VOL.3 ISSUE 2
DROIT PENALE: INDIAN LAW JOURNAL ON CRIME & CRIMINOLOGY
ISSN: 2456-7280

RAPE AS *JUS COGENS*: PREVENTION OF SEXUAL VIOLENCE THROUGH INTERNATIONAL CRIMINAL JUSTICE SYSTEM

- Dr. A. Vijayalakshmi[1]

ABSTRACT

Jus Cogens (peremptory norms) under public International Law has no place for derogation. Under the International Humanitarian Law and Human Rights Law, there are some crimes which attained the position of jus cogens and considered to be delictum juris gentium (crime against nations) inter alia crime of Genocide, Apartheid, Slavery etc. But one crime which still has not provided with such status is Rape and more particularly Rape during armed conflicts (both national and international). What constitute the offence of rape during armed conflicts is still a highly interpretive one. Rape and sexual violence committed during armed conflicts has more impact than the same offence committed during the period of peace. Though the national laws are punishing rape as a prohibited acted and considered as a distinct offence, the International Criminal Law still treating the said prohibited as umbrella crime. The crime of rape under international humanitarian law is considered as an act if it falls within its jurisdiction of either offences like Genocide, Crime against Humanity, War Crimes or Crime of Aggression. The international crimes evolved jurisprudentially after the World War II, (IMT, IMTFE, CCL No:10), with the aid of International Ad hoc tribunals (ICTY, ICTR), hybrid tribunals and now we are in the era of International Criminal Court (Rome Statute 2000).Even after several decades, the offence of rape still strives to be recognised as an international crimes.

For centuries, rape is used a tool for any armed conflicts. The victories power will conquer the defeated States property including women and girls. Even sometimes, during the armed conflict itself, the either party will target the women and girls to prove their power to their counterpart. The illustrations are alive in Rwanda, Former Yugoslavia particularly Bosnia-Serbia, Cambodia etc. Rape has many forms like torture, sexual slavery, enforced prostitution, genital mutilation, spreading of infectious disease etc. It is not only a crime against human body but also against the psychology, insult to humanity. Without proper legal mechanism, the perpetrators of this crime are easily moving out of clutches of law. This paper will argue for compelling necessity on declaring Rape as a distinct international crime and sanction the status of jus cogens.

***Key words**: International Humanitarian law, International Criminal Law, International crimes, genocide, crime against humanity, war crimes, rape.*

[1]Dr. A. Vijayalakshmi, Assistant Professor (Senior Scale), Dept of Criminal Law and Criminal Justice Administration, School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University, Chennai.

Introduction

Jus Cogens (peremptory norms) under public International Law has no place for derogation. Under the IHL (herein after referred to as the 'IHL') and Human Rights Law, there are some crimes which attained the position of *jus cogens* and considered to be *delictum juris gentium* (crime against all the nations) *inter alia* crime of Genocide, Apartheid, Slavery etc. But one crime which still has not provided with such status is Rape and more particularly Rape during armed conflicts (both national and international). What constitute the offence of rape during armed conflicts is still a highly interpretive one. Rape and sexual violence committed during armed conflicts has more impact than the same offence committed during the period of peace. Though the national laws are punishing rape as a prohibited acted and considered as a distinct offence, the International Criminal Law (herein after referred to as the 'ICL') still treating the said prohibited as umbrella crime. The crime of rape under International Humanitarian Law (herein after referred to as the "IHL") is considered as an act if it falls within its jurisdiction of either offences like Genocide, Crime against Humanity, War Crimes or Crime of Aggression. The international crimes evolved jurisprudentially after the World War II, with the aid of International *Ad hoc* tribunals, hybrid tribunals and now we are in the era of International Criminal Court ((herein after referred to as the 'ICC'). Even after several decades, the offence of rape still strives to be recognised as an international crime.

For centuries, rape is used a tool for any armed conflicts. The victories power will conquer the defeated States property including women and girls. Even sometimes, during the armed conflict itself, the either party will target the women and girls to prove their power to their counterpart. The illustrations are alive in Rwanda, Former Yugoslavia particularly Bosnia-Serbia, Cambodia etc. Rape has many forms like torture, sexual slavery, enforced

prostitution, genital mutilation, spreading of infectious disease etc. It is not only a crime against human body but also against the psychology, insult to humanity. Without proper legal mechanism, the perpetrators of this crime are easily moving out of clutches of law. This paper will argue for compelling necessity on declaring Rape as a distinct international crime and sanction the status of *jus cogens*.

International crimes in the generic sense denotes such crimes as against the interest of the nations and destructs the values of humanity. The nature of such egregious crimes is necessarily shocks the basic consciences of mankind. Though crime of rape is one of such nature, the non-availability or the concept of *non-liquet* (no law or law is unclear) of the substantive understanding of the crime legally. As per the *Principle of Legality*, it is explicit the *nullum crimen sine lege* (no crime without law) and *nullum poena sine lege* (no punishment without law). Hence it is mandatory requirement of definitional element of any crime. *Principle of Substantive Justice* is an excuse for the above principle, as such any act which violates the general international law may be qualified as condemned act.

Evolution of International Criminal Law

The notion of the ICL though recent, the foundational views were developed by World War II tribunals. Till 1990's there was no definite crime considered to be committed against the international community. The ICL is one branch which is constantly under evolution. Basically, the historical roots of the subject matter have been derived from the practice of the national legal systems. The first attempt to make up the ICL was substantive law. This includes the definition of the prohibited act, criminal accountability, elements, and defences. International crimes mean, offences over which international courts or tribunals have been given jurisdiction under public international law. After the World War II, twin International tribunals, International Military Tribunal (herein after referred as to the "IMT")

and that of the International Military Tribunal for the Far East (herein after referred to as the "IMTFE") Judgements by punishing the Nazi war criminals during 1946, the attention of the international community turned towards codification of the ICL. In the chronological sense there were series of International Conventions came into effect which inter alia involve, (i) Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (herein after referred to as the "Genocide Convention").[2] This Convention laid down Genocide as a discrete offence; (ii) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces, on the High Seas, Protection of Prisoner of War and Civilians Rights in the field of war, 12th August, 1949 and its Additional Protocols (herein after referred as the "Geneva Conventions) marked an advance as regard the extension of both substantive crimes.[3] This Convention added a new crime called war crime, though war crime were been prosecuted and punished during the IMT. As there was no treaty or customs, it was not considered to be a criminalized crime. After this Geneva Convention and its Additional Protocols entry, codified the offence as war crime. This may have called as grave breaches of the Geneva Convention; (iii) The next source for the ICL was Nuremberg Charter, 1950. After the Convention on Crime of Genocide, the United Nations General Assembly (herein after referred to as the "UNGA") along with International Law Commission (herein after referred as the "ILC") prepared a Statute for International Criminal Jurisdiction (UNGA/ Res/216 B (II).

However, the systematic development of the subject matter was evolved by way of the establishment of two the UN sponsored Ad-hoc tribunals. The United Nations Security

[2]Adopted by the UN General Assembly through Resolution UNGA/Res/96(I) on December,1948.
[3]The International Committee of Red Cross Sponsored the Geneva Convention for the Protection of War Soldiers, wounded and ship wrecked persons, prisoners of war and wounded and the protection of civilians. It is a source of IHL.

Council (herein after referred to as the "UNSC") in an unprecedented manner by relying upon Art 39 of the Chapter VII of the Charter established the twin tribunal (i) International Criminal Tribunal for Former Yugoslavia (1992) (herein after referred as the "ICTY") and (ii) International Criminal Tribunal for Rwanda (1994) (herein after referred as the "ICTR"). On 1993, through the UNSC/ Res/827/1993 it established the ever first Ad-hoc international criminal tribunal to prosecute persons responsible for serious violations of IHL committed in the territory of Former Yugoslavia. Under the Statute of the ICTY, the following crimes are being recognized for the prosecution and punishment, (1) grave breaches of Geneva Convention; (2) violations of laws or customs of war; (3) Genocide; (4) Crime against Humanity. Following this, in 1994, reacting to the request from the permanent representatives of Rwanda, the Security Council established the next Ad-hoc tribunal the ICTR to prosecute the persons charged with the crime of Genocide and other serious violations of IHL by UNSC/Res/955/1994 and the crimes under the Statute of the ICTR are (1) Genocide; (2) Crime Against Humanity (herein after referred to as the "CAH"); and (3) Violations of Art. 3 of Geneva Convention and additional protocols (herein after referred to as the "War Crimes).

This is the first after the Convention on Genocide[4] both the tribunal have jurisdiction to prosecute for Genocide, CAH and War Crimes. In this way ICL systematically evolved jurisprudentially[5] for the crimes of Genocide, CAH and War Crimes under criminal frame work. Under UNSC/Res/1315/2000, 14th August 2000, the Security Council established Special Tribunal for Sierra Leone (herein after to as the "STSL"). The crimes coming under the jurisdiction of this tribunal are CAH, War Crimes, serious violation of IHL and crimes

[4]Art.VI of the Convention on Genocide. The full text of the Convention is available in www.preventgenocide.org accessed on 13.1.2019.
[5]Under ICTY, totally 161 individuals indicted, 90-convicted,19-acquitted, 13-referred, 1-retrial, 37-withdrawn. Under ICTR, totally 93 individuals indicted, 80-concluded, 5-transferred, 8-fugitive. The key figure of cases is available in www.icty.org/decisions and www.ictr.org/decisions accessed on 15.1.2019.

under Sierra Leone Criminal law. The next was Special Tribunal for Lebanon (herein after referred to as the "STL"). Under the UNSC/Res/1595, 1644, 1757/2006, the Security Council established the STL in the Netherlands on 14th February,2009. The establishment of Extraordinary Criminal Court of Cambodia (herein after referred to as the "ECCC"), considered to be one of the sources of development of ICL and international crimes.

Establishment of International Criminal Court

The United Nations General Assembly in its 49th Session, discussed about the Establishment of Permanent International Criminal Court (herein after referred to as the 'ICC')[6] which decided to establish an ad hoc committee to review the issues on draft Statute for an ICC. After various sessions, on 17th July,1998 Rome Statute for the International Criminal Court was adopted.[7]Finally Rome Statute for ICC came into force on 1stJuly, 2002. The jurisdiction for the ICC isCrime of Genocide, Crime against Humanity, War Crime and Crime of Aggression.[8] ICC was considered to be inherited court which got its sources from the Statutes of the ICTY and ICTR. The interpretation of the international crimes wasvehemently done by the ad hoc tribunals in various decisions. Still the quest for constituting rape as international crimes is in existence.

Interpretation of offence of rape as punishable acts under International Crimes:[9]

[6]UNGA/Res/49/53 dated 17 February 1995. The full text of the report is available in https://un.org/en/A/Res/49/53 accessed on 16.1.2019
[7]UNGA/Res/50/46 dated 18.1.1995, discussed about the establishment of Preparatory Committee; UNGA/Res/52/160 dated 28.1.1998 discussed about to hold United Nations Diplomatic Conference on Plenipotentiaries on the establishment of ICC; UNGA/Res/53/105 dated 26.1.99 speaks about the significance of Rome Statute; UNGA/Res/56/85 dated 18.1.2002 speaks about establishment and entry onto force of ICC. The full text of the detailed report of the resolutions are available in https://un.org/en/ga/62/plenary/icc/bkg.shtml accessed on 16.1.2019.
[8]Arts. 6,7,8,8*bis* of the Statue of ICC.
[9]Art. 2(b), (c) (Grave breaches of Geneva Convention, 12 August 1949), Art.3 (Violations of Laws or Customs of War), Art.4 (Genocide) and Art.5 (g) (Crime against Humanity) of the Statute of the ICTY referred to jurisdiction of the ICTY with rape as punishable act. Art.2 (Genocide), Art.3(g) (Crime against Humanity) and

(i) Crime of Genocide

The definition for crime of genocide is verbatim of the definition of the said crime under the Convention on Prevention and Punishment of Crime of Genocide, 1948 (herein after referred to as the 'Genocide Convention'). The crime was unnamed since the paper submitted by the renowned Polish jurist Prof. Raphael Lemkin in 1944 in his book "*Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposal for Redress*" (herein after referred to as the "Axis Rule"). He was the instrumental factor who attracted the attention of the international community to take note of the magnitude and the gravity of the offence. In the encyclopaedic work he gave the definition of the term "*Genocide",* which means destruction of a nation or of an ethnic group. The author combined the two terms to denote the old practise in its new development, the ancient Greek term *genos* which means race or tribe and the Latin term *cide* means killing.[10] In 1946, the next signpost utility of Prof. Lemkin's scholarship was with regard to the creation of international treaty for the prevention and punishment of the crime.[11]After several modifications and amendments, the ECOSCO submitted its report to the Legal Committee and it was approved and adopted by the UNGA through resolution UNGA/Res/96(I) December 11, 1946, the text Convention was adopted unanimously by the UNGA on December 9, 1948.[12] The question of application of the

---

Art.4 (e) (Violations of Art 3 Common to Four Geneva Convention, 12 August, 1949 of the Statute of the ICTR referred about the jurisdictions of the ICTR, Art.6 (Genocide), Art.7 (g), 7 (2) (f) (Crime against Humanity), Art.8(2)(b)(Xxii),8(2)(e)(vi) (War Crimes), Art.8bis of the Statute of the ICC referred the crimes with prohibited act of rape. The full text for the Statutes of the ICTY, ICTR and the ICC refer, www.icty.org/x/file/Legal-1.20Library/Statute/statute-sept09_en.pdf and https://www.ohchr.org/en/.../pages/statuteinternationalcriminaltribunalrwanda.asx and https://www.icc.cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf028861283503/romestatuteeng.pdf Accessed on 1.2.2019

[10]*Axis Rule in Occupied Europe* was published in November 1944 was the first place where the word "*Genocide",* appeared in print, though the author of the term coined the term in 1943 and submitted in 1933 Madrid Proposal as a analysis on German occupation policy in Europe. He directly addressed the term in this book in Chapter IX of Part I, he broadly used the term not only to describe the systematic exterminations of Jews by Germans, but also described a coordinated plan of different actions. Part I: Analysis of "German Techniques of Occupation", last chapter discussed about Genocide.

[11]*Genocide – A crime without name",* American Scholar, Vol. 15, No.2 (1946), pp. 227-230.

[12]UNGA/Res/260A (III) dated December 9, 1948, adopted in 3rd Session and 179th Plenary Session of UNGA for the adoption of the Convention on the prevention and Punishment of Crime of Genocide and the GA

Convention-whether universally or territorially was raised. According to the preamble of the Convention, it states that,

> "*...that the parties pledge themselves to prevent and to repress such acts wherever theymay occur*".

After the international treaty on crime of Genocide, now the crime is of international legal concern and responsibility.[13]

(ii) Interpretation of act of Rape as technique or punishable acts by the Tribunals and the ICC:

(a) Crime of Genocide:

Art.2 (2) (b) of the definition of the crime of Genocide speaks about the prohibitedact of causing serious bodily or mental harm to the members of the group. This element wasscrupulously examined before the Rwandan Tribunal. The Tribunal impart with the moderntechniques of the offenders legally rehabilitated and reequipped the characterization of causingserious bodily or mental harm to include the causative the crime of Genocide. Physical actsincludes, rape, sexual violence, torture, inhuman treatment and serious injuries were interpretedas to constitutes serious bodily and mental harm caused to the member of the group as a processto destroy the group in whole or in part.[14]

---

approves the text of the Convention. The text consists of 19 articles and the ILC was assigned o study the question of an International Criminal Tribunal to try the persons charged with Crime of Genocide. The full text of the report is available at www.undocuments.net/a3r260.htm. Accessed on 5.2.19.

[13]Art 2 of the Genocide Convention defines crime of Genocide as, "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.The full text of the Convention is available at http://treaties.un.org/doc/publiccation/unts/.../volume-78-i-1021-english-pdf. Accessed on 7.2.19

[14]In the following cases the ICTR Trial Chamber has dissected the elements of Genocide under Art 2 (2)(b) to interpret rape as a genocidal technique; *The Prosecutor v. Alfred Musema* (ICTR-96-13-A dated 27.1.2000); *The Prosecutor v. Clement Kayishema and Obed Ruzindana* (ICTR-95-1-T dated 21.5.99); *The Prosecutor v. Jean Paul Akayesu*(ICTR-96-4-T dated 2.9.98); *The Prosecutor v. Juvenal Kajelijeli* (ICTR-98-44-T dated 1.12.03);

The Trial Chambers of the ICTR in the *Akayesu* decision opined that the rape and sexual violence constitute the offence of genocide both physically and mentally. The aftermath of the said act is graver than the act of killing. The interpretation on systematic and widespread act of rape and sexual violence against women was path breaking happening.

The Trial Chamber in *Kayishema and Ruzindana* decision further extended the horizons of the interpretation of Art.2(a)(b), the mental harm suffered by the victims of rape and sexual violence had a very serious consequential effect on them and to their group.[15]

Ethnic Cleansing **as genocide:**

UNGA/Res/47/121 dated 7 April 1993, UNGA has observed that the situation of human rights violations in the territory of the FormerYugoslavia was 'ethnic cleansing', which was not the consequences of the war but its goal and further. The United Nations General Assembly declared the deterioration conditionin the Republic of Bosnia and Herzegovina is the abhorrentpolicy of 'ethnic cleansing' and it is a form of Genocide. Though the expression "*ethnic cleansing*" is not a legal term, but it is a phenomenon. It is a policy that accompanied by serious human rights violation towards a particular ethnic group which tries to change the order of ethnicity. The Trial Chambers of the ICTY in *Karadzic and*

The Prosecutor v. Laurent Semenza (ICTR-97-20-T dated 15.5.03); *The Prosecutor v. Pauline Nyiramasuhoko and 5 Others* (ICTR-98-42-T dated 24.1.11); *The Prosecutor v. Sylvester Gacumbitsi* (ICTR-01-64-T dated 17.6.04) and *The Prosecutor v. Tharacisse Muvunyi* (ICTR-2000-55A-T dated 15.9.06). To refer cases decided by the ICTR visit www.unictr.irmct.org/en.cases accessed on 5.2.19

[15]Some of the victims of the said violence committed suicide, some got affected psychologically, some women killed their own kids born out of these rapes. The Chamber in *Alfred Musema* trial decision held that "causing serious bodily or mental harm to include, but not limited to, acts of …rape, sexual violence." *Alfred Musema* Trial decision, para 156; Witnesses testified before the Chamber by recalling the events. They deposed that Hutu soldiers started to kill the members of the Tutsi group according to the list already prepared by them. One of the witnesses evidenced the killing of Annunciatea Mujawayezu. She was raped and one of her breasts was cut off and fed it to her hunger child which is aged about 5 years old. Then they killed the mother and the child, para. 806-809. Musema raped a Tutsi woman by uttering "The pride of the Tutsi is going to end today", before raping her, and four other men raped her after him. For analysis of this element see, Allice T.C. Milne 2005, "Prosecuting decisions on Gender Violence in the ICTR", *Buffalo Human Rights Law Review,* Vol.11, pp.109-111; Patricia Viseur Seller 2002, "Sexual Violence and Peremptory Norms: The Legal Value of Rape, *Decision Western Reserve Journal of international Law.* Vol.34, pp.299-302; Mark Ellis 2006-2007, "Breaking the Silence: Rape as an International Crime", *Decision Western Reserve Journal of international Law,* pp.231-233.

Mladic[16]recognised forced impregnation as a form of *ethnic cleansing* and interpreted the act of rape and sexual violence as a technique to commit crime of genocide.[17]

(b) Crimes against Humanity:

Rape as Crimes against Humanity (herein after referred to as the "CAH") has been discoursed by the Trial Chambers of the ICTY and the ICTR has considerably accepted that rape as a nature of torture, one of the punishable acts under the Statues of the ICTY and ICTR. In *ZejnilDelalic*[18] decision, the Trial Chamber held that rape of any person is a striking act against the human dignity and included rape as a prohibited act of torture.[19] Rape as a prohibited definite act under CAH was discussed in *Furundzija*and *Akayesu* decisions by the Trial Chambers of the ICTY and the ICTR. The Chambers dissected the element of this act by stating that rape includes two components such as physical invasion and coercion and

[16]*The Prosecutor v. Radovan Karadazic*and *The Prosecutor v.Ratko Mladic*, Trial decision dated 11 July, 1996, IT-95-5-R61 and IT-95-18-R61, para.62, Prof Garde's work was considered as expert and observed that, "…the term ethnic cleansing is a practice which means that you act in such a way that, in a given territory, the members of a given ethnic group are eliminated, aiming that a given territory be "ethnically cleansed" in other words, that territory would contain only members of the ethnic group that took the initiative of cleansing the territory".

[17]In the former Yugoslavia during the armed conflict, there was a practise of devoting separate camps for systematic rape. The sole object of the camp was to impregnate the Bosnian Muslim women with Serbian offspring and detained the women till the advanced stage of pregnancy, so that the women could not go for termination of the child. The child born out such rape would bear the Serbian ethnicity, as in their culture the ethnicity was not determined by the mother's bloodline. Therefore, the rape includes both physical violence as the Muslim woman who gives birth after a rape, would both increase the Serb population and used to humiliate, degrade, shame and frighten the group, thus causing the group to flee as there would be no recovery for a woman who was forcibly impregnated or raped. The contributions of the scholars are remarkable in this issue. Sharon A. Healy in his commendable work in *Prosecuting Rape under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 1995-96, Brooklyn Journal of International Law, pp.327-383, discussed that forced impregnation of Muslim women are by-product of rape which in turn satisfies the element of Art.4(2)(b), (c) and (d) of the Statue of the ICTY; Cavanaugh A. Kathleen again argued that forced impregnation satisfies the element of Art.4(2)(d) of the Statute which prevent child birth within the same group. The victims of mass rape and sexual violence were unable to continue their own ethnic bloodline, rejected by the society, refusals of sexual intercourse within the family way made ethnic line procreation impossible-Kathleen 2001:11,12; Siobhan K. Fisher uses the phrase "occupation of the womb" in deliberating the understanding of ethnic cleansing in the Former Yugoslavia, "*Occupation of the Womb: Forced impregnation as Genocide*:, Duke Law Journal, Vol.46,No.1, pp.91-133; Kelly. D. Askin, 1996 "*Sexual Violence in decisions and Indictments of the Yugoslavia and Rwandan Tribunals: Current Status*", The American Journal of International Law, Vol.93, No.1, pp. 97-123.

[18]*The Prosecutor v. ZejnilDelalic and Others,* dated 16 November 1998 IT-96-21-T paras. 495-497.

[19]Rape and sexual violence in front of others during interrogation amounts to infliction of severe mental and physical pain

absence of consent.[20] This definition was endorsed by the Trial Chambers of the ICTY in *Furundzija*decision. From the above discussion the International Criminal Law has approved Rape as an inclusionary prohibited act it is satisfying the other substantive elements of CAH.[21] In *Kunarac* appeal decision,[22] the Appellate Chambers of the ICTY observed and construed that rape is a form of enslavement.

After the establishment of the ICC, the first decision on crime of sexual harassment and rape was passed 2016.[23] This decision was the ever first judgement passed on the interpretation of the offence f rape after the codification of international criminal law by the International Law Commission. In *Jean Pierra Bemba Gombo* decision, it was observed by the Trail Chambers of the ICC, both rape and sexual violence must consider as CAH and War crimes.[24]The Chamber opined that rape is nothing but invasion of the part of the body. The element of material element that perpetrator of the taking advantage of the coercive environment was supported by the decision passed by the ICTR in *Akayesu* decision. The international criminal justice system, it was acknowledged that rape and sexual violence is a form of War crime and Crime against humanity. The interpretations by the ad hoc tribunals on the crime of rape and sexual violence is something different from the interpretations of the ICC. The latter is more authoritative than the former.

---

[20]In *Akayesu*Trial decision it was held that mechanical definition of rape cannot be applied to interpret the said act under the Statute, paras. 597 and 598 of the Trial decisions.

[21]*The Prosecutor v. AntoFurundzija* dated 10 December 1998, para. 185; *Akayesu* decision extended the application of rape by including sexual violence as rape. As both the Statutes were absent in defining sexual violence, it was interpreted that "Other inhuman acts" attracts sexual violence, *The Prosecutor v. Miroslav Kvocka and 4 Others* dated 2 November 2001, paras. 175-180.

[22]*The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Appeal decision dated 12 June, 2002, IT-96-23 & IT-96-23/A. In para.186 the Chamber states that, "…*enslavement, even if based on sexual exploitation, is a distinct offence from that of rape*".

[23]*The Prosecutor v. Jean Pierre Bemba Gombo* dated 21 March 2016, ICC-01/05-01/-08.

[24]Arts.7(1)(g) states about Crimes against humanity as "…rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable violence…"; Art.8 (2)(e)(vi) reads as, "…committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Art.7(2)(f), enforced sterilization and other form of sexual violence also constituting a serious violation of Art 3 Common to the Four Geneva Convention…". To view the full text of the Statute visit https://www.icc-cpi.int/nr/rdonlyres/addl6852-aee9-4757-abe7-9cdc7cf028861283503/romestatuteeng.pdf accessed on 10.2.19

Rape as *jus cogens:* Need of the hour

Jus cogens was defined in Art.53 of the Vienna Convention on Law of Treaties, 1969 (herein after referred to as the "Vienna Convention") as, "treaties conflicting with a preemptory norm of general international law ("*jus cogens*").[25] It is clear from the Convention that, the norms which has been accepted by the international community as a general norm (*erga omnes*-compelling necessity), any of the country shall not discharge itself from such norm.[26]Thus the peremptory norm (*jus cogens)* limits any State sovereignty, it creates a deterrence effect among the State parties from acting contrary to the given principle. This universal responsibility of *jus cogens* creates the compelling necessity, *erga omnes*. Hence the norm enables the State arrest, prosecute and punish the individual who violates the principle of *jus cogens* and can be restricted.[27]

International Instruments and its failure to prevent the crime of rape

Till date, there are colossalof international instruments and mechanisms are drafted and effected to protect women and prevent the crime of rape *inter alia*, Nuremberg Charter and Tokyo Charter 1945, the UN Charter 1945, Four Geneva Conventions 12 August 1949, International Convention on Civil and Political Rights 1966 (herein after referred to as the "ICCPR"), Additional Protocol I and II of the Geneva Convention 1977, Convention on

[25]Art.53 of the Vienna Convention reads as, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm international law having the same character." The full text of the Convention is available at https://treaties.un.org/doc/publication/unts/volume/201155/volume-1155-i-18232-english.pdf accessed on 12.2.19.

[26]Dean Adams 2005, "Prohibition of widespread rape as *jus cogens*", *San Diego International Law Journal*, Vol.6:357, pp. 359, the author observed that, "…in other words, *jus cogens* is [a} mandatory norm of general international law from which no two or more nations may exempt themselves or release one another…".

[27]David Mitchell 2005, "The Prohibition of Rape in the IHL as a norms of *jus cogens*: Clarifying the Doctrine", *Duke Journal of Comparative and International Law*, Vol.15:219, pp.226

Elimination of All forms of Discriminations against Women 1979 (herein after referred to as the "CEDAW"), Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984, Statutes of the ICTY 1993 and ICTR 1994, Rome Statute of the ICC, 2000.[28]Most of the above mentioned international instrument failed to define rape and failed to include rape and sexual violence as a form of violation of IHL and thus prevented to punish the perpetrators of the crime.

A solo instrument that speaks about the crime of rape and sexual violence as violation of international human rights law was found during 1990's which speaks about prevention and punishment of sexual violence against women was in year 1994 through a Regional Human Rights instrument, Inter-American Convention on the Prevention and Punishment and Eradication of Violence against Women (herein after referred to be as the American Convention, 1994"). Arts.2 and 7 of the American Convention, 1994 directly enlisted act of rape as punishable crime under international human rights law.[29] Unfortunately, being a

[28]Though the Nuremberg Charter and Tokyo Charter 1945 failed to include rape as a distinct offence for prosecution, but it was included under the act of "inhumanetreatment," "ill treatment," and "failure to respect family honour and rights," establishing a clear precedent for the international prosecution of rape as a war crime, Kelly D. Askin, 2003 "Prosecuting Wartime Rape and Other Gender related crimes under International Law: Extraordinary Advances, Enduring Obstacles", *Berkeley's Journal of International Law*Vol.21:288; Theodor Meron 1993, "Rape as a Crime under IHL", *The American Journal of International Law,* Vol.87:No.3, pp.426 & 427. But Control Council Law No:10 (adopted by the victorious powers to prosecute the war criminals tried other than Nuremberg Trial and Tokyo Trial [IMT and IMTFE] particularly locals of Germans, as "…sexually violent crimes committed during peacetime can also be considered as crimes against humanity…". The Charter of the UN under Chapter VI and VII empowers the Security Council (herein after referred to be as the "SC") to act accordingly if there is any threat to man kind's peace and security. Art.29 of the Charter empowers the SC for establishment of subsidiary organ for the performance of the function. More particularly in its Preamble it is stated that, "*…to affirm faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and women and of the nations large and small, and…*" which guaranteed the protection of women from sort of degrading activities, full text of the Charter available in https://treaties.un.org/doc/publication/ctc/uncharter.pdf accessed on 11.2.19. Arts.27 and 146 of the Four Geneva Convention on the Protection of prisoners of war and civilians prohibits "rape" and its commission is considered as violation of IHL. Arts.76(1) and 4(2)(e) of the Additional Protocol I and II (relating to the protection of victims of international and non-international armed conflicts) prohibits rape and sexual violence against women. Art.4(2)(e) exclusively mentioned that, "*outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and form of indecent assault*".

[29]Art.2 of the American Convention, 1994 reads as, "Violence against women shall be understood to include physical, sexual and psychological violence: a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced

Regional Convention and has limitation in its application, the said Convention under Arts. 18 and 24 provides liberty to the parties to the Convention for reservation and denunciation.[30]Other than the American Convention, 1994 none of the international human rights laws *inter alia* Universal Declaration of Human Rights (herein after referred to as the "UDHR"), CEDAW, European Convention of Human Rights or African Charter of Human Rights, Apartheid Convention, Child Rights Convention, American Declaration of the Rights of Man. Thus, American Convention, though a Regional Human Rights instrument which throws light on the specification of rape and sexual violence as violation of international human rights law and thus satisfies the *jus cogens.*

From the above discussion it is proved that the failure of these IHL instrument not only failed to address the victims of the heinous crime but also unsuccessful in prosecuting and punishing the crime of rape as a distinct offence. Unless the prohibited act satisfies the elements of the international crimes such as genocide, war crimes, crimes against humanity and crime of aggression rape and sexual violence would not have been analysed. Rape and sexual violence against women are considered as violation of IHL as it is normative in such a way that it is being committed only during the time of war. The only International Human Rights law that speaks about the international crime is Convention on Prevention and Punishment of crime of genocide on the influence of the author Prof Rafael Lemkin in his

---

prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and c. that is perpetrated or condoned by the state or its agents regardless of where it occurs" and Art.7 of the Convention states that, "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to…" To view the Convention, visit https://www.oas.org/en/mesecvi/docs/belemdopara-english.pdf accessed on 20.2.19.

[30]Art.18 of the Convention reads as, "…Any State may, at the time of approval, signature, ratification, or accession, make reservations to this Convention provided that such reservations are: a. not incompatible with the object and purpose of the Convention, and not of a general nature and relate to one or more specific provisions…" and Art.24 of the Convention discuss about the denunciation if they firmly persists throughout the year, Patricia Viseur Sellers 2002, "Sexual Violence and Peremptory Norms: The Value of Rape", *Case Western Reserve Journal of International Law,* Vol.34: Issue:3, pp. 301.

work, *Axis Rule in Occupied Europe*, Art.1 of the Genocide Convention,1948 instructing the State parties to prevent and prosecute the crime of genocide if committed during time of peace or time war.[31] The only international crime which attaches the status of *jus cogens* is crime of genocide. But the imposition of special character *dolus specialis* which mandate to punish the crime to prove the special mental element of *"…(with)intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such…"* the act of rape will not be violation of IHL or international human rights law. The same mental and material element restricts and limits the prosecution and punishment of crime of rape or sexual violence as war crimes or crimes against humanity.

The complexity in awarding the *jus cogens* status to the crime of rape is the difference in defining the crime of rape and sexual violence in the domestic laws same was discussed before the Trial Chambers of the ICTR in *Furundzija* case.[32]. The Chamber observed that there was a discrepancy in defining the crime which out laws rape internationally. But at the same time the Chamber opined that logical uniformity among the definition of the crime is forcible sexual penetration of the human body by penis or by any foreign object into the

[31]Art.1 of the Genocide Convention reads as, "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." The interpretation of this provision relating to criminal liability State responsible for prevention of crime of genocide was analysed by the International Court of Justice in "*Case Concerning the Application of the Convention on Prevention and Punishment of Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) dated 26.2.2007 and *Case Concerning the Application of the Convention on Prevention and Punishment of Crime of Genocide* (Croatia v. Serbia) dated 3.2.2015, the world discuss about the principle of State Responsibility for the prevention of crime of Genocide according to Art.1 and Art.9 of the Genocide Convention. The cases are available at https://www.icj-cij.org/files/cases-related/91/13687.pdf and https://www.icj-cij.org/files/cases-related/118/18450.pdf accessed on 21.2.19.

[32]In the trial judgement of *TheProsecutor v. AntoFurundzija* case, the Trial Chambers of the ICTR has elaborately discussed about the definition of rape under various countries penal law which includes section 375 of Indian Penal Code also. Section 375 of the IPC defines rape as, "A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—(First) — Against her will. (Secondly) —Without her consent. (Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. (Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married. (Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

vagina or anus. This implies that any such acts are prohibited and punishable one. But this norm is prevented and punishable only under the domestic law and not effective as binding norms under international law. Thus, crime of rape or sexual violence may attain the status of compelling necessity for prevention and punishment under the domestic and not under international law.

Jurisprudence evolved through tribunals decision and UNSC:

The interpretative judgements passed by the two ad hoc tribunals has characterized rape and sexual violence as violation of IHL and thus constitute the prohibited acts of genocide, war crime, torture, slavery in cases like *Akayesu, Kunarac, Celebici, Furundzija,* cases. The report submitted by the Special Rapporteur to the United Nations Economics and Social Council on the agenda of "Prevention of Discrimination and Protection of Minorities" notified that sexual violence and sexual slavery is a form of slavery in all circumstances as such it must be prohibited under the norm of *jus cogens*.[33]The report has defined the crimes *inter alia* sexual violence, rape, sexual slavery. From his report it is implied that the said prohibited acts should be prevented in all circumstances even during time of peace. The consequences of preventing rape and sexual violence are reflected in serious human rights violations and sexual violence against women are being committed in Sierra Leone, Cambodia, Bangladesh, Burma, Myanmar, Sri Lanka. As the prohibited act was defined substantially as a separate crime (*jus cogens*) the said heinous act failed to attract the international consideration. The UNSC and the UNGA has condemned the sexual violence and rape women in the territory of Former Yugoslavia and other territories, through its

[33]David Mitchell, *Prohibiting Rape*, pp. 254-Gay J. McDougall, Special Rapporteur submitted his final report to the UN Sub-Commission on the Promotion and Protection of Human Rights on the topic "Systematic rape, sexual slavery and slavery-like practises during armed conflict" dated 22 June 1998, E/CN.4/Sub.2/1998/13. The full text of the report is available at https://www.refworld.org/docid/3b00f441144.html accessed on 23.2.19.

various resolutions as "…*strongly condemning reports of massive, organised and systematic detention and rape…"*[34] the UNGA or the UNSC resolutions has no binding effects on the State parties and only instruction to be adopted accordingly. In 2000 the United Nations Security Council in its resolution 1325 submitted by the Special Advisor on Gender Issues and Advancement of Women, precisely observed that women and girl children should be protected from any form of sexual violence and rape. Also, it imposes the obligation on the State parties to put an end to impunity for the prosecution and punishment of perpetrators of the international crimes including sexual violence and rape.[35]

Conclusion

From the above discussion, the jurisprudence evolved by the ad hoc tribunals, international instruments, United Nations General Assembly and Security Council's Resolutions, scholarly works of the academicians, judges echo the gravest concern of the international community and indicates that prevention and punishing of crime of rape and sexual violence as *erga omnes* of *jus cogens*. The prohibition of rape and sexual violence initiated by the international instruments, tribunals, world court, ICC reserving crime of rape as violation of IHL and international criminal law. The accord among the international organizations reveals the acknowledgment of *jus cogens* norms. But the challenge of determining the *jus cogens* status is the legal definition of the crime-whether the act itself a

[34]UNSC/Res/798/1992 dated 13 August 1992; UNSC/Res/820/1993 dated 17 April 1993; UNGA/Res/48/143/1993 dated 20 December 1993; UNSC/Res/917/1994 dated 16 June 1994; UNSC/Res/1076/1996 dated 22 October 1996. The Resolution passed by the UNSC and UNGA are available at www.un.org/en/sc/documents/resolution/html and www.un.org/documents/ga/res/48/a48r143.html accessed on 20.2.19.

[35]Report submitted by Francoise Nduwimana, Special Advisor on Gender Issues and Advancement of Women, Department of Economic and Social Affairs, Commission for Africa, United Nations. She submitted her report on Women, Peace and Security: Understanding the Implications, Fulfilling the Obligations. It was adopted as resolution by the UNSC in 2000. To view the full report visit http://www.un.org/womenwatch/osagi/cdrom/documents/Background_paperAfrica.pdf accessed on 22.2.2019.

crime or as a subsection of another crime.[36] The ultimate need of the hour to sanction the peremptory norm for the crime is to create awareness among the international community through judges, counsels, NGO's, international organizations, scholars, legal education institutions to sensitize about the legal value of criminalizing rape and sexual violence under international criminal law. The State should act towards the compliance of this normative principle and should be deterred about its responsibility for its failure as State sponsored crime. As rightly observed by the ad hoc tribunals the ICTY and ICTR, rape not only crime against human body but it is also used to humiliate, derogate, discriminate, punish or to destroy a person.[37] Apart from that it was highlighted by the Chambers that it is psychological suffering of person and exacerbated by social and cultural condition which is acute and long-lasting.[38] The interpretations of the courts including the ICC will develop and recognize rape as a distinct and independent crime. This should be compelled by the UNSC through its powers under Chapter VII of the UN Charter to compel the obligations of the States to prevent and punish the crime of rape and sexual violence as *jus cogens*. Accountability for the failure shall be vigorous as noted by Judge Theodor Meron.[39]

[36]Mark Ellis 2007, "Breaking the Silence: Rape as an International Crime", *Case Western Reserve Journal of International Law*, Vol.38: Issue.2006-2007, pp. 246,247.
[37]*Akayesu*Trail decision, IT-96-4-T dated 2 September 1998, para.687.
[38]*Delalic*Trial decision, IT-96-21-T dated November 1998, paras 495 and 496. The Chamber observed that, "*…considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity*"
[39]Theodor Meron 1993, "Rape as a crime under International Humanitarian Law", *The American Journal of International Law*, Vol.87, No.3, pp.428, "Meaningful progress in combating rape can only be made by more vigorous enforcement of the law."