, but not their physical integrity. Further, by listing rape with degrading treatment suggests it is less serious than torture.

The second critique of article 27(2) of the Geneva Convention IV is that it does not make rape a grave breach. Much of the modern day law of war crimes is related to the grave breach system in the Geneva Conventions. Grave breaches are the most serious of the prohibited acts in the Conventions and such acts can entail individual criminal responsibility. The Geneva Conventions impose a positive obligation on states to exercise jurisdiction over persons committing grave breaches. The status of rape in international humanitarian law has been unclear precisely because rape is not explicitly mentioned as a grave breach in the Geneva Conventions. Acts that are considered grave breaches in the Geneva Convention IV if committed against persons protected by the Convention include wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious

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injury to body or health.\textsuperscript{35} Rape could be included within such a category but hasn’t been because rape is characterized as an outrage against personal dignity and a crime against a woman’s honour in the \textit{Geneva Convention IV} and because cultural attitudes towards rape prevented, until recently, such a reading. Feminist scholars agree that rape has not historically been considered torture because it has been considered private. As Christine Chinkin writes,

Violence against women for example has not been readily viewed as torture, or as being imputable to the state, because of its widespread commission by private actors within the private arena of the home. Yet, rape in international armed conflict, which is largely committed by military agents of the state under public authority, has also been ignored.\textsuperscript{36}

Since the early nineties there has been a push to recognize that rape could be a grave breach by recognizing that rape amounts to “wilfully causing great suffering or serious injury to body or health”.\textsuperscript{37} This is an important development but it only applies where a rape was committed during conflicts which are not of an international character, as the grave breach system applies only to international conflicts. The only part of the 1949 \textit{Geneva Conventions} that applies during internal conflicts is common article 3.\textsuperscript{38} Common article 3 makes no mention of rape or sexual assault, and, therefore, there is no specific prohibition against rape in instances of civil conflict unless \textit{Additional Protocol II}, which includes a prohibition against rape, applies.\textsuperscript{39}

\textsuperscript{35} Art.147.  
\textsuperscript{37} In 1992 the International Committee for the Red Cross declared that rape was covered by wilfully causing great suffering provision. Shortly afterwards the US stated that rape was already a war crime or was a grave breach in international customary law. See Theodor Meron, "Rape as a Crime under International Humanitarian Law," \textit{Am. J. Int’l. L.} 84 (1993): 428.  
\textsuperscript{38} \textit{Additional Protocol II} of 1977 supplements common article 3. Article 4 of the \textit{Additional Protocol II} lists torture as a prohibited act if committed against those who are not taking a direct part in hostilities.  
\textsuperscript{39} Not all countries have ratified \textit{Additional Protocol II} and not all civil conflicts will meet the requirements set out in the instrument which determine whether it applies.
These deficiencies in the Geneva Conventions have to a large extent been overcome in the Rome Statute which establishes the International Criminal Court. The Rome Statute is the most comprehensive international instrument because rape, sexual slavery, enforced prostitution, forced pregnancy and sexual violence are all enumerated crimes against humanity and war crimes. However, the jurisdiction of the statute is limited as many nations, including Sri Lanka and the United States, have failed to sign or ratify it.

C. Definition of Rape

The above discussion focused on rape without reference to sexual violence more generally. Rape is not defined in international law so it is unclear what acts fall under the category of rape and which would be considered sexual violence. In the domestic law of many states, rape has been defined as an act by a man against a woman where a woman’s vagina is penetrated by the man’s penis without her consent. Accounts of the acts of sexual violence which occurred during the genocide in Rwanda and the war in the former Yugoslavia reveal that such a definition would catch only a portion of the sexual atrocities which occurred. Such a limited definition simply does not adequately respond to the reality of violence which includes acts such as genital mutilation, rape with objects, oral and anal

Prior to the signing of the Rome Statute the ICTY and ICTR Statutes stand as examples of international criminal instruments which included provisions relating to rape. Art. 3(g) of the ICTR Statute and art. 5(g) of the ICTY Statute listed rape as a constituent act of crimes against humanity. Art. 4(e) of the ICTR Statute also includes rape as a violation of Common Article 3 and Additional Protocol II. In this section, rape is listed with outrages upon personal dignity, and humiliating and degrading treatment, as it mirrors art. 4(2)(e) of Additional Protocol II.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, arts 7(1)(g) and 8(2)(b)(xxii), (entered into force 1 July 2002). Interestingly, although rape and sexual violence are considered war crimes in the Rome Statute these acts are not listed as grave breaches of the Geneva Conventions. Art. 8(2)(a) enumerates acts which are considered war crimes by virtue of the fact that they are grave breaches of the Geneva Conventions while art. 8(2)(b) enumerates those acts which are war crimes because they are “other serious violations of the laws and custom applicable in international armed conflict.”

As of November 2005, 100 countries are States Parties to the Rome Statute of the International Criminal Court.
rape, and male on male rape. The lack of precise definition has been problematic for the ad
hoc international criminal tribunals as every element of the crime has to be proven for a
finding of guilt. Both the ICTR and the ICTY defined rape in order to determine which
elements needed to be proven to find someone guilty of rape. In Akayesu, the Trial
Chamber of the ICTR held that rape "is a form of aggression and that the central elements
of the crime of rape cannot be captured in a mechanical description of objects and body
parts."\textsuperscript{43} The Chamber adopted a very broad definition of rape: \textit{a physical invasion of a
sexual nature}, committed on a person under circumstances which are coercive. The
Chamber also defined sexual violence: sexual violence, which includes rape, is considered
to be \textit{any act of a sexual nature} which is committed on a person under circumstances which
are coercive.\textsuperscript{44} Furundzija was decided at the ICTY shortly after the ICTR came down with
the Akayesu decision, but the Trial Chamber in that case choose not to simply adopt the
Akayesu definition, opting instead to examine definitions of rape in national law and then
come up with a somewhat narrower definition. The Trial Chamber noted that no definition
of rape could be found in international treaty or customary law and that in such instances it
is permissible to look at national law to determine the elements of a crime. The Trial
Chamber noted that there was a trend in national law towards broadening the definition of
rape so that it now embraces acts which were previously classified as comparatively less
serious offences, that is sexual or indecent assault.\textsuperscript{45} The Trial Chamber found that most
legal systems in the common and civil law worlds consider rape to be the forcible sexual

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\textsuperscript{43} \textit{Prosecutor v. Akayesu} (1998), Case No. ICTR-96-4-T, para. 597, (International Criminal Tribunal for
Rwanda, Trial Chamber I), on-line: United Nations <http://www.ictr.org/>. \textsuperscript{44}
Akayesu, para. 598. Note that in Akayesu rape was a constituent act of crimes against humanity so it had to
be proven that the act of rape was committed (a) as part of a wide spread or systematic attack; (b) on a civilian
population; and (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or
religious grounds. \textsuperscript{45} \textit{Prosecutor v. Furundzija} (1998), Case No. IT-95-17/1-T, para. 179, (International Criminal Tribunal for the
\end{flushright}
penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus. Based on its review on national legislation the Trial Chamber found that rape had the following elements:

(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.

Rape is a prohibited act under a number of broader crimes in the Rome Statute but the Statute does not include a definition of rape. However, according to the Elements of Crimes document which accompanies the Rome Statute, the elements of rape (as an act of a crime against humanity, art. 7(1)(g)-1) are

- penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body... and the invasion was committed by force, or by threat of force or coercion, such as that cause by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The document also defines the elements for sexual violence (as a constituent act of crimes against humanity, art. 7(1)(g)-6). Sexual violence is defined as an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion. The notable difference is that penetration is not an element. A further element is that the conduct was of a gravity comparable to the

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46 Furundzija, para. 181.
47 Furundzija, para. 185.
48 Rome Statute Elements of Crimes, ICC-ASP/1/3(II-B) (entered into force 09/09/2002). Note that there are other elements to prove crimes against humanity.
other offences in article 7(1)(g), namely rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization.\textsuperscript{49}

D. What is to be gained in Characterizing Rape as Torture?

Given these weak prohibitions against rape in international humanitarian law there is much to be gained from characterizing rape as torture. Torture is clearly prohibited in international human rights law, international humanitarian law and international customary law. Under international law more protection is afforded to those vulnerable to torture and more substantive remedies are available to survivors of torture. Characterizing rape and sexual violence as torture would only provide greater legal remedies but it would also convey the seriousness of sexual violence.

i) Torture in International Human Rights Law

The prohibition against torture is a universal human right.\textsuperscript{50} Torture is prohibited in number of international instruments, many of which have been widely ratified including the \textit{International Covenant of Civil and Political Rights (ICCPR)} and the \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)}. The \textit{Convention against Torture} defines torture as

\begin{quote}
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.\textsuperscript{51}
\end{quote}

\textsuperscript{51} \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, GA Res. 39/46 [annex, 39 UNGAOR Supp. (No.51) at 197, U.N. Doc., A/39/51 (1984)] entered into forced June 26, 1987, art.1. These are widely considered to be the elements of torture at customary international law;
Article 2 of the Convention states that no exceptional circumstances, including a state of war or internal political instability, may be used as a justification for the use of torture, meaning that no derogation is permissible.  

ii) Torture in International Humanitarian Law

Torture in times of armed conflict is specifically prohibited by international treaty law, in particular the Geneva Conventions of 1949, the two Additional Protocols of 1977 and Rome Statute of the International Criminal Court. Torture is considered to be a grave breach in each of the four Geneva Conventions. As it is listed in common article 3 of the Geneva Conventions, torture is a prohibited act during internal conflicts at any time and any place against those who are not taking an active part in hostilities. The clear prohibition against torture also exists in international criminal law. In the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) torture is a prosecutable offence as a grave breach of the 1949 Geneva Conventions and as a crime against humanity. Similarly, in the ICTR Statute, torture is within the tribunal’s jurisdiction as violation of common article 3 of the Geneva Conventions and as a crime against humanity. In the Rome Statute torture and inhuman treatment constitute acts of war crimes and crimes against humanity. Significantly, under the Rome Statute there is no element requiring that

However, how individual states interpret these elements is by no means uniform and the interpretation of what treatment constitutes severe pain and suffering seems to be narrowing as a result of the US’s War on Terror.

Torture is also non-derogable in the International Covenant on Civil and Political Rights. See art.4 of the ICCPR.

Geneva Convention I, art. 50, Geneva Convention II, art.51, Geneva Convention III, art.130, Geneva Convention IV, art.147 and common art.3.

Additional Protocol I, art.75 (2). Additional Protocol II art. 4(2)(a)

Art. 7(1)(f), art. 8 (2)(a)(ii).

Those who are not taking active part in hostilities include civilians, as well as members of armed forces placed hors de combat by sickness, wounds, detention, or any other cause.

Statute of the International Criminal Tribunal for the Former Yugoslavia. SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993), arts. 2(b) and 5(f).

the pain was inflicted by or with the consent of a public official. The definition simply requires that the pain or suffering was inflicted upon a person in the custody or under the control of the accused.\textsuperscript{59}

iii) \textbf{Prohibition against Torture as \textit{Jus Cogens}}

In addition to prohibitions against torture in international treaty law, the prohibition against torture has achieved \textit{jus cogens} status.\textsuperscript{60} \textit{Jus cogens} are peremptory norms in international law.\textsuperscript{61} Thus, the norm prohibiting torture is universally applicable and no derogation is permitted. There are legal obligations (\textit{obligatio erga omnes}) arising out of a certain crime's characterization as \textit{jus cogens}. Recognizing crimes as \textit{jus cogens} carries with it the duty to prosecute or extradite persons suspected of committing such crimes and the obligation not to grant impunity to the violators of such crimes.\textsuperscript{62} It also creates universality of jurisdiction over such crimes.\textsuperscript{63} The strength of the doctrines of \textit{jus cogens} and \textit{obligatio erga omnes} is rarely used but the significance of a crime achieving the status of \textit{jus cogens} is still symbolically important.

The above description reveals that torture is considered to be more serious than rape in international law. The gap between the two has been closed to a large extent by the \textit{Rome Statute}, which includes both rape and torture as a constituent act of war crimes and

\textsuperscript{59} \textit{Rome Statute,} art.7(2)(e). This reflects the developing concept that the state actor requirement is not as relevant in humanitarian law as it is in international human rights law. More on this in chapter 2.


\textsuperscript{61} For purposes of the \textit{Vienna Convention on the Law of Treaties}, a peremptory norm of general international law is defined in article 53 to mean "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". See article 53 of the \textit{Vienna Convention on the Law of Treaties} (1969) UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969). (entered into force 1980).


\textsuperscript{63} Ibid.: 65-66.
crimes against humanity. However, since the Rome Statute is not customary international law and many nations are not signatories, broadening the scope of torture in international law so as to include rape and sexual violence is valuable.
CHAPTER 2: RECOGNIZING RAPE AS A METHOD OF TORTURE

A. Jurisprudence from Regional Human Rights Bodies

In the late nineties the European Court of Human Rights and the Inter-American Court of Human Rights heard cases where state officials used rape as a method of torture. These cases set important precedents as they were the first to find that rape of a detainee by a state official constitutes torture within the meaning of the respective regional human rights treaties. The first case, Fernando and Raquel Mejia v. Peru, dealt with the issue of whether rape by security forces constituted torture and as such was a violation of article 5 of the American Convention on Human Rights. The Commission noted that the Convention did not specify what is to be understood as torture and referred to the Inter-American Convention to Prevent and Punish Torture which states in article 2 that

Torture shall be understood to be any act performed intentionally by which physical and mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture will also be understood to be application to a person of methods designed to efface the victim's personality or to diminish his physical or mental capacity, even if they do not cause physical pain or mental anguish.

Accordingly, to prove torture three elements have to be established: an intentional act through which physical and mental pain and suffering is inflicted on a person; committed for a purpose; and committed by a public official or by a private person acting at the instigation of the former. Significantly, the Court found that rape is physical and mental abuse that is perpetrated as a result of an act of violence. The Court also emphasized that rape is a method of physical torture, as well as psychological torture.

The following year the European Court of Human Rights in *Aydin v. Turkey* adopted the same interpretation. One of the issues before the Court in this case was whether rape is torture for the purposes of article 3 of the *European Convention on Human Rights*. The court was required to determine whether rape was ill-treatment or torture. According to the Court, the distinction between ill-treatment and torture in the Convention was that torture was very serious and cruel suffering.\(^66\) The Court found that

While being held in detention the applicant was raped by a person whose identity has still to be determined. 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 respond to the passage of time as quickly as other forms of physical and mental violence.\(...\)

... Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.\(^67\)

The element to be proven was whether rape constituted the same level of suffering as treatment which is understood to be torture. By simply recognizing that rape is mental and physical suffering, the court was able to interpret rape as falling within the torture provision of the Convention.

In both *Fernando and Raquel Mejia v. Peru* and *Aydin v. Turkey*, the rapes were committed by state officials so the precedent which these cases set is limited to recognizing rape as torture where the rape was committed by an official of the state. Nonetheless, the jurisprudence from these cases was extremely significant as it came at the time when the ICTY was issuing indictments against individuals for torture based on allegations that they


\(^{67}\) Ibid.: para. 83 and 86.
had raped female detainees. The findings in these two cases were referred to in ICTY judgements.

**B. Jurisprudence from International Criminal Tribunals**

Indictments for rape as a crime against humanity were made at both the ICTY and the ICTR. While this was an important development for the prohibition of sexual violence in international criminal law, rape was not included as a grave breach in the ICTY Statute. As a result of this limitation, the Prosecutor of the ICTY made indictments for acts of rape and sexual violence as a violation of the laws or customs of war (art. 3). This was possible because although art. 3 of the statute doesn’t explicitly mention rape or sexual violence, the provision reads “such violations shall include but not be limited to”. This contrasts with art. 2 which gives an exhaustive list of acts which are grave breaches of the *Geneva Conventions*. The only way to charge an act of rape or sexual violence as a grave breach under art. 2 is to charge it as torture or wilfully causing great suffering. There have been numerous indictments which did exactly that and the decisions from these cases amount to clear evidence of the shift towards broadening the definition of torture to include sexual violence and rape.

*i. Celebici (Delalic)*

In the indictment for this case the Prosecutor alleged that that rapes committed by one of the accused against two women in a prison camp in Bosnia and Herzegovina were torture and as such constituted a grave breach of the *Geneva Conventions* and a violation of

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68 In contrast, torture fell under both tribunals’ jurisdiction as a crime against humanity and was also included in the *ICTY Statute* as a war crime (breach of *Geneva Conventions*) and in the *ICTR Statute* as a violation of common article three.
the laws and customs of war. Trial Chamber II found that acts of rape and sexual violence can be acts of torture and noted that rape is classified as torture and cruel treatment precisely because it is not expressly mentioned as a grave breach in the Geneva Conventions. Since there is no definition of torture in the Geneva Conventions the Trial Chamber II looked to customary international law and decided that the definition of torture found in the Torture Convention represented the definition in international customary law. Like in Raquel Mejía v. Peru and Aydin v. Turkey one issue to be determined was whether rape met the element of severe pain or suffering. The Trial Chamber II held that rape causes severe suffering:

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.

Trial Chamber II also discussed the element of purpose in the context of rape and found that in circumstances where rape was committed, by, or at the instigation of a public official, or with the consent or acquiescence of an official during armed conflict then it is presumed that it occurred for a purpose that involved punishment, coercion, discrimination or intimidation. The degree of suffering and purpose elements of the definition of torture have perhaps posed the greatest challenge to rape being viewed as torture and the judgment in Celebici is significant for dealing with both of these issues.

ii. Akayesu

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69 See counts 18, 19, 21 and 22 of the March 21, 1996 indictment.
71 Ibid., para.459.
72 Ibid., para.495.
73 Ibid.
In the same year as the *Celebici* judgment was decided, the ICTR Trial Chamber decided the *Akayesu* judgement. The case is most well-known for the fact that it was the first time that rape was found to constitute genocide. Beyond that finding, *Akayesu* stands as the one of the most important cases with respects to sexual violence because of the broad and progressive definition of rape articulated by the tribunal which was discussed in chapter 2. This case is also significant because the Trial Chamber confirmed *Celebici* and found that rape could amount to torture. The rapes in this case took place at the Taba bureau communal where Tutsis had taken refuge during the genocide. Akayesu was the bourmestre of Taba commune and it was proven that some communal policemen armed with guns and Akayesu himself were present while some of these rapes and sexual violence were being committed. With respect to characterizing rape as torture the trial chamber noted that rape, like torture, is a violation of personal dignity, and that rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\(^74\)

**iii. Furundzija**

*Furundzija* is significant as it was the first case prosecuted exclusively on crimes of sexual violence before an international tribunal. In that case Furundzija was found guilty of a violation of the law or customs of war as torture (count 13) and as outrages upon personal dignity, including rape (count 14). This occurred where Furundzija, a local commander of a unit of military police, interrogated the victim, known as Witness A, in a house where the accused’s unit was stationed. Witness A was nude throughout the interrogation and a co-accused threatened her with a knife and threatened to cut her private parts out. In a later

\(^74\) *Akayesu*, para. 597.
phase of the interrogation, Furundzija continued to interrogate the victim as the co-accused raped her by the mouth, vagina and anus in front of a group of soldiers. As the interrogation intensified so did the sexual assaults and rape. Furundzija did not commit the rape himself, however, he was found to be liable for torture as the trial chamber decided his interrogation and the assaults were part of the same act of torture. This case properly recognizes and reconfirms that finding in Celebici that rape and sexual assault will be torture when the elements of torture are met and recognizes that the interrogator should be responsible for all acts which constitute the torture, whether committed by him or his subordinates.

iv. Kunarac (Foca Camp)

In Kunarac, the Trial Chamber I sentenced three ethnic Serbs to prison for their abuse of women at a rape camp in the Bosnian town of Foca. The defendants were found guilty of a number of crimes, including torture as a crime against humanity and torture as a violation of the laws or customs of war and rape as a crime against humanity and as a violation of the laws or customs of war. There are three important aspects of this case: the finding that rape causes serious suffering; the finding about the elements of torture at international humanitarian law; and the finding on cumulative charging and cumulative convictions.

On appeal the accused argued that the rapes committed did not amount to torture because there were no visible signs that the victims suffered any harm from the rape. In response the Appeals Chamber found that

Generally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence

75 Furundzija, para. 266.
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 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. The Appeals Chamber thus holds that the severe pain or suffering, whether physical or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterise the acts of the Appellants as acts of torture. The Appellants' grounds of appeal in this respect are unfounded and, therefore, rejected.  

This confirms the argument which is central to characterizing rape as torture – that rape is severe suffering.

Another significant aspect of this case is the Trial Chamber's finding on the elements of torture. Significantly, and in contrast to the finding in Celebici, the Trial Chamber concluded that the presence of a state official or any other authority wielding person is not necessary for an act to be regarded as torture under international humanitarian law. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed. In discussing why a different set of elements may exist for torture within international humanitarian law than in international human rights law, the Trial Chamber held that

\[\text{[t]he role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.}\]

The Appeals Chamber upheld this finding and noted that the state official requirement in the Convention against Torture existed because the Convention applies to states and seeks to

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78 Ibid.: para. 495.  
79 Ibid.: para. 470.
regulate their conduct. This finding is very significant since it suggests that virtually all rape committed during armed conflict could be found to be torture and the distinction between rape in detention and other forms of rape will no longer have any meaning within the context of humanitarian law.

The final aspect of this case which is relevant to this discussion is the tribunal’s finding on cumulative charging. The accused in this case was charged with both rape and torture under article 5 of the ICTY statute based on the same conduct. The Trial Chamber held that cumulative charging is permitted for simple reasons that it is not possible to know in advance which charge will result in convictions.\(^8^1\) The Chamber recognized that cumulative charging and cumulative convictions were separate matters. On the issue of cumulative convictions, the Trial Chamber adopted the finding from the Appeal Chamber decision in Celebici that reasons of fairness to the accused multiple criminal convictions based on the same conduct will only be permitted if each statutory provision involved has a materially distinct element not contained in the other where an element is materially distinct from another if it requires proof of a fact not required by the other.\(^8^2\) The Trial Chamber in Kunarac applied this test to determine whether cumulative convictions for rape and torture on the basis of the same act could be sustained. The Chamber held that a materially distinct element of rape is the sexual penetration element while the materially distinct element of torture is the severe infliction of pain or suffering aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating against the victim or a third

\(^{80}\) Kunarac, Appeal Chamber, para. 146 and para. 148.
\(^{81}\) Kunarac, Trial Chamber, para. 548.
person. This finding that cumulative convictions of torture and rape based on the same act were permissible was affirmed by the Appeal Chamber. The Appeal Chamber noted that the tribunal should be careful with cumulative convictions since the accused would suffer greater stigma from them but that the positive side of cumulative convictions was that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."

C. Reports of U.N. Special Rapporteurs

One place to look for signs of an emerging broadening of the definition of torture is in the reports of the U.N. Special Rapporteur on Torture. Professor Kooijiman who was the Special Rapporteur from 1985-1993 while recognizing rape was torture did so inconsistently. His successor Sir Nigel Rodley, Special Rapporteur from 1993-2001, also recognized this and stated that that rape and other forms of sexual assault in detention violated the inherent dignity and the right to physical integrity of the human being and as such were torture. In his 1995 report, Rodley noted that there were allegations of sexual torture from both men and women but that the majority of allegations concerned women.

Further, he noted that

when sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape as a means of extracting confessions or information, to punish, or to humiliate detainees. In some instances the gender of an individual constituted at least part of the very motive for the torture itself, such as in those where women were raped allegedly for their participation in political and social activism.

83 Kunarac, Trial Chamber, para. 557.
84 Kunarac, Appeal Chamber, para. 169.
86 Nigel S. Rodley, Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to the Commission on Human Rights Resolution 1992/32 (UN ESCOR, Commission on Human Rights, 50th Sess., item 10(a), UN Doc. E/CN.4/1995/34, (1995)), para.16. Rodley stated that this was the position of his predecessor, Professor Kooijmans, and he supports it.
87 Ibid., para.18.
88 Ibid.
Other U.N. Special Rapporteurs who have dealt with this subject include Radhika Coomaraswamy, Special Rapporteur on Violence against Women (1994-2003), and Gay J. McDougall, Special Rapporteur on Systemic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict (1997-present). In her 1994 report, Coomaraswamy states that rape is often used as an instrument of torture and the report discusses how rape in custody is torture. In her 1998 report, Coomaraswamy restated her position that rape can amount to torture in circumstances where the rape was committed by a state official and she referred to comments from the Special Rapporteur against Torture, jurisprudence from the ICTY and ICTR and the decision in Aydin v. Turkey as evidence that rape is increasingly being recognized as torture.

Gay J. McDougall, Special Rapporteur on Systemic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, stated in her 2000 report, that one of the purposes of her report was to emphasize that rape and other forms of sexual abuse may constitute crimes against humanity, war crimes, genocide, sexual slavery, grave breaches and torture. In an earlier report, McDougall noted that most, if not all, of the cases of rape and sexual violence during armed conflict described in her report could be prosecuted as torture on the basis that in international customary law torture requires an intentional infliction of severe mental or physical pain or suffering, and a nexus a government action or

inaction. The role of Special Rapporteurs is to highlight important issues and emerging trends. These three Rapporteurs through their reports have aided in the process of reconstructing international law by suggesting a broadening the definition of torture to include rape where the state element of torture is met.

The jurisprudence from the ad hoc criminal tribunals, the regional human rights court and the comments from the Special Rapporteurs do not suggest that new law is being created. Rather, they reflect a willingness to interpret existing international law, and in particular existing prohibitions in international humanitarian law, in a way which will provide redress for abuses which primarily affect women.

D. Conclusion

The jurisprudence from the ICTY and ICTR establishes a clear shift in the way that rape and sexual violence during armed conflict will be dealt with under international humanitarian law. While the value of these judgements as precedence is limited given the scope and nature of the ICTY and ICTR, the normative value of them is enormous. They provide the clearest evidence that a norm of characterizing rape as torture is emerging. Together with the jurisprudence from regional human rights bodies and a growing body of academic literature supporting this development, it is clear that this is evidence of an emerging norm. The process through which the courts and tribunals decided that rape in detention could constitute torture was not strictly speaking a process of creating new law and perhaps it is inaccurate to characterize this as an emerging norm, rather it is a trend in

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93 Meron: 428.
international human rights and international humanitarian jurisprudence to interpret the
definition of torture broadly so as the include acts which previously had not been considered
torture.

The emergence of a broader interpretation of torture is not yet settled. For instance
the question of what are the elements of torture is not yet resolved. The finding in Kunarac
that state involvement is not an element suggests that the distinction between rape in
detention (where the element of state involvement exists) and other rape during armed
conflict could become irrelevant and that any rape committed during armed conflict would
be seen as torture. This is a positive development and gives hope that in the future a rape
committed during armed conflict would be charged as a grave breach as torture, as well as
any specific prohibition against rape. In other words, rape should be charged as two
offences rape and torture. Given the Appeal Chamber ruling in Celebici in seems that at
least in some jurisdictions that cumulative convictions of torture and rape could result from
one act of rape.
CHAPTER 3: CASE STUDY OF SRI LANKA

Chapter two described the status of rape and torture in international law and highlighted the evidence of an emerging willingness for international and regional courts to characterize rape in certain circumstances as torture. This development in international humanitarian law will affect how crimes prosecuted at the ICC and future international criminal tribunals are tried. Yet, many countries experiencing armed conflict are not signatories to the *Rome Statute* and will not have an international criminal tribunal assign criminal liability for violations of international humanitarian law. In such instances, perpetrators must be held accountable within national legal systems and the way in which domestic law frames rape and torture will determine which acts can be prosecuted. This chapter provides a context to the conflict cases of torture and custodial rape in Sri Lanka and then examines Sri Lanka’s obligations under international humanitarian and human rights law, as well as the relevant domestic provisions pertaining to torture and rape.\(^{94}\)

A. Background to the conflict

The conflict in Sri Lanka began in the early eighties and remains unresolved despite a 2002 ceasefire. The civil conflict has been primarily between the government’s Sinhala-dominated military and the separatist LTTE, a Tamil nationalist group.\(^{95}\) The origins of the ethno-religious tensions lie in the post-colonial period when a series of Sinhala-nationalist

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94 Information on cases of torture and rape in Sri Lanka is taken primarily from international human rights organizations, such as Amnesty International, U.N. reports and reports from the Medical Foundation for the Care of Victims of Torture. This study could have benefited from an information source within Sri Lanka for data on the prevalence of cases of torture and rape within Sri Lanka. This would have allowed me to compare the findings regarding patterns of torture and sexual violence with the findings from international sources. My access to Sri Lankan jurisprudence was limited and as a result, I was not able to conduct as wide a survey of case law as would have been ideal.

95 Another aspect of the conflict involved the government combating insurgencies led by the Janatha Vimukthi Peramuna (JVP), a Sinhala socialist nationalist organization. Insurgencies in the south of the island occurred in 1971 and 1987-1990.
policies were adopted. At the beginning of the conflict there were a number of different Tamil militant groups, however, by 1990 the LTTE had emerged as the dominant one. The LTTE called for armed struggle and the creation of a Tamil homeland in the north and east of the island. India’s attempt to broker peace between the LTTE and the Sri Lanka government resulted in the Indo-Lanka Accord in 1987. The Accord provided for a new system of devolution and gave Tamil the status of an official language. It also provided for the deployment of an Indian Peace Keeping Force (IPKF) to enforce the cessation of hostilities and the surrender of arms. The IPKF ended up fighting the LTTE who opposed the accord. During this period there were reports of widespread human rights abuses committed by the IPKF in the north, including rapes. The IPKF withdrew from Sri Lanka in 1990. The LTTE subsequently took control of the Northeast of the country, including the Jaffna peninsula, and hostilities resumed between the military and the LTTE. This period, sometimes referred to as the Eelam War II, saw intense fighting, particularly around the Jaffna peninsula which the LTTE remained in control of until 1995. A ceasefire was negotiated with the help of Norway in 2002 but the conflict dynamic has escalated considerably since the presidential election of November 2005 and a return to hostilities is a real possibility.

In addition to deaths caused directly by military operations, there have been a large number of deaths from suicide bombings, political assassinations, and forced disappearances. Numbers are disputed but approximately 60,000 people have been killed in the conflict\textsuperscript{96} and 26,000-60,000 have been "disappeared".\textsuperscript{97} Arbitrary detention,

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\textsuperscript{96} Darini Rajasingham-Senanayake, \textit{Dysfunctional Democracy and the Dirty War in Sri Lanka} (East-West Center, 2001), 6. These are official estimates as of January 1999.

\textsuperscript{97} Wasana Punyasena, "The Facade of Accountability: Disappearances in Sri Lanka," \textit{Boston College Third World L.J.} 23 (2003): 129. Also see Rajasingham-Senanayake, \textit{Dysfunctional Democracy and the Dirty War}
\end{flushleft}
disappearances and torture are among the most significant human rights abuses by the state. During the period of January 1, 2001 to March 31, 2003 the Human Rights Commission of Sri Lanka received 6050 complaints regarding arrests, detentions, torture and harassment deaths in custody, missing persons and disappearances. Human rights abuses committed by the LTTE include acts of torture, executions, political killings, particularly of Tamils critical of the LTTE, and the use of child soldiers. Notably, however, there are no reports of sexual violence committed by the LTTE. No study has been done on why this is, but it may be related to the fact that 1/3 of LTTE combatants are women. The LTTE has recruited women on the basis that they believe in gender equality and the LTTE has argued that the movement can provide social emancipation for women. There is some evidence that fear of, or anger about, sexual violence against Tamil women by the IPKF and Sri Lankan military is one reason motivating women to join the LTTE.

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100 In Miranda Alison’s qualitative study of 14 female LTTE combatants and ex-combatants, 7 interviewees said that in general this is a reason for women to join the movement and several of the interviewees knew of women who had joined the LTTE because they had been raped. Miranda Alison, "Cogs in the Wheel!? Women in the Liberation Tigers of Tamil Eelam," *Civil Wars* 6, no. 4 (2003): 42-43.
B. Torture in the Conflict

According to Amnesty International, torture has been among the most common human rights violations reported in Sri Lanka.\(^{101}\) In addition to Amnesty International, numerous other organizations have raised concerns about torture in Sri Lanka, including various U.N. bodies.\(^{102}\) International concern about torture in Sri Lanka gained momentum in the period from 2000-2002. In late 2000, two members of the U.N. Committee against Torture visited Sri Lanka to investigate whether reports of systematic torture were accurate. The U.N. Committee against Torture concluded that “although a disturbing number of cases of torture and ill-treatment as defined by articles 1 and 16 of the Convention are taking place, mainly in connection with the internal conflict, its practice is not systematic.”\(^{103}\) Despite this conclusion reports of torture continued to emerge and in September 2002 the U.N. Special Rapporteur on Torture wrote to the Sri Lanka government noting there had been a rise in reports from Sri Lanka of ill-treatment and torture allegedly committed in the North and East of the country. The Special Rapporteur also noted that there was a high number of rape cases reported, most of which occurred within the context of the conflict.\(^{104}\) According to a 2005 interview with Radhika Coomaraswamy, who is now the Chairperson of the Sri Lanka National Human Rights Commission, there has been an increase in the


\(^{103}\) Activities of the Committee under Article 20 of the Convention: Sri Lanka 17/05/2002 (UN Committee against Torture, UN Doc A/57/44) at para. 181. Note 1 of the report reads, “The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have occurred fortuitously in a particular place or a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question.”

daily number of torture complaints; she did not know if this was due to an increase in reporting or an increase in the use of torture.\(^{105}\)

As noted by the U.N. Committee against Torture, many of the reported cases of torture occur within the context of the conflict. The bulk of these cases involve Tamils who were arrested or detained by the military or the police for suspected links with the LTTE.\(^{106}\) In some instances, these persons were captured during LTTE operations. Amnesty International in its 1999 report entitled *Sri Lanka: Torture in Custody* found that thousands of Tamil men and women have been arrested each year particularly in the North and the East of the country, as well as in Colombo, on suspicion of being members or sympathizers of the LTTE.\(^{107}\) Human Rights Watch’s 2002 report of Sri Lanka cited a report by a human rights lawyer N. Kandasamy which indicated that 18,000 people may have been arrested under emergency regulations and the PTA from January to November 2000.\(^{108}\)

Some patterns emerge from human rights reports and studies done by doctors treating torture survivors. The majority of Tamil detainees are detained in the north-east of the country by the army, navy or other security force. A minority are detained by the police, usually by the police in Colombo.\(^{109}\) The length of detentions is on average longer when the detention was made by the army. This is significant since the likelihood of torture increases

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\(^{106}\) Under the *Prevention of Terrorism Act (PTA)* people can be held in army or police custody for up to 18 months on an administrative order (renewable 3-month orders). See art. 9(1) of the *Prevention of Terrorism Act*, No. 48 of 1979.

\(^{107}\) *Sri Lanka: Torture in Custody*, 8.


\(^{109}\) Micheal and Mary Salinsky Peel, *Caught in the Middle: A Study of Tamil Torture Survivors Coming to the Uk from Sri Lanka* (London: Medical Foundation for the Care of Victims of Torture, 2000), 21. In this study 65% were detained by the army and 24% by the police. The study was relatively small as it was based on 49 cases of Tamil Sri Lankans who were treated by doctors at the Foundation. The study only included 2 women so it is unclear whether the break down among female detainees is similar.
with the length of the detention. For instance one study found that those detained by the police were held an average of less than 3 weeks while those held by the army were kept about 5½ months. Reports indicate that incidents involving the army, navy and security forces are worse than those involving the police. For instance, those detained by the police in Colombo in Peel’s study were less likely to be subjected to suspensions and suffocations. Methods of torture include beatings with a PVC pipe filled with sand or cement, burning with cigarettes and hot metal rods, cutting with knives and bayonets, being suffocated with plastic bags containing petrol, rape, and assault on male genitals.

C. Sexual Violence in the Conflict

Perhaps, the worst period for sexual violence occurred during the period from 1987-1990 when the Indian Peace Keeping Force (IPKF) came to the island to uphold the Indo-Lankan Accord and ended up fighting a war with the LTTE. The number of rapes during the period of the Indian Army operations is unknown. According to Vidyamali Samarasinghe, rape was acknowledged as an atrocity but was also accepted as an inevitable consequence of war. She quotes an Indian army officer in Sri Lanka who agreed that rape was a heinous crime but that “all wars have them”. In the period following the withdrawal of the IPKF rape was less common although custodial rape became a concern for human

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110 Ibid.
111 Ibid. Amnesty International’s Report, Sri Lanka: Torture in Custody., also suggests that likelihood and severity of treatment increase in the north and east where security forces are involves, see p 8-9.
114 Daya Somasundaram, a professor of Psychiatry at the University of Jaffna believes that the rapes reached “epidemic proportions”. See Daya Somasundaram, Scarred Minds: The Psychological Impact of War on Sri Lankan Tamils (New Delhi; Thousand Oaks; London: Sage Publications, 1998), 244.
rights organizations in the late nineties. Many reports of custodial rape emerged during the 1998-2002 period and were linked to police, security, or military personnel.

D. Patterns of Rape and Sexual Violence

The number of victims of sexual torture is difficult to ascertain for a number of reasons. First, there is significant stigma associated with both male and female rape. Second, the fact rapes are often perpetrated by state security personnel and police certainly inhibits victims from reporting crimes. As there has been no comprehensive study of Tamil detainees, it is difficult to estimate what percentage of detainees who report torture have experienced rape or sexual violence. Some numbers have been collected for alleged rapes involving the armed forces in the north and east. For example, 37 cases of rape committed by armed forces personnel were reported in the Sri Lankan press in 1998.116 Virtually all reported cases of sexual violence in detention involve women, but studies done by doctors who treat Tamil torture survivors provide clear evidence that Tamil male detainees have experienced rape or sexual violence. In a study published in the Lancet it was found that 21% of the Tamil men in the study who had been tortured reported sexual abuse, and 5% of the men in the study (also included in the 21%) reported being raped. The authors of the study believed that sexual abuse of Tamil men in detention in Sri Lanka is common and that the true percentage was higher than 21% as some men will not report the sexual abuse.117

Sexual violence reported by male victims includes rape, hitting on the genitals, inserting genitals into drawers and slamming the drawer shut, pumping water through fire

117 Peel and others, "The Sexual Abuse of Men in Detention in Sri Lanka," 2070. Another study by the same group found a higher rate of rape (17%) and sexual abuse (32%) among men detained by the army. See Peel, Caught in the Middle: A Study of Tamil Torture Survivors Coming to the Uk from Sri Lanka.
hoses onto genitals, putting chilli pepper on the genitals and being forced to commit sexual acts with other detainees.\textsuperscript{118} Often the sexual abuse took place while the victims were being beaten.

The pattern of sexual torture is different for women. A study entitled \textit{Rape as a Method of Torture} done by the Medical Foundation for Survivors of Torture found that for female victims, the sexual attack was the primary form of torture, whereas for male victims, sexual assault occurs in a series of assaults.\textsuperscript{119} A survey of the cases reported to Amnesty International and the U.N. Committee against Torture would seem to support this finding among Tamil survivors of torture. Anecdotal evidence reveals that women are more likely to be gang raped. A review of some of the more high profile cases reveals the particular ways in which women are vulnerable to and experience sexual torture. The most high profile case involved an 18-year old Tamil student, Krishanthi Kumaraswamy, who was detained at a checkpoint while cycling home from school outside of Jaffna on September 7, 1996. Her mother, her brother and a neighbour went to inquire about her whereabouts and were also detained. All four were murdered and Krishanthi was also gang raped. Five soldiers and one police officer were sentenced to death. While Kumaraswamy's case has elements of a general pattern of sexual torture – the victim was detained at a checkpoint, gang raped and murdered – it stands out as an anomaly because criminal convictions resulted from the crimes. Another high-profile case involved a former member of the LTTE, Ida Carmelita, who had surrendered to the police only to be gang raped and killed a month later by five soldiers who forced their way into her home on July 11, 1999.


\textsuperscript{119} Peel, ed., \textit{Rape as a Method of Torture}, 65.
Although two of the suspects had been identified and taken into custody, the case stalled after two key witnesses were threatened and subsequently fled to India. Sathasivam Rathykala was arrested by four male police officers on November 24, 2001 while she was on duty at a hospital. Rathykala alleges that she was accused of being a member of the LTTE, beaten with clubs and ropes and was trampled with boots and raped on more than one occasion by twelve officers. She was made to sign a statement admitting her involvement with the LTTE and was taken to a village to “identify” LTTE members. She was transferred to another police station and was left in solitary confinement for a month. After that she was transferred to a remand prison and at this time the police fabricated three charges against her. She was eventually released on bail in September 2002 and in 2003 a report was filed with three U.N. Special Rapporteurs.\(^{120}\)

These cases highlight two ways in which women are particularly vulnerable: as civilians at checkpoints and combatants or suspected LTTE members. Clearly both men and women are vulnerable when being searched at checkpoints but women and girls are at particularly risk because women make up a significant part of the LTTE suicide bomber squad.

**E. Sri Lanka’s Obligations under International Law**

The only relevant international humanitarian law treaties that Sri Lanka is bound by are the *Geneva Conventions*. Since Sri Lanka has not signed *Additional Protocol II*, there is no provision prohibiting rape binding Sri Lanka in civil conflicts (unless one reads “willingly causing great suffering” or torture in common article 3 to include rape). Sri

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Lanka has ratified the *International Covenant of Civil and Political Rights (ICCPR)* and the *Convention against Torture (CAT)* and is therefore bound by the prohibitions against torture which are contained in those instruments.\(^{121}\) Even if it had not ratified these conventions, a prohibition against torture exists at customary international law and Sri Lanka is thus bound by that. Sri Lanka has ratified the *Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)*, CEDAW does not contain any specific prohibition against rape but provisions prohibiting discrimination on the basis of gender should be read to include gender-based violence.\(^{122}\)

**F. National law on Torture**

In Sri Lanka, cases of torture can be prosecuted under the *Penal Code* or the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (Torture Act)*. Causing *grievous* harm is an offence under s. 313 of the Penal Code and is punishable with up to seven years imprisonment. A list of what constitutes grievous harm is found in s.311 and includes emasculation, impairment of sight, impairment of hearing, permanent disfiguration of the head or face, impairment of a joint or member, and fractured bones. Given that the only act of sexual abuse on the list in sec. 311 is emasculation (s.311 (a)), this provision is of little use to female survivors of sexual torture and only of use to male survivors who have been castrated. There is a default category in 311(i) which defines grievous harm as any act which causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits, for a period of twenty days. This section could be available to survivors of sexual torture.

\(^{121}\) ICCPR ratified 11 Sept 1980, CAT ratified 02 Feb 94.

\(^{122}\) CEDAW ratified 05 October 1981. See General Recommendation no.19.
Sec. 312 of the Penal Code makes it an offence to cause hurt. The definition of causing hurt is “committing an act with the intention of thereby causing hurt to any person or with the knowledge that he is thereby likely to cause hurt to any person.” On its face, this provision appears that it could be used to prosecute perpetrators of sexual violence. Causing hurt or grievous hurt and grievous hurt in order to obtain a confession are prohibited in ss. 321 and 322. The maximum sentences are 7 years and 10 years respectively. It is notable that neither the grievous harm or harm provision in the Penal Code have a requirement that the perpetrator is a state official and, as such, the provisions are broader than the definition of torture in international human rights law.

The Torture Act was passed to bring Sri Lanka in line with its obligations as a signatory of the Torture Convention. Cases brought under this act are heard in the High Court and the sentence of imprisonment is 7-10 years.\textsuperscript{123} By August 2004 only one person had been convicted under this act and 33 alleged perpetrators has been indicted.\textsuperscript{124} To date this provision has not been used for cases of sexual torture.

E. National law on Rape

There are a number of provisions dealing with sexual assault in the Penal Code. S.363 defines rape as being committed when a man has sexual intercourse with a woman without her consent (unless it is his wife) or with consent where consent happened under certain circumstances. Subsection (b) notes that sexual intercourse where consent was given while a woman was in detention, whether lawful or unlawful, will be rape. No exact

\textsuperscript{123} Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment Act, No. 22 of 1994, Certified on 20\textsuperscript{th} December, 1994. arts. 2(4) and 12.

\textsuperscript{124} Centre, Systematic and Widespread Torture by State Insitutions in Sri Lanka and the Absence of Effective Remedies for Victims and Their Family Members, 180.
definition of sexual intercourse is given but the Code notes that penetration constitutes sexual intercourse. There are also provisions for rape in custody (s.364(2)(A)) and gang rape (s.364(2)(G)), recognizing that these can be aggravating factors. Originally both of these provisions carried imprisonment terms of 10-20 years, but in 2004 the death penalty was re-introduced for rape. Acts of sexual violence which do not fit the definition of rape because the element of penetration is missing can be prosecuted under s.365(b), grave sexual abuse, which carries an imprisonment terms of 7-20 years.

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CHAPTER 4: ANALYSIS OF SRI LANKAN PROVISIONS

A. Sri Lankan Provisions

i) Law on Torture

There are a number of areas of concern with regards to the Sri Lankan law on torture. While the Torture Act covers most of the provisions of the Torture Convention, one significant omission is that the definition of torture in the Torture Act is “any act which causes severe pain, whether physical or mental, to any other person”.\textsuperscript{126} Torture as defined in the Torture Convention is “severe pain or suffering”. The U.N. Committee against Torture has on several occasions raised the issue of this omission with Sri Lanka. It has been suggested that some treatments may not qualify as severe pain but would be severe suffering, for example prolonged light exposure or sleep deprivation. Sri Lanka’s position is that “severe pain whether physical or mental” would necessarily include any suffering. It further states that when interpreting domestic law which gives effect to international obligations Sri Lanka courts will necessarily give expression to the provisions of the relevant international instrument.\textsuperscript{127} There is no evidence that courts in Sri Lanka have interpreted the definition of torture differently because of the omission of the word suffering.

ii) Law of Rape

The law of rape under the Penal Code has some progressive aspects, as well as some areas that are a serious concern. The fact that the punishment available for rape is severe

\textsuperscript{126} Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, art.12.

reflects an acknowledgement that the government considers rape to be a very serious crime. The special provisions for rape in custody and gang rape represent an important development with recognizing aggravating factors in sexual assault. The single biggest problem with the rape provision in the *Penal Code* is the definition is too limited. The definition of rape in the Penal Code is not broad enough to include all the circumstances in which rape occurs. In particular, the provision fails to recognize male rape. Male rape is made further invisible because homosexuality is prohibited under s.365 (prohibiting unnatural sex) and s.365A (gross indecency between persons). As a result sexual violence and rape of males is not prohibited and a victim who comes forward with a complaint could risk being charged under one of these provisions. A further problem with the definition of rape is that it may not be broad enough to include instances of anal rape, oral rape and rape with objects.

Under Sri Lanka criminal law rape and sexual violence are more serious than torture by virtue of the fact that the maximum sentence available for those offences is greater than is available for torture. This is the inverse of international law where the prohibition against rape is significantly weaker than the prohibition against torture. Given that Sri Lanka law recognizes the seriousness of rape and sexual violence, how would recognizing rape as torture help victims obtain redress? The simply answer is that it would help in non-criminal remedies. In Sri Lanka, non-criminal redress can be obtained through the fundamental right petition procedure. The fundamental rights remedy can only be used where rights enumerated in the constitution have been violated. The right to be free from rape is not an enumerated fundamental right and, as a result, in order for victims of rape and sexual violence to use this provision, rape and sexual violence must be seen as torture.
B. Fundamental Rights Provision

Under section 126 of the Constitution, a fundamental rights petition can be brought by persons who believe their rights protected in the Constitution have been violated. Only the Supreme Court has jurisdiction to hear fundamental rights petitions. As the fundamental right petition is not a criminal prosecution there is no accused but rather there are respondents and proof is on the lesser civil standard of a preponderance of probability. Due to this lesser burden of proof and because the victim need not rely on a police investigation to bring the action, this means of redress is frequently used and is, at the moment, the best remedy available to survivors of torture. The Court can order any compensation or give any direction it sees as just and it will generally order monetary compensation, paid by the state or individual perpetrators or both. After deciding a fundamental rights case, the Supreme Court can order the Attorney General to take steps to bring criminal charges.

Freedom from torture, cruel, inhuman or degrading treatment or punishment is a fundamental right under article 11 of the Constitution. There is no definition of torture in the Constitution. There is no right to be free from rape in the Constitution; therefore it is necessary for rape to be characterized as torture, cruel, inhuman or degrading treatment in order to make a petition under section 126. As early as 1993 the Supreme Court of Sri Lanka interpreted article 11 of the Constitution broadly so as to catch sexual assault. In the fundamental rights case of Kumarasena v. Subinspector Sriyantha and others, a case where a young girl had been arrested without reasonable grounds and detained for approximately 6

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hours at a police station where she was sexual harassed by the police, the Supreme Court held that

"... in the circumstances of this case, the suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11 of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating the petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the petitioner to degrading treatment."  

*Kumarasena* was a sexual abuse case decided in 1993; surprisingly, it took nearly a decade before the Supreme Court decided on a rape case. The first case in which the Supreme Court awarded compensation to a rape victim as a violation of her right to be free from torture was the case of *Velu Arasa Devi* decided in 2002. Velu Arasa Devi was stopped at a checkpoint at 11pm one evening where the 1st and 2nd respondents were on duty. Several hours later the 1st and 3rd respondents came to her residence and ordered her to come to the checkpoint. She was raped by more than one person. The court declined to make any findings of fact regarding the role of the respondents as if the court did not want to prejudice any future criminal trial. The court held the state responsible for the infringement of her rights under article 11 and article 13(1) (right to be free from arbitrary arrest) and awarded her 150,000 rupees payable by the state. It is significant that in this case there were no other non-sexual forms of abuse which could be said to constitute the torture; thus, it is clear that the court found the rape to constitute the violation of article 11. Unfortunately, the court did not offer any substantial analysis of its understanding of the scope of torture in article 11 and it is unclear whether the court considers rape to be torture or whether it considers it to be degrading treatment as in *Kumarasena v. Subinspector Sriyantha and others*.

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The same year as the *Velu Arasa Devi* case was decided, the Supreme Court decided the *Yogalingam Vijitha* case. Yogalingam Vijitha was a Tamil woman who had been displaced twice as a result of the conflict. She moved to Negembo in order to get married. After the marriage she discovered her husband was already married and she refused to live with him. Her husband threatened to use his influence to have her arrested as a member of the LTTE suicide squad and to have her tortured. She left Negembo but plain clothes police officers from Negembo found and arrested her in another town. They transported her back to Negembo where she was assaulted with a club on her knees, chest, abdomen and back. She was detained five days under the *Emergency Regulations*. She was again assaulted, this time her face was covered with a shopping bag containing chilli powder and petrol, pins were struck her nails, she was trampled and she was hung and beat with a club. Finally she was asked to sign a statement in Sinhala which she could not read. She was shown a plantain flower, a hard cone-like object which is approximately 8 inches long, which had been soaked in chilli powder and was told she would be raped with it if she didn’t sign the statement. She was raped with the plantain flower continually for 15 minutes until she signed the paper. She was transferred to a terrorist investigation unit in Colombo and detained another 26 days where they tried to force her to identify members of the LTTE. The Court found that the medical opinion of the Judicial Medical Officer corroborated the evidence of the petitioner, including on the matter of the rape. The Court found that her rights under article 11, 13(1) and 13(2) were violated and she was awarded 250,000 rupees, of which 150,000 was payable by the state. This case is significant not only because it reaffirms the finding in *Velu Arasa Devi* that rape is torture, but also because the Supreme Court adopts a broad definition of torture, which includes rape with an object.
The fundamental rights petition procedure offers real redress for victims of sexual torture. The likelihood of success is higher given the lesser standard of prove and the court awards a monetary compensation. In many cases where criminal charges have been brought against police officers and security personal for rape and torture, victims and witnesses have been harassed by the accused and their associates until the witnesses withdraw. As a result victims are liable to be re-traumatized by the criminal proceedings. Further, the fact that the state is found liable provides some deterrent effect for government departments and agencies to strengthen their policies on torture. On the other hand, the procedure holds virtually no value in terms of individual deterrence since the perpetrators are not held criminally liable.

C. Conclusion

The case study of Sri Lanka reveals that in considering whether characterizing rape as torture would be beneficial to survivors of sexual torture, there is a need to look carefully at domestic criminal provisions, as well as human rights provisions to determine how rape and torture are treated within the legal system. In international humanitarian law the fact that rape was considered a crime against honour made it a relatively less serious prohibited act; however, in states where crimes against honour are taken very seriously this concept of rape may result in a situation where a sentence for rape is more severe than a sentence for torture or other assault. In such instances, the more serious sentence is significant because it recognizes that rape is a serious offence. Yet, a cumulative charge of torture would serve to link wartime rape to state practice and would serve to reinforce that rape during armed conflict is not a private matter but is a political matter. Given that the available sentence for
rape in detention is longer than that available for torture in Sri Lanka, prosecutors dealing with cases of custodial rape should charge both rape in detention and torture. At the same time, human rights organizations should continue to support survivors of sexual torture in their efforts to bring fundamental rights petitions in the Supreme Court of Sri Lanka.
CONCLUSION

If international criminal law is to offer some form of justice to victims of rape and sexual violence, the crimes must reflect the experience of the victims. Recognizing rape as a method of torture is an important aspect of this. At the same time, in order to adequately reflect the reality that these crimes are gendered-based crimes, rape and sexual violence must also be charged. Fears expressed in the early nineties by some feminists, such as Copelon and Blatt, that keeping categories of both rape and torture would undermine the attempt to characterize rape as torture are no longer valid. Much has changed in international criminal law since that time. There has been a large body of jurisprudence created from the ad hoc tribunals and the Rome Statute has been ratified by 100 countries. Real progress was made at the ICTY and ICTR towards recognizing rape as a serious violation of humanitarian law. More importantly, the fact that rape and sexual violence are clearly prohibited in the Rome Statute as crimes against humanity and war crimes and that the Rome Statute does not provide a hierarchy of crimes provides hope that the prohibition in international law against rape may eventually be considered as serious as the prohibition against torture. In the meantime cumulative charging of rape and torture for acts of rape is the best way to deal with rape during armed conflict and this should be considered a viable legal option in international criminal law given the jurisprudence from the ICTY which held that there can be cumulative convictions of rape and torture for the same act of rape.

The same approach should be used in domestic law. Cumulative charging of rape and torture for the same act of rape should be the starting point for prosecutors laying charges. However, it is likely that on the domestic level that cumulative charging of rape
and torture will be limited to rape committed by state officials. This is because domestic torture provisions are likely to use a definition of torture similar to the one in the *Torture Convention*, which includes the state involvement element, rather than the definition at international customary humanitarian law where the state element does not exist.

The finding in *Kunarac* that state involvement is not an element of torture in international humanitarian law will have significant impact on which acts of rape during armed conflict can be considered torture. Originally the state element made the distinction between rape by a state official and other wartime rape significant as only the former could be argued to be torture. The *Kunarac* approach allows for a more realistic understanding of sexual violence during armed conflict – all rape during armed conflict should be seen as militarized.

The domestic rape law in Sri Lanka is less than perfect because of its limited definition of rape. Aside from this significant limitation, the law could allow for cases of rape by state officials to be prosecuted as both rape and torture, provided the victim is female, although female victims may face gender stereotypes about which kind of violence men and women suffer during armed conflict, i.e., men are tortured and women are raped. The findings of the Sri Lanka Supreme Court in the fundamental rights petition cases discussed in chapter 4 lay the precedent for cases of rape by state officials to be charged as both rape and torture. Male victims, on the other hand, will not be able to use the rape provision until the definition of rape is changed to include male rape.

The Sri Lanka case study highlights the importance of using constitutional or human rights remedies where they exist since they may actually provide redress in a more accessible manner. Although international humanitarian law has more in common with
domestic criminal law than domestic human rights law, the potential to use constitutional and human rights remedies to develop humanitarian norms should not be underestimated.

Recognizing that rape and sexual violence are torture is a significant part of the process of redrawing the boundaries of international law; yet, on a broader level there is a need to continue to evaluate what treatment amounts to torture. Photos from Abu Ghraib and reports of interrogation methods used by US military against detainees at Guantanamo Bay demand that we seriously consider whether sexual humiliation and other ‘non-violent’ forms of sexual abuse, such as forced masturbation and forced nudity, are torture. Eric Steiner Carlson, a researcher who worked as analyst for the Sexual Assault Investigation Team at the ICTY, has warned that male sexual assault during armed conflict is not being treated with the seriousness it deserves. While investigating reports of sexual violence in the former Yugoslavia, he was struck by frequent and consistent reports of sexual violence against male prisoners, that he “began to contemplate the possibility that sexual assault against men (soldiers, prisoners and non-combatants) was, perhaps, not only widespread in war, but that it was also an almost integral part of war-making itself.”

Reflecting on the reports of U.S. soldiers’ treatment of Iraqi detainee’s, Carlson writes that “in the wake of the many misinformed debates in the United States and elsewhere, which have included a defence of these acts, because—as the apologists have it—they were less like torture and more like ‘a college fraternity prank’, I realized we had not learned our lessons from the tragedy in the Balkans.”

It is very possible that ‘non-violent’ forms of sexual abuse would amount to torture because they cause severe psychological pain. Further research in this area is needed to

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131 Ibid.
understand the effects of sexual humiliation. Yet, if even it was found that some acts of ‘non-violent’ sexual abuse do not meet the pain or suffering threshold of torture, such acts would certainly amount to degrading treatment. The fact that degrading treatment is prohibited in many of the same international instruments as torture, such as in the ICCPR, CAT and the Geneva Conventions, has generally been lost in recent debates about what treatment amounts to torture.
International Instruments


Geneva Convention relative to the protection of civilian persons in time of war (IV), 12 August 1949, 75 U.N.T.S. 267, art. 27(2) (entered into force on 21 October 1950).


The Lieber Code of 1863, 24 April 1863.


Sri Lankan Legislation


Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment Act, No. 22 of 1994.

Penal Code, Chapter 19.


Jurisprudence


Prosecutor v. Delalic (1998), Case No. IT-96-21-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) online: United Nations


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