ΠΑΝΤΕΙΟΝ ΠΑΝΕΠΙΣΤΗΜΙΟ ΚΟΙΝΩΝΙΚΩΝ ΚΑΙ ΠΟΛΙΤΙΚΩΝ ΕΠΙΣΤΗΜΩΝ

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The use of sexual violence and of prostitution as means of warfare: an international law perspective

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The use of sexual violence and of prostitution as means of warfare: an international law perspective

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Germanos Paraskevas Bozoutsidis

Index of Abbreviations

1899 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land	Hague Regulations II
1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land	Hague Regulations IV
1949 Geneva Convention (III) relative to the Treatment of Prisoners of War	Geneva III
1949 Geneva Convention (IV) relative to the protection of civilian persons in time of war	Geneva IV
1969 Vienna Convention on the Law of Treaties	VCLT
Additional Protocol I	API
Additional Protocol II	APII
Convention on the Elimination of All forms of Discrimination Against Women	CEDAW
International armed conflicts	IACs
International Committee of the Red Cross	ICRC
International Court of Justice	ICJ
International Criminal Court	ICC
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for Yugoslavia	ICTY
International Humanitarian Law	IHL
International Law Commission	ILC
Non-international armed conflicts	NIACs

Prisoner of War	PoW
Sexually Transmitted Diseases	STDs
United Nations General Assembly	UNGA
United Nations Security Council	UNSC

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Abstract

This dissertation examines the influence of feminist critical approaches to International Humanitarian Law. Feminist perspectives has found that during armed conflicts the victims of sexual violence are more than anticipated, as it is not only women, but also men who can be victims of sexual violence, which can lead to the question whether this finding provides a new understanding of State practice as allowing sexual violence during armed conflicts. Furthermore, through the use of feminist perspectives, it can be concluded that agency is enjoyed by more than male soldiers during conflict. In light of the finding women, that are understood as victims in armed conflicts, have traditionally participated as combatants too, and taking notice how Maupassant gave agency to sexworkers in his short stories, another question begged is whether international humanitarian law can recognise sexworkers as either combatants, members of organized armed groups or civilians participating directly in hostilities.

It is argued that feminist critical approaches influence and enrich International Humanitarian Law as to its interpretation, but do not alter the core content of its rules. Male victimhood and women's aggression in the military can not be understood as a form of State practice, as there is plenty of uniform State practice condemning such behaviors, accompanied by *opinio juris*. Moreover, while it may be true that sexworkers might have agency in armed conflicts, they still fail to satisfy the criteria to be a combatant, member of an organized armed group and direct participant to hostilities.

Key words: *International Humanitarian Law, feminist critical perspectives, customary law, combatants, members of armed groups, direct participants to hostilities, sexworkers*

Περίληψη

Η παρούσα Διπλωματική Εργασία μελετά την επιρροή του κριτικού φεμινισμού στο Διεθνές Ανθρωπιστικό Δίκαιο. Ο κριτικός φεμινισμός παρατηρεί ότι την περίοδο ενόπλων συρράξεων τα θύματα σεξουαλικής βίας είναι περισσότερα από το αναμενόμενο, καθότι εκτός των γυναικών, είναι και οι άνδρες που μπορεί να είναι θύματα σεξουαλικής βίας, πράγμα που οδηγεί στην ερώτηση αν αυτή η παρατήρηση διαμορφώνει την κρατική πρακτική ώστε αυτή να αποδέχεται τη σεξουαλική βία σε ένοπλες συρράξεις. Επιπλέον, μέσω του κριτικού φεμινισμού, παρατηρείται ότι εμπρόθετος δράση έχουν και άλλοι δρώντες εκτός από τους στρατιώτες. Λαμβάνοντας υπ' όψιν ότι οι γυναίκες, που παραδοσιακά ορατοποιούνται ως θύματα, συμμετέχουν παραδοσιακά και ως μαχητές στις συρράξεις, και το πως ο Maupassant παρουσιάζει στις μικρές του ιστορίες σεξεργαζόμενα άτομα έχοντα εμπρόθετο δράση, άλλη μια ερώτηση εγείρεται: αν το Διεθνές Ανθρωπιστικό Δίκαιο μπορεί να αναγνωρίσει τα σεξεργαζόμενα άτομα είτε ως μαχητές, μέλη οργανωμένων ένοπλων ομάδων ή αμάχων που συμμετέχουν ενεργά στις εχθροπραξίες.

Υποστηρίζεται ότι ο κριτικός φεμινισμός επηρεάζει και εμπλουτίζει το Διεθνές Ανθρωπιστικό Δίκαιο, χωρίς όμως να αλλάζει το βασικό περιεχόμενο των κανόνων του. Η ανδρική θυματοποίηση και η γυναικεία βία στο στρατό δεν μπορούν να νοηθούν ως Κρατική πρακτική, καθώς υπάρχει μεγάλη ομοιόμορφη Κρατική πρακτική που καταδικάζει αυτές τις συμπεριφορές, ακολουθούμενη από *opinio juris*. Επιπροσθέτως, ενώ είναι αλήθεια ότι τα σεξεργαζόμενα άτομα δύνανται να έχουν εμπρόθετη δράση στις ένοπλες συρράξεις, αδυνατούν όμως να ικανοποιήσουν τα κριτήρια για την αναγνώριση τους ως μαχητές, μέλη οργανωμένων ενόπλων δυνάμεων ή ενεργά συμμετεχόντων στις εχθροπραξίες.

Λέξεις κλειδιά: *Διεθνές Ανθρωπιστικό Δίκαιο, κριτικός φεμινισμός, εθιμικό δίκαιο, μαχητές, μέλη οργανωμένων ενόπλων δυνάμεων, ενεργά συμμετέχοντες στις εχθροπραξίες, σεξεργαζόμενα άτομα*

1. Introduction

International law has for far too long attempted to evade the incorporation of feminist perspectives into the mainstream interpretation methods of it.[1] Feminists' inquiries in international law started in the 1970 and 1980's, in the aftermath of the second wave of feminism. These inquiries started firstly by observing that "*womens' voices were effectively excluded from*"[2] the academic discipline of History. Some years later, such questions infiltrated the academic discourse between legal scholars and were met with some pushback "*as the essence of law is* [...] *its impartiality and objectivity*".[3] While it is indeed true that the realm of law prides itself on its principles and its objectivity, it is equally well recognised that it is difficult to distinguish between international politics and international law, as they are intertwined. Contrary to the embracing of the principle of non-discrimination by international law, in the realm of international politics there is a plethora of evidence that demonstrates that women are discriminated against by their male peers on a systematic level.[4] This observation, along with the fact that women have been systematically marginalized,[5] can act as an indication that indeed there are gendered dimensions of international law, even if these dimensions are harder to visualize.

Beginning from domestic law, mainly in family law questions,[6] feminist approaches questioned whether the law truly applied non-discrimination between men and women. As the Supreme Court of the United States confirmed in *Frontiero v. Richardson*, "*women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena*".[7]

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[1] Charlesworth H, Chinkin C and Wright S, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.

[2] 'Lecture Series - Ms. Hilary Charlesworth' (*Un.org*2023) <https://legal.un.org/avl/ls/Charlesworth_IL.html#> accessed 24 November 2023.

[3] Ibid.

[4] Enloe CH, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (2nd edn, University of California Press 2014), 4**;** See also, MacKinnon CA, *Toward a Feminist Theory of the State* (Harvard University Press 1989), 239.

[5] Charlesworth H, Chinkin C and Wright S, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.

[6] Ibid.

[7] *Frontiero v. Richardson* 411 U.S 677, 686; The subject matter of this case concerned whether a husband could be a *dependant* for the obtention of benefits for his wife who worked in the U.S. Air Force. In order to conclude in this dictum, the Supreme Court of the United States took into consideration the submissions made by *amicus* (American Civil Liberties Union) represented by Ruth Bader Ginsburg, Esq., who, some years later, became an Associate Judge in that court. In her Joint Brief with the Appellant, she points out that: "*that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past*

The turning point for feminist approaches to be introduced in international law was a seemingly easy and basic question Enloe asked: where women are in international politics?[8] From that moment on, when the field of international politics opened the door to the examination of the gendered dimensions of policy, it follows that there could be a similar examination since law is usually the outcome of a political process. Feminist legal scholars starting from the 1990's started to develop a "*broad and lively area of scholarship*".[9] This area of scholarship has been built upon the use of intersectional cross-fertilization methods between the fields of international relations and international law, where scholars from one area would provide rich insight to the other. The common denominator for both disciplines, of course, is the "*identification of a distinctive women's voice that has been overwhelmed and underestimated in traditional epistemologies*".[10]

While it is difficult to distinguish between the various "*schools*" of the feminist approaches in the discipline of international relations,[11] one of the most prominent is the critical feminist approach "school".[12] The main topic of reflection for critical feminist security studies scholars is the phenomenon of war as observed through gendered lenses. In principle, critical feminists have elaborated convincingly that the more mainstream theories of international relations fail to consider the variable of gender when theorizing about war. Choosing to overlook the gendered dimension of war, these theories "*have inadequately conceptualized* [...] *who actors in war, and the gendered values reflected in the making and fighting of wars*".[13]

Evidently, these questions are not very far away from the subject matter of *jus in bello*, also known as International Humanitarian Law (IHL). Unsurprisingly, there is an

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discrimination, women are 'vastly underrepresented in this Nation's decisionmaking councils. There has never been a female. President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government"; During Oral Argument, she added that: "*What is known is that, by employing the sex criterion, identically situated persons are treated differently*" and that "*Sex, like race, has been made the basis for unjustified, or at least unproved assumptions, concerning an individual's potential to perform or to contribute to society.*"; 'Arguments Transcripts' (*Home - Supreme Court of the United States*) <https://www.supremecourt.gov/oral_arguments/archived_transcripts/1972> accessed 24 November 2023.

[8]'Lecture Series - Ms. Hilary Charlesworth' (*Un.org*2023) <https://legal.un.org/avl/ls/Charlesworth_IL.html#> accessed 24 November 2023.

[9]*Ibid.*

[10]Charlesworth H, Chinkin C and Wright S, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.

[11] Steans J, *Φύλο Και Διεθνείς Σχέσεις* (Chara Karagiannopoulou ed, Πεδίο 2016), 13.

[12]Jackson R and Sorensen G, *Θεωρία Και Μεθοδολογία Των Διεθνών Σχέσεων* (Panagiotis Tsakonas ed, Gutemberg 2006), 406.

[13]Sjoberg L, *Gendering Global Conflict: Towards a Feminist Theory of War* (Columbia University Press 2013), 7.

almost perfect overlap between these feminist inquiries and this body of law. It follows naturally that there can be no doubt that IHL has indeed gendered dimensions which have been traditionally overlooked, with the traditional interpretation being deferent to this gendered reality, where "*war is productive of and reflective of gender norm in global politics*".[14]

Traditionally, IHL has seen women exclusively as "*passive bystanders or only victims or targets*".[15] In fact, IHL mainly sees women as an "*object of special respect*"[16] that must be protected from war, without real agency, when women "*have historically and continue to have a role as combatants,*[...] *members of resistance movements and as active agents in both formal and informal peacebuilding and recovery processes*".[17] Simultaneously, IHL closes its eyes from the fact that women, agents themselves, can also commit crimes. This practice has been corrected *in principle* by the Elements of Crime of the Rome Statute of the International Criminal Court, which recognizes that the terms used are gender-neutral so that they can encompass male victims and women perpetrators.

This is a shocking realization which effectively breaks the traditional gendered understanding of IHL that visualized primarily men as soldiers and women as passive victims. This finding becomes more shocking when one contemplates that currently it is also men who can be potential victims of sexual violence. Male victimhood to sexual violence can be possible, as men are also gendered individuals and their subjection to sexual violence destroys their presumed gender identity, and because the definition of sexual violence is wider than one ordinarily thinks. While sexual violence has for long been synonymous with rape, according to the International Committee of the Red Cross (ICRC) it encompasses all "*acts of a sexual nature imposed by force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power directed against any victim*".[18] This means that the term sexual violence includes "*rape, sexual slavery, forced*

[14]Sjoberg (n 13), 7.
[15]UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Comment 30' (18 October 2013) UN Doc. CEDAW/C/GC/30, para. 6.
[16]Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted in 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 3 (API) art 76.
[17]UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Comment 30' (18 October 2013) UN Doc. CEDAW/C/GC/30, para. 6.
[18] 'Q&A: Sexual Violence in Armed Conflict' (*International Committee of the Red Cross* 18 August 2016) <https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers> accessed 25 November 2023.

prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of a comparable gravity".[19]

While very few women have been charged with international crimes where they were the active perpetrator and men and other women were the victims, their actions remain important to be studied, examined and taken in due regard when one attempts to observe the evolution of IHL.[20] The main reason why critical feminists shed light on the use of sexual violence is because it deconstructs the myth that women are inherently more peaceful than their male peers and that they enjoy no agency.[21]

Nevertheless, women remain a vulnerable group.[22] Currently, what is more worrisome is that women are all the more vulnerable in armed conflict and more susceptible to sexual violence. As a matter of fact, there has been a great visualisation of sexual violence in armed conflict during the last years, with sexual violence being more omnipresent than ever.

But what does the incorporation of feminist inquiries really mean for IHL? According to the doctrine of international law, whenever there is State practice followed by an *opinio juris*, there is a customary rule. In the current state of IHL, there is a customary rule that explicitly prohibits all forms of sexual violence in armed conflict.[23] Simultaneously, critical feminists have provided IHL with much insights as women are recognised to have agency in armed conflict, can lead to an expansion of our understanding of who can be a combatant in both international and non-international armed conflicts, as well as the plausibility of civilian women to take direct part in hostilities.

Realising IHL's gendered dimension, the question that now begs itself is when one attempts to reflect on IHL, does the incorporation of gender and the use of sex as a weapon in armed conflicts change its traditional interpretation?

In order to answer this question, it is necessary for two subquestions to be examined. Firstly, in light of the alarming rate of sexual violence during armed conflicts, is there a new customary rule that replaces the prohibition of sexual violence in armed conflicts, allowing of the use of sexual violence in armed conflicts? Secondly, in light of the plausibility of the expansion of the definition of combatant and of the direct participant in hostilities, can a

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[19] *Ibid*.
[20] Sjoberg L., *Women as Wartime Rapists: Beyond Sensation and Stereotyping* (New York University Press 2016), p. 1.
[21] *Ibid.*, p. 8.
[22] *Eugénie Chakupewa et al v. the Democratic Republic of Congo* (Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2835/2016) CCPR/C/131/D/2835/2016 (9 December 2021), para. 6.4.
[23] Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1, Rules* (Cambridge University Press 2005), 323-7. (Customary Rule 93)

sexworker be considered a combatant, or at least taking direct part in hostilities, when they willfully transmit Sexually Transmitted Diseases (STDs) to enemy soldiers, in order to render them *hors de combat*?

This analysis will argue partly in the affirmative. Critical feminism has helped enrich our interpretation and understanding of IHL because we can visualize better the extent of sexual violence during armed conflict as well as the scope of military agency women can perform in conflict areas. However, critical feminism does not alter the content of the rules of IHL, as sexual violence remains prohibited and the criteria for the characterisation of an individual as combatant or direct participant remain the same.

Concerning the first subquestion, the criteria of State practice and *opinio juris* are not truly met, despite the growing number of victims of sexual violence that became visible due to the gendered lenses applied. In fact, both subjects and other participants of international law have long supported the prohibition of sexual violence. This is why States have concluded so many relevant treaties and issued so many relevant resolutions in the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC). Simultaneously, through non-binding UNGA resolutions as well as relevant judicial decisions of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), sexual violence remains met with legal scorn by the international community.

Concerning the second subquestion, while feminist scholars have enriched our understanding of women's militarization, the criteria set under international law are not met. Specifically, under IHL, there are specific criteria for the recognition that an individual is a "*combatant*" in international armed conflicts (IACs), namely, they have to be a member of the regular armed forces, or member of a paramilitary militia, which is recognised by the State. There has been no instance yet where sexworkers have been members of regular armed forces, or of a recognised paramilitary militia by the State. Also, as they do not openly carry weapons, they can not be considered as being combatants in an IACs as members of a militia.

Also, in cases of non-international armed conflicts (NIACs), while there is an unresolved ambiguity concerning the existence of combatants, the present analysis shall examine both the possibility of a combatant existing in NIAC as well as not existing, but (in the alternative) taking direct part in hostilities. In order to take part as "*combatants*" in NIACs, sexworkers have to be part of the regular armed forces of the State or of dissident armed forces. Currently there is no found practice where sexworkers are part of regular armed forces (or armed militia recognised by the State). Also there is no relevant practice

concerning the integration of sexworkers in dissident armed forces in order to be used as "*soldiers*" against the opposing party.

Lastly, sexworkers might be *prima facie* satisfying the criteria for direct participation in hostilities, taking into account a more relaxed interpretation of international humanitarian law. However, this observation leads to a conclusion that contradicts the very purpose of international humanitarian law: the protection at the hands of the enemy. Also, it is very difficult to have the ICRC's interpretive criteria fully met as there can be serious doubt on whether sexworkers through providing their services to the enemy and by concealing the fact that they have a STD in order to transmit it, can reach the threshold of harm necessary and the belligerent nexus in order to directly participate in hostilities.

In order for these arguments to be fully developed, the analysis will be divided into two great chapters. In the following chapter, the first subquestion will be examined concerning the alleged emergence of a customary rule that may allow sexual violence in armed conflicts. The chapter shall be divided into two subsections: namely the thesis, where the analysis will examine all the relevant evidence that may support such a claim in two sections: the first being State practice and the second being *opinio juris*; and the antithesis, which shall also be divided into two sections: the orthodox interpretation of State practice, and the orthodox identification of *opinio juris*. The third chapter, which will examine the agency of sexworkers and their participation to the armed conflicts, will also be divided into two subchapter: in the fist subchapter, the analysis will delineate the case for sexworkers using sex as a weapon, then proceed to examine the notion of consent concerning prostitution during armed conflicts, and then continue to examine the criteria for the classification of an individual as a combatant in IACs, NIACs or whether this individual is directly participating in hostilities. In the second subchapter, the analysis will enter into a discussion where the combatants and direct participation criteria shall be applied to the case of voluntary prostitution as described in the first subchapter.

Having examined all the relevant questions of law, and having deepened our understanding of the full scope of protection IHL offers, the analysis can therefore safely conclude to its main thesis that the feminist critical approach rather than altering IHL, enriches it.

2. Is Sexual violence permissible in the battlefield?

The use of sexual violence in armed conflict is a tale as old as time.[24] From historical sources we are made aware of its extensive use already from antiquity. However, attempts to minimise it[25] or prohibit sexual violence in armed conflict in its totality have not been successful. Historically, the rules that prohibit the use of sexual violence towards civilians emerged during the historic begining of the formation of rules that today call International Humanitarian Law. Nevertheless, in practice it is reported that there is a widespread, and in many cases, systematic, use of sexual violence in armed conflict. In its codification of IHL, the ICRC concluded in a customary rule that prohibits the use of sexual violence in armed conflicts.[26] As the systematic use of this asymmetric weapon[27] still carries on, it begs the question whether there has been a new rule of customary law that leaves the prohibition replacing it with a green card for its use;

However, before proceeding to the following analysis, it must be answered whether it is even possible for such a rule to emerge and leave the effect of both conventional and customary law that points to the prohibition of sexual violence in armed conflict? The answer to this question lies in the affirmative, as one can easily recourse to the Statute of the International Court of Justice (ICJ), only to find that customs and treaties are both primary sources of international law and it follows that as they are enumerated in the same paragraph, they are of equal status. As Greenwood observes "[t]*here is* [...] *no strict sense of hierarchy between treaty and customary law, contrary to what is sometimes alleged*".[28] The ICJ suggested that "[i]*n general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim*",[29] which has been used in order to establish

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[24] Sjoberg (n 20), p.17

[25] Grotius suggested that in principle sexual violence should be prohibited in armed conflicts, however, he was not against the kidnap of women from soldiers in order to marry them. See also: Niarchos CN, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17 Human Rights Quarterly 649.

[26] Customary Rule 93.

[27] Carter KR, 'Should International Relations Consider Rape a Weapon of War?' (2010) 6 Politics & Gender 343, p. 350.

[28] Greenwood C. *Sources of International Law: An Introduction* (United Nations, 2008), 5. <https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf>

[29] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] ICJ Rep 14, para. 276.

that a custom may not replace the effect of a treaty provision. Nevertheless, this dictum concerns the applicable law during the litigation of a contentious case, rather the question of whether a newer custom may replace a prior treaty provision. After all, in the heart of the *Nicaragua v. US* case, the court examined the customary violations of the Charter by the US.

It can be deduced that according to the doctrine, as the sources of international law are coequal, in lack of a hierarchy *inter se* enumerated in the Statute of the ICJ, "*the fact that a norm derives from a treaty does not necessarily mean that it prevails over customary law and general principles of law*",[30] even if in practice treaties are perceived to act as *lex specialis* to the relevant customary law.[31] Furthermore, "*there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own*".[32] This means that "[t]*reaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and* [can] *be replaced by new customary rules*".[33]

In the following chapter, it will firstly be demonstrated that the extensive practice on the battlefield can be an indication that the criterion of State practice for the formation of a customary rule may indeed be claimed. However, on the second part of the present chapter, as it shall be demonstrated below, battlefield practice is not enough to claim that there is uniform and consistent State practice, as there is a plethora of evidence that demonstrate State practice points to the exact opposite direction; and there is also a lack of *opinio juris*. It shall be therefore proven that there is no new rule of customary international law that overthrows the current rule that prohibits the use of sexual violence in armed conflict.

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[30] Pauwelyn J, *Conflict of Norms in Public International Law How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003), 95.
[31] UN Study Group on the Fragmentation of International Law "Conclusions of the work of the Difficulties arising from the Diversification and Expansion of International Law" (2006) para. 5.
[32] *Military and Paramilitary Activities in and against Nicaragua* (n 29), para. 177; See also Jennings R and Watts A, *Oppenheim's International Law*, vol 1 (9th edn, Longman 1996), 36.
[33] Shaw MN, *International Law* (8th edn, Cambridge University Press 2017), 92.

a. Extensive practice followed by a paradoxical *opinio juris* evolved into law?

In order to establish and prove the existence of an international custom it is essential to demonstrate consistent[34] State practice followed by the relevant *opinio juris*.[35] In the present sub-chapter, it will be demonstrated that: i) there is a extensive State practice of use of sexual violence in the battlefield, and ii) that this practice may be followed by a pertinent *opinio juris*.

i. State Practice

There is a clear ongoing pattern of an epidemic use of sexual violence in *the battlefield*,[36] which is the traditional 3D physical source where one can recourse to document State practice for the creation and evolution of the rules and customs of war.[37] Currently, there are many ongoing armed conflicts around the world and in many, if not in most, there are repeated reports of violations of IHL, including widespread sexual violence. The degree of the use of sexual violence in armed conflict is so greatly visible nowadays that there are separate sections and whole chapters in official reports from the United Nations and other credible observers that study these alleged violations of IHL. But can such acts, that are traditionally considered violations of IHL, be indicative of State practice which hereby proves the first component necessary for the recognition of the new customary rule that allows such behaviour?

In order to answer the above question in the affirmative, one must first understand the full scope of what consists of 'State practice'. In fact, "*many types of acts and omissions may amount to 'State practice' for the formation of customary international law*".[38] As Shaw

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[34] *Military and Paramilitary Activities in and against Nicaragua* (n 29), para. 186.
[35] *North Sea Continental Shelf* (*Federal Republic of Germany/ Denmark and Netherlands*) (Merits) [1969] ICJ Rep 3, para. 77.
[36] Amal Clooney when addresing the UNSC said that: "I agree that we are facing an epidemic of sexual violence and I believe that justice is the antidote." UNSC Meeting record of 23 April 2019 UN Doc S/PV.8514 (2019), 10. <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N19/117/56/PDF/N1911756.pdf?OpenElement>
[37] Tavernier P and Henckaerts J-M, *Droit International Humanitaire Coutumier: Enjeux et Défis Contemporains* (Bruylant 2008), 180: "En effet, le droit de la guette est né de la confrontations sur le champ de bataille entre souverains égaux en droits"**;** "Le droit de la guerre, en tant que système de règles juridiques, a son origine dans la réglementation coutumière des rapports sur le champ de bataille entre deux entités juridiquement égales" in Siotis J, *Le Droit de La Guerre et Les Conflits Armés d'un Caractère Non-International* (Librairie générale de droit et de jurisprudence 1958), 53.
[38] Dixon M, McCorquodale R and William S, *Cases and Materials on International Law* (6th edn, Oxford University Press 2016), 31.

notes, "*customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do*".[39] It can thus be deduced that all actions and omissions that a State commits and can be attributed to it, can, *in principle*, be considered as indicative of 'State practice'. As a matter of fact, as it is stipulated in International Law Commission's (ILC) Articles on States' Responsibility for Internationally Wrongful Acts, the conduct of any State organ, regardless of the branch of government it belongs to, is considered as the conduct of the State[40].

In this vein, it is highlighted that the term 'State organs' "*covers all the individual or collective entities which make up the organisation of the State and act on its behalf*"[41]. Hence, it would not be a great stretch of thought to link the conduct of the State's army, and by extension the State's soldiers, to the State's practice. This is also supported by doctrine as "*physical acts that constitute practice contribute to the creation of customary international law, which include for example battlefield behavior, the use of certain weapons and treatment afforded to different categories of persons*".[42] As the comportment of the State's army in the battlefield is something that can be attributed to the State, it can be, therefore, concluded that these officers that rape or use in any other means and forms of sexual violence, are reflecting, in their actions, State practice.

One more clarification is now essential. In the context of creating a customary law in international law, one needs State (emphasis added) practice. However, it is important to note that in case of NIACs, at least one of the belligerent parties will be a non-state actor. In this vein, it is important to consider that "[t]*he practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute State practice as such*".[43] For this reason, the present analysis, although it might also examine both NIACs, when examining them, it will take into consideration exclusively the conduct of the official armed forces of the State.

Having established the causal link between the States armies' behavior *in the battlefield*, it is time for the analysis to proceed with its reflection on the merit of the claim that there is evidence of State practice in support of the leaving of the rule that prohibits sexual violence during armed conflicts.

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[39]Shaw MN (n 33), 55.
[40] UN General Assembly, Resolution 56/83 (2001), with Annex containing Articles on State Responsibility for Internationally Wrongful Acts, UN Doc A/56/49(Vol. I)/Corr.4., art. 4.
[41]International Law Commission (ILC), Yearbook of the International Law Commission, 2001, vol. II, Part Two UN Doc A/56/10 (2001), 40.
[42]Perrakis S and Marouda MD (eds), *Armed Conflicts and International Humanitarian Law: 150 Years from Solferino* (Bruylant 2009), 148 (internal quotation marks omitted).
[43]Ibid., 149.

The first time that crimes of sexual violence were ever reported and annexed in an international document, was the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In that report, this Commission after establishing the facts on how the First World War started and how Germany, Austria were culpable for the premeditation of the war, how they violated the neutrality of Belgium and how Bulgaria and the Ottoman Empire participated in that plan, it examined the crimes that occurred during the war. The report found that "[i]*n spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage*"[44] and that "*there are good grounds for the constitution of a special commission, to collect and classify all outstanding information for the purpose of preparing a complete list of the charges under the following heads:* [...] *(5) Rape*".[45] Therefore, regardless of the prohibition on the use of sexual violence, in respect of one's family honour,[46] which was mentioned in the Hague Regulations,[47] there are clear evidence of the widespread practice of use of this weapon.

Some years later, during the Second World War, it is equally historically documented that crimes of sexual violence occurred. The French Prosecutor, when submitting relevant documents as evidence of mass atrocities before in the International Military Tribunal at Nuremberg, he acknowledged the fact that sexual violence occurred during the Second World War, but declined to comment further wishing for the Tribunal's forgiveness for "*avoid*[ing] *citing the atrocious details*".[48] Nevertheless, the International Military Tribunal at Nuremberg failed completely to address sexual violence as the final Judgement makes no reference to sexual violence or rape.[49] This lack of reference, though, can be justified since sexual violence was not even mentioned in the Nurember Charter,[50] therefore explaining why the

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[44] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 American Journal of International Law 95, 113.
[45] Ibid.,114.
[46] Altunjan T, *Reproductive Violence and International Criminal Law* (TMC Asser Press 2022), 37.
[47]Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907) (Hague Regulations IV), art 46.
[48]International Military Tribunal, *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Göring et al.*, Transcripts, 1945–1946, Trial of the Major War Criminals Before the International Military Tribunal (1947–1949) (IMT Transcripts 1945–1946), vol 6, Record of 31 January 1946, Afternoon Session; 405 <https://tile.loc.gov/storage-services/service/ll/llmlp/2011525338_NT_Vol-VI/2011525338_NT_Vol-VI.pdf>
[49]*The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Göring et al.* (Judgment) [1946] 22 IMT 203 <https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf>
[50] Article 6 of the Nuremberg Statute which fixes the subject-matter jurisdiction of the Tribunal states that: "*The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any*

Nuremberg Tribunal made not reference to these crimes, regardless of the fact that it -without doubt- knew that sexual violence had taken place.

Contrary to the Nuremberg tribunal, the Tokyo Tribunal for the Far East took actions concerning the prosecution of sexual violence. In its Charter the Tokyo Tribunal makes no explicit reference to rape and other forms of sexual violence as offences that the Tokyo Trobunal extends its jurisdiction over.[51] Unlike, the Nuremberg Tribunal that shied away, the Tokyo Tribunal examined factually the facts concerning the Rape of Nanking,[52] and the word 'rape' can be found on the final Judgment 20 times. What can be witnessed is that the Japanese indeed used rape systematically during the Second World War, even if it had undertaken to respect article 46 of the Hague Regulations,[53] which prohibited violations of family honour.[54]

After the signature of the Geneva Conventions that made special references to the protection of women from rape,[55] the use of sexual violence continued. Not only was its use widespread, but also it was used as means of torture. In his 1986 Report, Kooijmans identifies

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of the following crimes: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing: (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity: (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan", Nuremberg Charter annexed to *Agreement for the prosecution and punishment of the major war criminals of the European Axis* (adopted 8 August 1945) 82 U.N.T.C. 280.

[51] According to the Tokyo Charter which was annexed to the Treaty of Peace with Japan signed at San Francisco: "*The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: [...] b. Conventional War Crimes: Namely, violations of the laws or customs of war; c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated [...].*", Treaty of Peace with Japan (adopted 8 September 1951, came into effect 28 April 1952) 136 UNTS 45.

[52] *The United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, The Union of the Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, The Kingdom of the Netherlands, New Zealand, India, and the Commonwealth of the Philippines v. Araki et al.* [1948] IMTFE 48413, 49604-12.

[53] Ibid., 48502.

[54] Hague Regulations IV, art. 46.

[55] Geneva Convention relative to the protection of civilian persons in time of war (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art 27 (Geneva IV).

the use of sexual violence through the use of "*rape, insertion of objects into the orifices of the body* [and] *chevalet*"[56] in times of emergencies, which can also include times during armed conflicts.[57]

After the dissolution of the Soviet Union, which lead the UNSC in a short-lived period of cooperation between its permanent members concerning the maintenance of international peace and security, two were the most shocking crises that this organ had to resolve: the dissolution of Yugoslavia and the genocide in Rwanda. While these two situations created the two most frequently cited ad hoc Tribunals, ICTY and ICTR, they also share another common thread. In both situation, there was an extensive use of sexual violence against women, in a premeditated, authority-sanctioned, industrial scale[58].

In Colombia, during the conflict between the Government and Revolutionary Armed Forces of Colombia, in the periods between 1957 to 2016,[59] the Special Jurisdiction for Peace, the transitional justice organ created by the peace agreement between the two belligerent parties, announced in September 2023 that it had registered at least 35.178 victims of sexual violence.[60] The Special Jurisdiction of Peace, notes that it has received complaints about both the national army of Colombia as well as the armed guerilla.[61] The victims of this violence, which due to its number can be seen to reach a systematic level, are not just women, that traditionally are seen as the ordinary victim of sexual violence,[62] but also people of diverse sexual orientations and gender expressions to the heteronormative paradigm. This

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[56] ECOSOC 'Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission of Human Rights resolution 1985/33' (1986) UN Doc. E/CN.4/1986/15, 29.

[57] UN Committee on Civil and Political Rights, 'General Comment 29: STATES OF EMERGENCY (ARTICLE 4)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para. 2.

[58]See indicatively: Commission on Human Rights, 'SITUATION OF HUMAN RIGHTS IN THE TERRITORY OF THE FORMER YUGOSLAVIA Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992' (1993) UN Doc. E/CN.4/1993/50; Commission on Human Rights, 'QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994' (1996) UN Doc E/CN.4/1996/68.

[59] Emma Jaramillo Bernat, 'La JEP Abre Su Macrocaso 11: Investigará La Violencia Basada En Género Cometida En El Marco Del Conflicto Colombiano' (*El País América Colombia* 27 September 2023) <https://elpais.com/america-colombia/2023-09-27/la-jep-abre-su-macrocaso-11-investigara-la-violencia-basada-en-genero-cometida-en-el-marco-del-conflicto-colombiano.html> accessed 15 November 2023

[60] Reuters, 'More than 35,000 Victims of Sexual Violence in Colombia's Conflict, Tribunal Says' (*Reuters* 27 September 2023) <https://www.reuters.com/world/americas/more-than-35000-victims-sexual-violence-colombias-conflict-tribunal-2023-09-27/> accessed 15 November 2023

[61]Ibid.

[62] Sjoberg L, *Women as Wartime Rapists: Beyond Sensation and Stereotyping* (New York University Press 2017), 19; Carreiras H and Kümmel G (eds), *Women in the Military and in Armed Conflict* (1st edn, VS Verlag für Sozialwissenschaften 2008), 29.

realisation of the Special Jurisdiction for Peace has been preceded by both the detailed reports of Independent International Commission of Inquiry on the Syrian Arab Republic from 2011[63] until the day the present analysis is drafted, and the findings of the 2022 Report of the Independent International Commission of Inquiry on Ukraine that men have also been subjected to sexual violence.[64]

While one can criticise the 2022 Report on Ukraine for not elaborating further, and satisfying itself in simply mentioning in short phrases that men were victims of forced nudity as means of sexual violence in the conflict between Russia and Ukraine, it is equally important that it confirms the findings which feminist scholars warned that the international community was shying from;[65] the fact that not only women, but that also men are victims of sexual violence. In this vein, it can be deduced that the practice of sexual violence in armed conflicts is much higher than one would normally anticipate, as more and more victims of it emerge and become visible. But why did we not know of these victims earlier on? Because of the stigma and the taboo a man bears due to gender expectations from him. It is simply too difficult for a man that is seen as the protector and the soldier, to be violated in such a deep and profound way, and in such a way that is traditionally kept for women. His masculinity is in absolute danger of shattering and in order for him to preserve it, he chooses to remain silent.[66]

In contrast with the 2022 Report, the 2023 Report on Ukraine was more elaborative. It examined further the way that the use of male forced nudity surpassed what was necessary for security purposes and how such conduct amounts as sexual violence in armed conflict.[67]

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[63] See indicatively: Human Rights Council 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (2011) UN Docs. A/HRC/S-17/2/Add.1, paras. 66-8, (2012) A/HRC/19/69, paras 65 and 99; (2012) A/HRC/21/50, para. 96-102; (2013) A/HRC/22/59, paras. 104-10; (2013) A/HRC/23/58, paras 91-3; (2013) A/HRC/24/46, paras 96-100; (2014) A/HRC/25/65, paras 62-9; (2014) A/HRC/27/60, paras. 75-8; (2015) A/HRC/28/69 paras 52, 59-61, 66, 73, 136, 145, and 173-83; (2015) A/HRC/30/48, paras 53 and 95; (2016) A/HRC/33/55, paras 104-8; (2020) A/HRC/45/31, paras 25, 35 and 59-62; (2021) A/HRC/48/70, paras 36, 86-9 and 92; (2022) A/HRC/49/77, para 70; (2022) A/HRC/51/45 para 72 and 80; (2023) A/HRC/54/58 para 80; *Application of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (*Canada and the Netherlands v. Syrian Arab Republic*) (Provisional Measures) [2023] ICJ Rep, paras. 32, 72-4.

[64] UN General Assembly 'Commission d'enquête internationale indépendante sur l'Ukraine' in the 'Note du Secrétaire général' UN Doc. A/77/533, paras. 88 and 97.

[65] Valerie Oosterveld, 'Sexual Violence Directed against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals' (2014) 10 J Int'l L & Int'l Rel 107.

[66]Dolan C, 'Victims Who Are Men' in Ní Fionnuala Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2023), 97; see also Human Rights Council 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (2011) UN Doc. A/HRC/S-17/2/Add.1, paras 67-8.

[67] Human Rights Council 'Report of the Independent International Commission of Inquiry on Ukraine' (2023) UN Doc. A/HRC/52/62, paras 83-4.

There was also special reference on how gender-based sexual violence was used in the context of the conflict, which, for the Inquiry Mission, may also rise to the level of torture.[68]

This previous male silence helped the international community evade examining this question earlier on, despite the precedent of the *Cesic* case. In this case the ICTY the defendant pleaded guilty to the charges brought by the Prosecution,[69] including to the charge of rape as a crime against humanity. The facts in that case include an incident where Cesic forced two muslim brothers to perform oral sex with each other in the presence of others.[70] What is noteworthy is that there was no reference to the 1993 Report of the Special Rapporteur on the situation on human rights in the territory of the former Yugoslavia concerning sexual violence against men, since the Report, for which the Rapporteur made visits to the territory of Yugoslavia, focused only on women. This invisibility demonstrates the extent of the invisibility of male victims of sexual violence. It is not, therefore, a big stretch of thought to imagine that actual practice of the use of sexual violence is even bigger than one can anticipate.

This overwhelming use of sexual violence during armed conflict was in the findings of the 1996 Report on the situation of human rights in Rwanda.[71] For the Special Rapporteur on the situation of human Rights in Rwanda, it was impossible to give an accurate statistical estimate due to the scale and brutality of its use.[72] The Rwandan Ministry of Family and the Promotion of Women registered only 15,700 cases, underestimating the real number of victims, which was higher.[73] In fact, sexual violence was so widerspread that experts estimated that the victims of sexual violence more than 250.000 women.[74]

In the 2023 Report by the Secretary General of the United Nations concerning the use of sexual violence in armed conflict during 2022, the grim picture of its extensive use remains the same. In Afghanistan, the United Nations Assistance Mission managed to report 38 verified cases of sexual violence against girls and boys.[75] In the Central African Republic,

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[68] Human Rights Council 'Report of the Independent International Commission of Inquiry on Ukraine' (2023) UN Doc. A/HRC/52/62, para 81.
[69] *Prosecutor v. Cesic* (Sentencing Judgment) IT-95-10/1-S, T. Ch I (11 March 2004), para 4.
[70] Ibid., paras 13-4.
[71] Commission on Human Rights QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994' (1996) UN Doc E/CN.4/1996/68, para. 16.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] UN Secretary General 'Report on the Conflict-Related sexual violence' (2023) UN Doc. S/2023/413, para 21.

from the 201 verified cases of sexual violence by the United Nations Multidimensional Integrated Stabilization Mission, the official army and its proxies are culpable for at least 25 of them.[76] Concerning the Democratic Republic of Congo, it is estimated that its armed forces are behind 149 rapes, and it is estimated that only 19% of the total rapes totally committed have been documented.[77] Concerning the conflict in the Tigray area between Ethiopia and the Tigray's People Liberation front, the State army was repeatedly involved in situations of sexual violence.[78] The 2023 Report of the Secretary General demonstrates that most documented sexual violence allegations are blaming non-state actors, and that apart from the fear of rape, victims in conflict zones with collapsed healthcare systems suffer greatly from HIV transmissions.[79] Lastly, one more factor that exacerbates the levels of sexual violence in conflict zones is the use private contractors and armed militia in States' military operations.[80] In total, it can be observed that "*the level of compliance by parties to conflict with applicable international norms remained low*".[81]

This finding of the United Nations' Secretary General is indicative of the extensive use of sexual violence during armed conflicts which reesults to devastating numbers of victims.[82] This leads to the conclusion that there is indeed adequate and consistent State practice on the battleground to entertain the argument that the criterion of State practice for the formation of a new customary rule of international law that allows the use of sexual violence in armed conflict, has finally been met.

ii. Opinio Juris

In order for a customary rule to be formulated, it requires not only consistent State practice, but this practice "*must* [...] *be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*".[83] In this sub-chapter, it shall be examined whether there may be *opinio juris* that is consistent with

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[76]UN Secretary General 'Report on the Conflict-Related sexual violence' (2023) UN Doc. S/2023/413, para 24.
[77]Ibid., para 33.
[78]Ibid., para 79.
[79]Ibid., paras 26 and 59.
[80]Ibid, para 11.
[81]Ibid., para 19.
[82] Gaeta P and others, *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014), 678.
[83]*North Sea Continental Shelf (n 35)*, para. 77

the relevant State practice as examined above, in order to establish the new rule of customary law that allows the use of sexual violence in armed conflicts.

As a matter of fact"[e]*ven if, at first sight, the psychological element might be seen as less perceptible, the* [ICJ] *has strictly maintained that it had to be present in the customary process: absent opinio juris, there is no customary rule*"[84]. However, it must be recalled that the correct identification of *opinio juris sive necessitatis* -what Pellet calls the subjective and psychological element of customary law-[85] has no specific formula. In fact, any attempt to identify the pertinent *opinio juris* "*leaves an impression of a complex and somehow mysterious alchemy*",[86] which grants international courts "*a rather large measure of discretionary power*",[87] which is sometimes likened to the attempt of international courts to "*enter into a debate which* [they] *may well come to see as essentially an academic exercise*".[88] Nevertheless, the 2023 Judgement in *Nicaragua v. Colombia* sheds some light concerning the identification of *opinio juris*, which can be causally linked to State practice, as sometimes "*given its extent over a long period of time,* [...] *State practice may be seen as an expression of opinio juris*".[89] In any case, despite the difficulty of identifying the *opinio juris*, the present analysis shall attempt to present and approach all relevant evidences that establish that the State practice of extensive use of sexual violence is followed by the necessary *opinio juris*, that allows for such a practice to occur, thus rendering this practice a rule of international customary law.

One more closer examination to the intersection of strategy, politics and international law here is necessary, in order to study *opinio juris*. This examination follows closely the use of sexual violence in armed conflict. While essentialist theories of polemology[90] are notorious for their borderline standardisation of sexist[91] interpretation of sexual violence that

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[84] Zimmermann A and others (eds), *The Statute of the International Court of Justice A Commentary* (Oxford University Press 2019), 753; See also *Military and Paramilitary Activities in and against Nicaragua* (n 29), para 207.

[85]Zimmermann A and others (eds) (n 84), 749

[86]Ibid.

[87]Ibid.

[88] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) (Joint Separate Opinion Higgins Kooijman Buergenthal on Questions of jurisdiction and/or admissibility) [2002] ICJ Rep 63, para 17. (internal quotation marks omitted).

[89]*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*) (Merits) [2023] ICJ Rep., para. 77

[90]Polemology is the branch of Sociology that examines the phenomenon of War through sociological lenses. In his sociological examination, Bouthoul uses interestingly several gender-stereotypical tropes in order to further his arguments. Therefore he is using an essentialist methodology to the phenomenon of war when he is approaching sociologically the examined phenomenon. Bouthoul G. "Traité de Polémologie Sociologie des Guerres" (Διεύθυνση Εκδόσεων Γενικού Επιτελείου Στρατού 1980), 21.

[91]Baaz ME and Stern M, 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)' (2009) 53 International Studies Quarterly 495.

concentrates on male (hetero)sexuality, the scientific consensus, as well as jurisprudence, suggests that sexual violence aims to destroy the victim and the ties it enjoys with the community *en masse.*[92] This weapon of war also has been linked with the decrease of the military morale of the opponent that is submitted to this violence.[93]

The massive use of sexual violence also remains reminiscent of the *countervalue* targeting strategy that endorses the targeting of big cities with nuclear weapons, for the sake of military advancement.[94] While one may find such a technique morally repugnant, there has been a silent acceptance to the -otherwise indiscriminate- nuclear attacks of the United States to Hiroshima and Nagashaki as lawful, since there is an absence of any official complaint by any State. As the ICJ has pronounced in *Preah Vihear*: *Qui tacet consentire videtur si loqui debuisset ac potuisset.*[95]

It is clear that States have accepted the countervalue strategy, regardless of the restrictions that may be posed by IHL, and which appears "*generally* [to] *be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law*".[96] If States have accepted the legitimacy of the attack in Hiroshima and Nagashaki, despite already existing rules of IHL that seem to be contrary to it, it is therefore not a stretch of though to safely *mutatis mutandis* conclude that in light of the above mentioned practice, States may indicate that they accept the use of sexual violence in armed conflict as permissible through their practice.

One other point to look to identify whether such *opinio juris* exists is the judicial and prosecutorial practice of States. The Secretary General of the United Nations observes that "[i]*n most contexts, impunity remained the norm*"[97] which heightens the "*risk of the 'rule of lawlessness' by eroding what should be the first line of defence against atrocity crimes*"[98] and

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[92]Sjoberg (n 13), 219-24.

[93]See indicatively: Sjoberg (n 13), 219-24; Cockburn C, 'War and Security, Women and Gender: An Overview of the Issues' (2013) 21 Gender and Development 433; Niarchos CN, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17 Human Rights Quarterly 649**;** Chinkin C, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 European Journal of International Law 326.

[94]In nuclear strategy, countervalue targeting is considered when an army targets an enemy city with nuclear weapons instead of targeting military targets in order to produce more casualties. This targeting method was what United States' President Truman had in mind when -in continuation from the Potsdam Declaration- he ordered the bombing of Hiroshima and Nagashaki so that the Japanese army would admit defeat and conclude a peace agreement. See also: 'Countervalue Targeting | Arms Race, Deterrence & Disarmament | Britannica', *Encyclopædia Britannica* (2023) <https://www.britannica.com/topic/countervalue-targeting> accessed 21 November 2023.

95 *Case concerning the Temple Preah Vihear* (*Cambodia v. Thailand*) (Merits) [1969] ICJ Rep 6, 23.

96 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Dispositif para. E.

[97]UN Secretary General 'Report on the Conflict-Related sexual violence' (2023) UN Doc. S/2023/413, para 4.

[98]Ibid..

emboldens the "*effects of impunity for patterns of conflict-related sexual violence*"[99]. What the United Nations' Secretary General is vividly explaining is that not only are there slim margins of probabilities that perpetrators of sexual violence during armed conflicts will ever face justice, but also, that these perpetrators act exactly based upon this knowledge.

As a matter of fact, until 2021 the ICC, that suffers from various systematic problems, whose analysis falls outside the scope of the present examination, also fell short in its promise of ending impunity concerning sexual violence.[100] Altujan even points out the comment of the ICC's Trial Chamber I concerning the attitude of the Prosecutor on the use of credible information that Lubanga is involved in the perpetration of sexual violence. More specifically, "[t]*he Chamber strongly deprecate*[d] *the attitude of the former Prosecutor in relation to the issue of sexual violence*"[101] and recalled that

> "*not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis*".[102]

The Office of the Prosecutor has also missed its chance in *Katanga* and in *Mbarushimana*, where in the first case the Trial Chamber acquitted the accused and more emphatically in the second, where the Pre-Trial Chamber refused to even confirm the charges. It is can be therefore deduced, that it is this very difficulty of the Prosecutor in *Mbarushimana* to even confirm the sexual violence related charges, which, effectively, indicatives that building a strong solid case accompanied from a convincing legal narratice for such cases is beyond difficult.[103] *Bemba* in 2016 was the first case where an accused was convicted for sexual violence, but he, too, was acquitted by the Appeals Chambers. The Office of the Prosecutor has been more successful in the last years with the *Ongwen* and

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[99]UN Secretary General 'Report on the Conflict-Related sexual violence' (2023) UN Doc. S/2023/413, para 4.
[100] Altunjan T, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878, 883.
[101]Ibid., 884.
[102]*Prosecutor v. Lubanga* (Sentencing Decision) (2012) ICC-01/04-01/06, T Ch I, para. 60; See also Altunjan T, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878, 884.
[103]Altunjan T, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878.

Ntaganda cases. So, the legal outcomes of the ICC trials remain simply too little and too slow in light of its 21 years of operation.

In this jurisprudential vein, what can further be said is that the practice that the ICRC recalls concerning the Customary Rule 93 (which shall be elaborated further bellow) concerning the prohibition of sexual violence, is somewhat lacking. In fact, the ICRC only cites 20 cases in national courts,[104] which -compared to the great extent of sexual violence that was established above- seems a bit too little to reflect that there is indeed this deep seeded belief of a legal demerit towards the crime of rape.

Simultaneously, the analysis can not disregard how soldiers, that are the agents of the State practice, view their own actions and whether they, as such, are bound by a rule that prohibits them to use sexual violence. In his sociological analysis of war, Bouthoul observes that during armed conflicts there is not only a waiver in what is considered lawful and taboo, but sometimes acts that under normal circumstances are perceived as despicable, during armed conflict are suggested or even mandated.[105] He thus concludes that the use of sexual violence in armed conflict is perceived as a condition that follows the subversion of the rules and norms that traditionally prohibit the use of sexual violence. As sexual and gender identities are performative,[106] the analysis remains mindful that it is mostly men that are the most common perpetrator of sexual violence in armed conflict as women are traditionally understood as "*trophies*" to be won. This line of though is closely linked with the "*sexual urge*"[107] theory that proposes that soldiers are raping due to their high libido which is caused by their "*bestial sexuality*"[108] which is seen to explain the widespread sexual violence in armed conflict as a byproduct of war, especially read under the "*spiral of violence*"[109] approach which explains the widespread sexual violence as a result of the widespread violence which naturally occurs during armed conflict and grants a psychological leave for soldiers to perform sexual violence as something normal.[110]

From all the above, it can be argued that the psychological understandings and attitudes of soldiers towards sexual violence in armed conflict, combined with the State

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[104](*Icrc.org* 2023) <https://ihl-databases.icrc.org/fr/customary-ihl/v2/rule93#5437979d-3016-42d3-bb63-2d7a902ceabc> accessed 19 November 2023

[105]Bouthoul G (n 90), 315

[106] Butler J, *Gender Trouble* (4th edn, Routledge 2007), 34.

[107]Seifert R, 'The Second Front' (1996) 19 Women's Studies International Forum 35.

[108] Baaz ME and Stern M, 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)' (2009) 53 International Studies Quarterly 495.

[109]Ibid.

[110]Johnson-Freese J, *Women, Peace and Security: An Introduction* (1st edn, Routledge 2018), 92.; Brownmiller S, *Against Our Will Men, Women and Rape* (Fawcett Columbine 1975), 31.

practice presented above and international law doctine, all seem to lead to the conclusion that there is a customary rule of international that allows sexual violence in armed conflict.

b. Orthodox interpretation of the evolution of international humanitarian law

In the previous subchapter it was argued that there are evidence of State practice and relevant *opinio juris* to consolidate a customary rule of international law that allows the use of sexual violence in armed conflict. In this subchapter, the analysis shall deconstruct this assertion by i) demonstrating that there is not enough State practice, let alone consistent practice, to establish the first criterion, and ii) proving that there is no *opinio juris* that follows the acceptance of sexual violence as a permissible act during armed conflict.

i. Practice of the battlefield is only part of the *State practice*

The previous subchapter made a lengthy argument about what constitutes State practice. It managed to link army behaviour *in the battlefield* with State practice. Indeed, this can provide the basis of a compelling argument, if only it was full picture. In fact, army behaviour *in the battlefield* represents a small portion of what constitutes State practice. This means that a wide variety of evidence and actions can reflect State practice, even if IHL's formation started firstly from the battlefield.[111] Concerning the

> "*nature of the acts of behaviours which can be taken into consideration in order to determine whether a practice exists - the Court has mentioned: administrative acts of attitudes, in particular in the field of diplomatic protection; legislation; acts of the judiciary; or, and this might be the most important and frequent aspect of practice, treaty*".[112]

[111]Tavernier P and Henckaerts J-M (n 37), 180: "En effet, le droit de la guette est né de la confrontations sur le champ de bataille entre souverains égaux en droits"**;** "Le droit de la guerre, en tant que système de règles juridiques, a son origine dans la réglementation coutumière des rapports sur le champ de bataille entre deux entités juridiquement égales" in Siotis J, *Le Droit de La Guerre et Les Conflits Armés d'un Caractère Non-International* (Librairie générale de droit et de jurisprudence 1958), 53.
[112]Zimmermann A and others (eds) (n 84), 750-1.

This is why, apart from what happens in the battlefield, more elements must be taken into consideration in order to safely paint the full picture of what it is the actual State practice. However, it is virtually impossible to manage to make space for all the documents, as they are so many, that prove State practice which directs to the prohibition of sexual violence in armed conflicts.

Now, if we take into consideration that a treaty itself can produce a new customary rule of international law,[113] the present deconstructive argument has to first present the historical dimension of the prohibition of sexual violence in international law. In fact, the prohibition of sexual violence is as old as the creation of conventional IHL. The 19th century is filled with the antithesis between Clausewitz and the attempt of several commanders to humanise war,[114] leading to the Lieber Code which aimed to create a military code of conduct based on the already existing customs of war,[115] and based upon that, it prohibited "*all rape*",[116] which effectively was punished by the death penalty "*on the spot*".[117] This code further helped the progressive evolution of IHL through the adoption of declarations and international conventions.[118]

The 1874 Brussels Declaration, in its part, acknowledged the prohibition of sexual violence, under the guise of the protection of *family honour* rights.[119] It is recalled that the protection from sexual violence is included in the ordinary meaning of *family honour* at the time of the adoption of the document.[120] The 1890 Oxford manual, which also attempted to identify existing customary law,[121] also reaffirmed this prohibition.[122] Family honour is equally protected by the 1988 II and 1907 IV Hague Regulations.[123] It is worth mentioning that the Hague Regulations "*were recognized by all civilized nations, and were regarded as*

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[113] *North Sea Continental Shelf (n 35)* para 74.
[114] Marouda MD, *Διεθνές Ανθρωπιστικό Δίκαιο* (1st edn, ΣΙΔΕΡΗΣ 2015), 48.
[115] Marouda MD, 'Διεθνές Ανθρωπιστικό Δίκαιο Των Ενόπλων Συρράξεων' in Konstantinos Antonopoulos and Konstantinos Magliveras (eds), *Το Δίκαιο της Διεθνούς Κοινωνίας* (3rd edn, Nomiki Vivliothiki 2017), 776.
[116] Instructions for the Government of Armies of the United States in the Field (1863) (Lieber Code), art. 44 <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863?activeTab=historical>.
[117] Ibid.
[118] Marouda MD (n 114), 48.
[119] Project of an International Declaration concerning the Laws and Customs of War (1874) (Brussels Declaration) art 38 <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874>.
[120] Altunjan T (n 46), 37.
[121] (*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880/preface> accessed 21 November 2023.
[122] Oxford Manual on the Law of War on Land (1880) art 49 <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880/preface>.
[123] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted on 29 July 1899) (Hague Regulations II), art 46; Hague Regulations IV, art. 46.

being declaratory of the laws and customs of war".[124] The 1949 IV Geneva Convention made further steps towards the protection from sexual violence, as it barred through Common Article 3 "*outrages upon personal dignity, in particular, humiliating and degrading treatment*",[125] and through art. 27 according to which "[w]*omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*".[126] While it is true that the above criticism made a compelling point that IHL at the time of adoption of the Geneva Conventions did not visualize male victims of sexual violence, this can not by itself prove the existence of a general State practice, when there is already a prohibition for the sexual violence which at the time could be visualized. Also, it must not evade the analysis' attention that apart from the gender-free language of Common Article 3, which also reflects "*elementary considerations of humanity*",[127] the Geneva Conventions are universally ratified[128] and thus their content should be accepted as reflecting State practice.

The Hague Regulations and Geneva Conventions, which were for sometime seen as separate bodies of law,[129] merged with the two 1977 Additional Protocols. While the Aditional Protocol II has dramatically less provisions than Additional Protocol I, it recognises in its Fundamental Guarantees that "[o]*utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault*"[130] are prohibited. It goes without saying that also Additional Protocol I encompasses the protection of individuals from sexual violence as a form of a Fundamental Guarantee.[131]

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[124]*The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Göring et al.* (Judgment) [1946] 22 IMT 203, p. 467 <https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf>

[125]Geneva IV, art. 3; Also, the International Criminal Tribunal for Rwnada has linked sexual violence to torture, therefore, the application of common article 3 which prohibitsoutrages upon personal dignity and degrading and humiliating treatment encompass rape and other forms of sexual violence as "*597. The Trial Chamber considers 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 … Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*". *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, T Ch I (1998), para 597.

[126]Geneva IV, art 27.

[127]*Military and Paramilitary Activities in and against Nicaragua* (n 29), para 218.

[128](*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties?activeTab=1949GCs-APs-and-commentaries> accessed 21 November 2023.

[129]Marouda MD, 'Διεθνές Ανθρωπιστικό Δίκαιο Των Ενόπλων Συρράξεων' in Konstantinos Antonopoulos and Konstantinos Magliveras (eds), *Το Δίκαιο της Διεθνούς Κοινωνίας* (3rd edn, Nomiki Vivliothiki 2017), 767.

[130] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted on 8 June 1977, came into effect 7 December 1978) (APII) 1125 UNTS 609, art 4.

[131] API, art 75**;** see also: *Prosecutor v. Akayesu* (n 125*)*, para 597; *Prosecutor v. Music, Delic, Delalic* (Judgment) (*Delalic*) IT-96-21-T, T Ch I (1998), para 496.

A great step ahead was achieved with the adoption of the Rome Statute establishing the ICC, according to which the use of sexual violence can ammount to both a war crime in IACS[132] NIACs[133] and a crime against humanity,[134] always depending on the specific circumstances of each case the Prosecutor brings before the ICC. The Rome Statute has the potential to visualize male victims of sexual violence, as the Elements of Crimes that complement the understanding of the provisions of the Rome Statute, use terms "*broad enough to be gender-neutral*"[135] and incorporate all victims, regardless of their gender. Remaining on the topic of international criminal justice, another honorable mention must be made for the Statute of the Special Court for Sierra Leone, which also prosecuted sexual violence as both a crime against humanity[136] and a violation of Common Article 3.[137]

However, State practice, apart from the conclusion of conventions, can be seen in the activities of States in international organisations. It is indeed recognised by the ILC that "[f]*orms of State practice include* [...] *conduct in connection with resolutions adopted by an international organization*".[138] After all, the ICJ has said that "*it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant*".[139] To begin, the first such document the analysis will have to examine the UNSC's Resolution 1325 which introduced the Agenda for Peace and Security. This document came as the aftermath of the 1995 Beijing Platform of Action,[140] which also recognised that "*violations of this kind, including rape, and in particular including systematic rape, sexual*

[132]Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) (Rome Statute) 2187 UNTS 3, art. 8.2.b.xxii.
[133]Ibid., art. 8.2.e.vi.
[134]Ibid., art. 7.1.g.
[135] Elements of Crime of the Rome Statute, 141 and 150. (Elements of Crime)
[136] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (adopted on 16 January 2002, came into effect 12 April 2002) (Statute for Sierra Leone) 2178 UNTS 137, art. 2.g.
[137]Ibid., art 3.e.
[138]ILC, 'Report of the International Law Commission' (30 April – 1 June and 2 July – 10 August 2018) UN Doc. A/73/10, p. 133
[139] *Military and Paramilitary Activities in and against Nicaragua* (n 29), para 72.
[140]Until 1995, the international community, under the auspices of the United Nations had organized three conferences on the topic of women and development (Mexico city, 1975; Copenhagen, 1980; Nairobi, 1985). In 1995 the Beijing conference was held and became a landmark for the progression of women's rights. In this conference, it was observed that the progression on women's rights was nearly not enough. In this conference, UN Member States recognised the universality of women's and girl's rights as well as their duty to protect and further advance women's and girls' rights. After the adoption of the Convention on the Eliminations of All Forms of Discrimination agaist Women, it is considered one of the most comprehensive documents for women's rights, as many UN resolutions refer to it. For more:Steans (n 11), 111-3; see also: 'Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome' (*UN Women – Headquarters*17 April 2023) <https://www.unwomen.org/en/digital-library/publications/2015/01/beijing-declaration> accessed 26 November 2023; 'What Is Beijing Platform for Action?' (*UNDP*2020) <https://www.undp.org/ukraine/publications/what-beijing-platform-action> accessed 26 November 2023

slavery and forced pregnancy require a particularly effective response"[141] are prohibited, and requested all United Nations member states to not only "*take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict*",[142] but also to

> "*to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions*".[143]

As it has been established above, there have been violations of the prohibition set by international treaty law and UNSC Resolution 1325, with extensive use of sexual violence in the battlefield. However, this lead the Council in a dynamic series of Resolutions that actively condemn the use of sexual violence. It is very interesting that the first resolutions after Resolution 1325 use generically the same language. For example, Resolution 1820 demands not only "*the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect*"[144], but also

> "*that all parties to armed conflict immediately take appropriate measures to protect civilians* [..] *from all forms of sexual violence, which could include* [...] *enforcing appropriate military disciplinary measure* [and] *training troops on the categorical prohibition of all forms of sexual violence against civilians*".[145]

What is interesting though, is that the next resolution issued on the matter by the UNSC, uses the exact same provisions.[146] One Resolution exactly later, it adds emphasis also in the "*the responsibility of all States to put an end to impunity and to prosecute those responsible for all forms of violence committed against women and girls in armed conflicts, including rape and other sexual violence*".[147] Resolution 2106 makes a step ahead and recognises the link between the prohibition of sexual violence and the maintainance of

[141] Fourth World Conference on Women, Beijing Declaration (adopted on 15 September 1995), para. 131. (internal quotations marks omitted) <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>
[142] UNSC Res 1325 (2000) UN Doc S/RES/1325, op. clause 10.
[143] Ibid., op clause 11.
[144] UNSC Res 1820 (2008) UN Doc. S/RES/1820, op. clause 2.
[145] UNSC Res 1820 (2008) UN Doc. S/RES/1820, op. clause 3.
[146] UNSC Res 1888 (2009) UN Doc. S/RES/1888, op. clauses 2-3.
[147] UNSC Res 1889 (2009) UN Doc. S/RES/1889, op. clause 3.

durable peace and security.[148] In 2015, the UNSC took an introspective step and also called upon peacekeeping officers to refrain from sexual violence via a zero-tolerance policy,[149] as well as calling the organization to cooperate with domestic authorities for the prosecution of peacekeeping officers where necessary.[150]

Moreover, the attention of the analysis must now be drawn to the 8514th meeting of the UNSC which led to the adoption of Resolution 2467 which concerned justice and accountability as well as the adoption of a survivor-centered approach in the mitigation of sexual violence in conflict and post-conflict areas, since sexual violence has "*become systematic and widespread, reaching appalling levels of brutality*".[151] In this meeting, many non members of the Council requested to address the Council. In all of the speeches there was some form of condemnation of sexual violence[152], despite the fact that States actively disagreed on the scope of the access women should have to their reproductive rights as well as the use of the term "*gender*" which finally resulted with the resolutions provisions to be significantly watered down, so that the United States delegation would not veto the resolution.[153]

Honorary mentions must also be made to the UNGA for playing its part in the formation of international customary rules that prohibit sexual violence in armed conflicts. The UNGA has on several occasions issued resolutions that categorically condemn sexual violence in armed conflict. Such examples are Resolution 50/192 which "[s]*trongly condemns the abhorrent practice of rape and abuse of women and children* [...]*which constitutes a war crime*"[154] and in this resolution the UNGA even "[e]*xpress*[ed] *its outrage*" that the practice has reached a systematic level.[155] Some years later, the UNGA had also recongised the responsibility of States to "[r]*efrain from engaging in violence against women*",[156] also including sexual violence in the understanding of the term "*violence*".[157]

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[148]UNSC Res 2106 (2013) UN Doc. S/RES/2106, 2.
[149]UNSC Res 2242 (2015) UN Doc. S/RES/2242, op clause 10.
[150]Ibid., op clause 9.
[151]UNSC Res 2467 (2019) UN Doc. S/RES/2467, op. Clause 5.
[152] UNSC Meeting record of 23 April 2019 UN Doc S/PV.8514 (2019). <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N19/117/56/PDF/N1911756.pdf?OpenElement>
[153] Ford L, 'UN Waters down Rape Resolution to Appease US's Hardline Abortion Stance' (*the Guardian* 23 April 2019) <https://www.theguardian.com/global-development/2019/apr/23/un-resolution-passes-trump-us-veto-threat-abortion-language-removed> accessed 22 November 2023
[154]UNGA Res 50/192 (1995) UN Doc. A/RES/50/192, op clause 1.
[155]Ibid., op clause 3.
[156]UNGA Res 48/104 (1993) UN Doc. A/RES/48/104, art. 4.b
[157]Ibid., art. 1.

The dicta of the ICJ at this stage must be recalled as "*for a rule to be established as customary, the corresponding practice must* [not] *be in absolutely rigorous conformity with the rule*".[158] As a matter of fact,

> "[i]*f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule*".[159]

The conduct of States, as presented above, demonstrates that they recognise not only the rule of the prohibition of sexual violence, but also accept that any case of its violation, it remains an "*abhorrent war crime*",[160] rather than a new State practice.

The present analysis of State practice must also incorporate one more element, which comes from the field of the protection of human rights. In the present analysis, it is of pertinence to take into account the Convention on the Elimination of All forms of Discrimination Against Women, as "*the protection offered by human rights conventions does not cease in case of armed conflict*".[161] The CEDAW Committee has concluded in its General Recommendation 30 that it follows from the Convention and in light of international criminal law, that States have undertaken to protect women from sexual violence in armed conflict.[162]

Now we turn to one more element of cardinal significance on the matter, which is the pronouncement by the ICRC of the Customary Rules, and more specifically for the scope of the present analysis of Customary Rule 93, which prohibits rape and other forms of sexual violence in armed conflict.[163] The ICRC was mandated to conduct a study codifying international customary law applicable in armed conflicts.[164] In this codification process, the ICRC took into consideration various sources of State practice in order to conclude the list of customary rules it identified that stem from international conventions to national legislation,

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[158] *Military and Paramilitary Activities in and against Nicaragua* (n 29), para. 186.
[159] Ibid.
[160] UNSC Meeting record of 23 April 2019 UN Doc S/PV.8514 (2019), p. 31 <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N19/117/56/PDF/N1911756.pdf?OpenElement>.
[161] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106.
[162] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Comment 30' (18 October 2013) UN Doc. CEDAW/C/GC/30, para. 23.
[163] (*Icrc.org*2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule93> accessed 22 November 2023.
[164] Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume 1, Rules* (Cambridge University Press 2005),xxvii.

military manuals and domestic judicial decisions. While indeed decisions concerning rape in armed conflict are not that numerous, it cited authoritative decisions[165] that make the prohibition of sexual violence clear in various legal systems of the world. The analysis also incorporated numerous resolutions by the United Nations organs, completing the picture on State practice. It is undoubted that the ICRC, the guardian of IHL,[166] would not make such a mistake and risk losing its well-earned credibility, pronouncing an ill-founded rule of customary international law, especially when it is acting under its "*promotion function*".[167]

This analysis can safely lead to the conclusion that State practice in fact supports the customary findings of the ICRC's Customary Rule 93 that sexual violence during armed conflicts is prohibited.

ii. **The theoretical construction lacks real *opinio juris***

In the above subchapter concerning *opinio juris*, the analysis addressed the mysterious character of *opinio juris* likening it to an alchemy in the identification of the psychological element of international customs. This section shall demonstrate though, that there is clear *opinio juris* which explicitly prohibits the use of sexual violence in armed conflicts.

Firstly, it must be recalled that "*given its extent over a long period of time,* [...] *State practice may be seen as an expression of opinio juris*".[168] This means that the conclusion of so many treaties, and the voting of so many resolutions establishes that not only is there sufficient practice which proves the existence of a prohibition, but that States feel compelled to keep on reiterating this prohibition, since they "*have been conscious of having such a duty*".[169] In other words, the above practice, has been conducted because States acknowledge that "*international law imposes upon them an obligation to do so*",[170] "*even if such practice may have been motivated in part by considerations other than a sense of legal obligation*".[171]

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[165]The US Court of Military Appeals ruled in the 1952 case of *US v. Schultz* that rape was "*a crime recognized as properly punishable under the law of war*", *US v. Schultz* 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

[166] Sandoz Y, 'The International Committee of the Red Cross as Guardian of International Humanitarian Law - ICRC' (*Icrc.org*31 December 1998) <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm> accessed 22 November 2023.

[167] Ibid.

[168]*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (n 89), para. 77.

[169]*Case concerning the S.S. "Lotus"* (*France/Turkey*) PCIJ Rep Series A No 10, 28.

[170]*Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) (Merits) [2012] ICJ Rep 99, para. 55.

[171]*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (n 89)*, para. 77.

It is thus without doubt that, currently, the *opinio juris* supports the prohibition of the use of sexual violence in armed conflicts, even if soldiers felt that they could rape with impunity or even because this was their impulse, as State practice leads to the opposite conclusion.

However, even if the analysis would disregard the finding of the 2023 Judgment in *Nicaragua v. Colombia*, as too controversial of a finding,[172] the analysis would still conclude that *opinio juris* supports the prohibition of sexual violence in armed conflicts. One of the most ordinary sources to identify *opinio juris*, is the analysis of the UNGA's resolutions *per se*. The ICJ has pronounced that

> "*even if they are not binding,* [they] *may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character*".[173]

Apart from the indicative UNGA resolutions that were presented as State practice, which in their part also reflect *opinio juris*, in this subsection, the present analysis examines more UNGA's Resolutions as reflecting *opinio juris*. First, Resolution 61/143, which was adopted without a vote, States recognised that they have a duty "*to eliminate impunity for all gender-based violence in situations of armed conflict*".[174] Resolution 63/155 recognised that "*armed conflicts is a major impediment to the elimination of all forms of violence against women, and* [...] *calls upon all States* [...] *to ensure that* [...] *all perpetrators of such violence are duly investigated and, as appropriate, prosecuted and punished*".[175] This resolution, in which violence is a term used loosely in order to include all forms of violence, encompassing sexual violence, was also adopted without a vote. What is impressive, is that Resolution 65/187 used the exact same provisions in its reaffirmation on the prohibition of sexual

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[172] See Indicatively: 'The ICJ's Judgment in Nicaragua v. Colombia: Back to the Basics' (*Opinio Juris*16 August 2023) <http://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> accessed 23 November 2023; 'The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant | ASIL' (*Asil.org*2022) <https://www.asil.org/insights/volume/27/issue/9> accessed 23 November 2023; See further: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*) (Dissenting Opinion of Judge Tomka) [2023] ICJ Rep, para 52; (Separate Opinion of Judge Xue) [2023] ICJ Rep, para. 37; (Dissenting Opinion of Judge Robinson)[2023] ICJ Rep, paras 10-14.

[173] *Legality of the Threat or Use of Nuclear Weapons (n 96)*, para. 70.

[174] UNGA Res 61/143 (2006) UN Doc. A/RES/61/143, op. clause 8.o.

[175] UNGA Res 63/155 (2008) UN Doc. A/RES/63/155, op clause 12.

violence[176] and passed in the exactly same manner. To the pattern of using the same language in the same provisions is also included in Resolution 69/147, which, also passing without a vote, pushed further, inviting States to refer such cases when necessary to the ICC.[177] A further step was made with Resolution 75/161 which recognised that the protection from sexual violence in armed conflicts should become a priority of States.[178] What can be deduced from the above is that States have agreed to the existence of their legal responsibility to protect from sexual violence in such a way, that the resolutions that recognise this legal duty need not even be voted upon.

Moreover, of relevance, can be what scholars suggest in order to identify *opinio juris*.[179] As it has been demonstrated, there have been several legal proceedings which concern the prosecution of sexual violence. It we take into account that before the ICC the accused never claimed that there was no rule that prohibited sexual violence, yet they would try to deminish the charges *per se* as too vague,[180] or attempt to justify that the sexual acts they committed were consensual, exactly supports the claim that they find a pretext to prove their innocence without even attacking the integrity of the law.[181] It is insightful to read these Defence strategies in light of what Vattel believed on the use of pretexts in international law. He wrote that "[p]*retexts are at least a homage which unjust men pay to justice. He who screens himself with them shews that he still retains some sense of shame*".[182]

Lastly, judicial decisions can also give an insight as to what is the *opinio juris*.[183] While the present analysis has long remained silent on the ICTY and the ICTR, it is now time to mention their tireless efforts to bring to justice the perpetrators of the most shocking crimes. In this indulgence, it is important to remain mindful of their findings concerning sexual violence. For instance, in *Delalic*, the Trial Chamber found that

> "*the rape of any person* [is] *a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of*

[176]UNGA Res 65/187 (2010) UN Doc. A/RES/65/187.
[177]UNGA Res 69/147 (2014) UN Doc. A/RES/69/147, op clause 13.
[178]UNGA Res 75/161 (2020) UN Doc. A/RES/75/161, op clause 8.
[179]Crawford J, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), 198.
[180] *Prosecutor v. Ntaganda* (Judgment) ICC-01/04-02/06, T Ch VI (2019), para 936.
[181] *Prosecutor v. Ongwen* (Trial Judgment) ICC-02/04-01/15, T Ch IX (2021), paras 2202-2309.
[182] Vattel E. *Le droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains* (1st ed., Liberty Fund 2008), 486.
[183]Crawford J (n 179), 198.

rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official".[184]

Another good authority on sexual violence is *Akayesu*, where the Trial Chamber not only recognised the link between rape and genocide,[185] but also linked rape to torture,[186] whose prohibition in the 2022 Report of the ILC was also identified as *jus cogens*.[187] Therefore, when the ICTY proclaimed apart that the prohibition of rape was a customary rule,[188] that "*the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community*",[189] it can be understood that part of this legal importance of the prohibition of sexual violence can also derrive causaly by its link to the prohibition of torture as a peremptory norm of public international law. The ICTY has also enhanced the understanding that *opinio juris* favors the prohibition of sexual violence in armed conflicts as it found that *Plavsic's* conduct, which also included sexual violence, was "*appalling*".[190]

From all of the above, it can be safely concluded that there is no *opinio juris* that can legitimately suggest the allowance of the use of sexual violence in armed conflict, when in fact, there are numerous counter-evidence, as were presented in this section.

Finally, there can remain no reasonable doubt that there is no new rule that has replaced the customary law prohibiting sexual violence in armed conflict. As it has now been explained that the content of IHL concerning sexual violence has not altered, but enriched by the feminist critical approach, it is now time to proceed with the examination of the evolutionary contribution of the feminist critical approach to the question: *who fights during war*?

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[184] *Delalic* (n 131), para. 495.
[185] *Prosecutor v. Akayesu* (n 125), para 731.
[186] Ibid., para 687.
[187] ILC, 'Report of the International Law Commission' (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10, p. 16.
[188] *Prosecutor v. Furundzija* (Judgment) IT-95-17/1-T, T Ch II(1998), para. 168.
[189] Ibid., para. 154.
[190] *Prosecutor v. Plavsic* (Sentencing Judgment) IT-00-39&40/1, T Ch III (2003), para 126.

3. What happens when the battlefield reaches the sexworker's bed?

Critical feminist scholars reflect on sex not only from the viewpoint of its use as a means of warfare -and by extension in its legality from a legal perspective- but also on how one uses this weapon and who is finely the one who uses this weapon. Usually, when one considers sexual violence in the context of an armed conflict, they could easily consider that -as combatants are the ones to use the weapons- the main users of this weapon are the soldiers. When reflecting on the term soldier one visualises them as a man.[191] The CEDAW Committee debunked this myth, recognising that women "*have historically had and continue to have a role as combatants*".[192] However, in the context of armed conflicts and sexual violence, women are seen as the victim, either raped or forced into prostitution,[193]as in the case of "*comfort women*".[194]

Nevertheless, when into prostitution, could sexworkers have enjoyed at least some margin of agency in the context of an armed conflict? Such a wondering echoes the question that Maupassant expressed through his short story "*Le lit 29*", where he deconstructed the trifecta of "*country, religion, family*".[195] This short story narrates the story of Irma, who worked as a sexworker during the Franco-Prussian war in order to transmit to Prussian soldiers syphilis.[196]

And yet this deconstruction leads this analysis to more questions. If sexworkers enjoy agency in armed conflicts, apart from the volition to create harm, have also the (in)direct means to provoke it, what does that mean for their status *durante bello*? Does this mean that sexworkers can be considered combatants under IHL? Does it mean that sexworkers are civilians taking direct part in hostilities? Or rather does it mean that sexworkers can have a

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[191] Sjoberg L, 'Women Fighters and the "Beautiful Soul" Narrative' (2010) 92 International Review of the Red Cross 53, 55.

[192]UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Comment 30' (18 October 2013) UN Doc. CEDAW/C/GC/30, para. 6

[193] Gentry CE and Sjoberg L, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (1st edn, Zed Books 2007), 4.

[194]"Comfort women" is a term to describe the 80.000 to 200.000 abducted women by the Japanese during the Second World War which were repeatedly raped, forced into prostitution and had become sexual slaves. They were detained in detention camps controlled by the Japanese, called "comfort centers". Altunjan T (n 46), 83. See also: 'Comfort Women | Definition, History, & Facts | Britannica', *Encyclopædia Britannica* (2023) <https://www.britannica.com/topic/comfort-women> accessed 1 December 2023; Natale F, 'The Security Distillery' (*The Security Distillery* 31 December 2020) <https://thesecuritydistillery.org/all-articles/weaponisation-of-female-bodies-part-i-comfort-women> accessed 1 December 2023.

[195] De Maupassant G., *Οι πόρνες* (Maria Spyridopoulou ed., 1st edn., ΡΟΕΣ 2018), 181-2.

[196]Ibid.

political opinion and that it can not be regarded that when they work the transmission of STDs to enemy soldiers is considered a belligerent act?

In order to examine these questions, the analysis will be split into two parts where the analysis i) will delineate the scope of the actions it shall take into consideration, and ii) will discuss all the legal issues concerning the participation of sexworkers in armed conflict and their status as such.

a. Thinking of Sex in armed conflicts

The lack of visualisation by IHL of voluntary prostitution can be *prima facie* construed as legal lacuna. However, sex is a recognised weapon, women participate in conflict, and in this combination sexworkers -which are commonly recognised as civilians- technically can use sex as a weapon and participate directly in conflict. In other words, questions of agency in such cases seem unregulated by customary and treaty law. This is why, the present analysis shall attempt to shed light in the recognition of the agency of sexworkers in armed conflict.

This examination shall: i) delineate the scope of the analysis concerning sexwork, ii), examine the actual link between sexual violence, prostitution and them being weapons in armed conflic t, and iii)navigate the criteria for the classification of who is combatants in armed conflicts and who participates directly in hostilities.

i. Theoretical construction

This section shall navigate the outer limits of the theoretical construction in which the present analysis is basing itself. The analysis will: i) delineate the acts that shall comprise the physical acts the analysis shall examine in the next subchapter, and ii) examine the plausibility of consent *durante bello* in prostitution will be examined.

1. **Sexualized agency of women in armed conflict**:

One striking example of women's agency when sexworking is narrated by Maupassant in his short story 'Le lit 29', that actively deconstructed gender archetypes of that time. In this short story, captain Épivent meets Irma, with whom he falls in love and starts an affair which abruptly ends when the Franco-Prussian War of 1970 starts. When he returns to Rouen, where the couple met, Irma has vanished. After extensive research and contradictory tales, he receives her letter where she requests him to visit her at the hospital. He pays her a visit, against the better judgment of the doctor. Épivent is led to her, only to find out that she has contracted syphilis. During their conversation, where he sits appalled, he finds out that when the Prussian managed to occupy Rouen, they raped her, transmitting to her syphilis.

While she had the choice to undergo treatment, she declined, as she had already begun mastering her plan of revenge to inflict as many Prussians as she could with syphilis so that they would die, even if that meant that she would have to die herself. She recalls being efficient as that more than one soldier would die because of her. After a while, the fact that she had entered into sexual relations with the Prussians was made known to the french public, who then slutshamed[197] her as "*femme aux Prussiens*".[198] Épivent rushes to leave feeling humiliated.

Nevertheless, he returned for a second time to meet her. In their second meeting, the motives and the actions of Irma become even clearer. She responds to his accusations of public humiliation through her Prussian affiliation, answering that she did what she thought was best to harm the enemy by killing as many as she possibly could. She continues questioning what is shameful, as she sacrificed herself for the liberty of her people and for her revenge through transmitting to the Prussians syphilis, expecting them to die of it. At that time she even claimed that she was more worthy of the military distinction that Épivent had received, since she had managed to kill more Prussian through transmitting syphilis to them. She even claimed to have killed more Prussian soldiers than Épivent and all of his regiment combined. The next day she died.

The literary scheme of naturalism was met with harsh criticism. Critics regarded naturalist works (the literary movement that Zola and Maupassant participated in) as

[197] In the Greek translation of the short novel, the phrase "femme aux Prussiens" was contextually translated as "*the slut of the Prussians*". De Maupassant G (n 195), 67.
[198] 'Le Lit 29' (*Free.fr* 2023) <http://maupassant.free.fr/textes/lit29.html> accessed 30 November 2023

"*shameful publication*[s]".[199] Two years after the publication of this short story, Le Figaro's Wolff believed that it was simply a fictional story of a poor choice of content.[200] Maupassant replied that he based his stories on impartial and independent observations,[201] meaning that he knew a story with at least a similar storyline. Hence, what Maupassant narrates is a clear case of voluntary prostitution, which is generaly defined as "[t]*he act or practice of engaging in sexual activity for money or its equivalent*".[202]

In the present case, Irma clearly wished to have all the sexual relations she conducted with the Prussians, and as a payment the Prussians thought that through her sexual services, she would continue to lead to good life she was leading when she was *en couple* with Épivent. Therefore, Maupassant saw Irma as an aggressor and an individual with agency, whose actions have direct consequences to the ongoing conflict, and who happened to become a prostitute for the duration of the war in order to achieve her goals.

Based upon the above, the scheme that the present analysis shall therefore examine is the following: all sexworkers who willfully engage in sexual acts with the opponent belligerent army in order to inflict them with SDTs and either kill them or at least render them *hors de combat*, under the guise their sexual activities as a form of prostitution.

2. The notion of *Consent* under international law concerning prostitution

All related legal documents of IHL,[203] recognise enforced prostitution as a war crime in IACs[204] and NIACs[205] as well as a crime against humanity.[206] The common thread between these treaty provisions is that they remain silent on the question of voluntary prostitution. In fact, one close inspection to the black letter of these conventional documents shall exhibit that they prohibit being forced into prostitution, and not prostitution itself. Similarly, customary lawprohibits sexual violence, by extention forced prostitution, but remains silent

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[199] Wolff A., 'Courrier de Paris' *Le Figaro* (Paris, 14 August 1880) <https://gallica.bnf.fr/ark:/12148/bpt6k277557x/f1.item.zoom>
[200] Wolff A., 'Courier de Paris' *Le Figaro* (Paris, 21 July 1982) <https://gallica.bnf.fr/ark:/12148/bpt6k278269c/f1.item.zoom>
[201] De Maupassant G. 'Les bas-fonds', *Le Gaulois* (Paris, 28 July 1882) <https://gallica.bnf.fr/ark:/12148/bpt6k5243130/f1.item.texteImage.zoom>
[202] Garner BA (ed), *Black's Law Dictionary* (9th edn, West 2009), 1342.
[203] Namely: Geneva IV, art. 27; API, art 75; APII, art. 4.
[204] Rome Statute, art. 8.2.b.xxii
[205] Ibid., art. 8.2.e.vi
[206] Ibid., art. 7.1.g.

on the topic of voluntary prostitution.[207] Doctrine can lead us *prima facie* to the conclusion, as there is no explicit bar on voluntary prostitution, under the *Lotus* principle,[208] one can presume its legitimacy under international law.

In order, though, to get a better understanding of prostitution in international law, one can recourse to the Elements of Crime concerning forced prostitution. The relevant elements that consist the crime of enforced prostitution as a crime against humanity are namely: whether the perpetrator has forced one or more persons to engage in sexual act(s) "*by force, or by threat of force or coercion* [...] *or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent*",[209] whether the accused "*obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with*"[210] the relevant sexual acts, whether there was a widespread and systematic attack directed against the civilian population,[211] and whether the accused was aware that their action(s) fell within this systematic attack.[212] Similarly, in the provisions relating to enforced prostitution in armed conflict, the content of the elements of crime concerning this crime IACS and NIACs is similar.[213] Their only differences revolve around the contextual elements, whether there was an armed conflict of IACS and NIACs, and whether the perpetrator was aware that their actions were linked to the conflict.

Their common thread is that all three crimes of enforced prostitution give their focus on the "*genuine consent*" of the person that engages in the sexual act(s). Therefore, *in principle*, if a person can give its genuine consent to engage in sexual acts for the benefir of third parties, the third party can not be held criminally accountable for enforced prostitution. This is the furthest point the present analysis can reach concerning the interpretation of enforced prostitution, as until the day of the drafting of the present analysis, there has never been an accused charged with that crime.[214]

In light of the Vienna Convention on the Law of the Treaties, the ordinary meaning[215] of 'consent' is understood as "*agreement, approval, or permission as to some act or purpose,*

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[207] Customary Rule 93.
[208] *S.S. "Lotus" (n 169)*, 18.; See also: Handeyside H, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat? ' (2007) 29 Michigan Journal of International Law 71.
[209] Elements of Crime, Article 7 (1) (g)-3, 9.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid., Article 8 (2) (b) (xxii)-3, 29; Article 8 (2) (e) (vi)-3, 37.
[214] Altunjan T, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878, p. 890.
[215] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into effect 27 January 1980) (VCLT) 1155 UNTS 331, art. 31, para 1.

[...] *given voluntarily by a competent person*",[216] and 'genuine' can be understood as "*authentic or real*".[217]

The identification of genuine consent is also an element for other related sexual crimes, such as rape. Based upon this observation, one can apply *mutatis mutandis* to what courts have concluded concerning genuine consent concerning rape. In the *Brima, Kamara and Kanu* case the Special Court for Sierra Leone found that "[c]*onsent of the victim must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances,* [...] [and] *in situations of armed conflict or detention, coercion is almost universal*".[218] The ICC has remained in this path, as in *Ntaganda* it took into consideration that "*coercion may be inherent in certain circumstances*"[219] during armed conflicts. It also found that "[t]*he establishment of at least one of the coercive circumstances* [...] *is therefore sufficient alone for penetration to amount to rape*".[220]

In sum, while the courts' findings leave little room for consent to be genuinely given, they *in principle* do not reject that notion in its totality. This means that it is also plausible *mutatis mutandis* for an individual to genuinely consent to enter into prostitution during armed conflicts.

ii. **Sexyfied weapon of armed conflict**

Historically, sexual violence was understood as collateral damage.[221] This understanding changed towards the adoption of laws and customs of war that explicitly prohibit sexual violence. Nevertheless, this prohibition still did not stop the strategic thought to utilize rape and sexual violence as a weapon. However, never in the history of IHL has there been documentation of a widespread use of prostitution as a weapon, but rather as a

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[216] Garner BA (ed) (n 202), 346.
[217] Ibid., 755.
[218] *Prosecutor v. Brima, Kamara and Kanu* (Judgment) SCSL-04-16-T, T Ch II (2007), para. 694.
[219] *Prosecutor v. Ntaganda (180)*, para 935; The Trial Chamber proceeded to explain that: "*coercion may be inherent in certain circumstances, such as armed conflict' or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, in relation to the requirement of the existence of a 'coercive environment', it must be proven that the perpetrator's conduct involved 'taking advantage' of such a coercive environment*".
[220] Ibid., para 934.
[221] Steans J (n 11), 157.

means to ensure the morale of their ranks, as it was the use of "*comfort women*".[222] While it is recalled that enforced prostitution is a form of sexual violence, as there is no historic practice of its use as a weapon used against the opponent's armed group, can it really be argued that there is a link between prostitution and warfare?

Despite the fact that this analysis lacks the necessary real-life data, it can satisfy itself by addressing the question through doctrine, in order to answer in the affirmative. This can be understood if one reflects on the Martens clause according to which,

> "*in cases not included in the Regulations* [...] *populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*".[223]

This phrase at the time of its adoption was included in the Preambulatory Clauses, rather than the operative part, but many decades after its initial adoption, it managed to turn itself into a rule of both customary and treaty law. Martens Clause, while it appears not in the Geneva Conventions, was subsequently codified into conventional law in the API.[224] There is, though, difference between the language of the provision in Hague Regulation II and API is that in the first, it is the "*populations and belligerents*" that are the subject of the protection, when in the latter it is "*civilians and combatants*". Also, the sources of law that protect these subject is coined differently, in the Hague Regulations protection comes from "*the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*",[225] while API origines the protection from "*established custom, from the principles of humanity and from the dictates of public conscience*".[226] It is beyond clear that the regulation of the ever so rapid development of military strategy and arsenal is meant to fall squarely within the scope of application of the clause,[227] even for States that are not contracting parties to API, as this provision reflects customary international law.[228]

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[222] 'Comfort Women | Definition, History, & Facts | Britannica', *Encyclopædia Britannica* (2023) <https://www.britannica.com/topic/comfort-women> accessed 1 December 2023; See also: Natale F, 'The Security Distillery' (*The Security Distillery* 31 December 2020) <https://thesecuritydistillery.org/all-articles/weaponisation-of-female-bodies-part-i-comfort-women> accessed 1 December 2023

[223] Hague Regulations II, Preambule.

[224] API, art.1 para 2.

[225] Hague Regulations II, Preambule.

[226] API, art.1 para 2.

[227] *Legality of the Threat or Use of Nuclear Weapons (n 96)*, para. 78.

[228] Ibid., para. 84.

Upon these considerations, the operation of the UNSC, when addressing matters falling under its mandate to maintain international peace and security, remains crucial. In fact, as the UNSC delivers both its the promise of maintaining international peace and security and the international community's on finding a "*more complete code of laws of war*",[229] Resolution 1820 recognised that the use of sexual violence as a tactic of warfare is forbiden,[230] and by extension, this prohibition can naturally be construed as forbidding enforced prostitution. But as it has been established above, prostitution apart from being enforced, can *technically* in some cases be voluntary. This means that, even if the prohibition *per se* concerns only enforced prostitution, on the contrary voluntary prostitution when either using the body of the sexworker in the context of armed conflicts as a weapon *per se* or sexwork used as a tactic, must always comply with the Martens clause. As it is necessary to follow the "*established custom, the principles of humanity and the dictates of public conscience*"[231], and as there is no uniform prohibition of prostitution *per se*, it can be concluded that in light of the connection of prostitution to sexual violence in the form of enforced prostitution, and while at the momment it remains to the sphere of imagination and "*academic exercise*",[232] voluntary prostitution can *theoretically* be used as a weapon and as a tactic of warfare. After all, in the above theoretical construction, the sexworker through its provision of sexual services transmitted to the enemy soldiers an STD that would eventually make them an *hors de combat*, or dead. It is evident that the sexworker used in this context prostitution as a weapon to produce harm to the enemy.

iii. Criteria for classification as a combattant

The present part of this subchapter shall be divided into three separate sections, where the analysis will examine the criteria for the qualification of someone as: i) a combatant in IACs, ii) member of an armed group in NIACs, and iii) civilians taking direct part in hostilities.

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[229] Hague Regulations II, Preambule.
[230] UNSC Res 1820 (2008) UN Doc S/RES/1820.
[231] API, art.1 para 2. (internal quotation marks omitted)
[232] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) (Joint Separate Opinion Higgins Kooijman Buergenthal on Questions of jurisdiction and/or admissibility) [2002] ICJ Rep 63, para 17. (internal quotation marks omitted).

1. International Armed Conflicts

Participation as a combatant in an IAC is regulated by both international customary and treaty law, which seem to overlap. Prior to the adoption of IHL in the form of treaty law, significant progress in the identification of the criteria for the recognition of combatants was done through the Brussels Declaration of 1874 and the Oxford manual of 1880. Specifically, they both identify that apart from the regular armed forces of states, combatants can also be ones that participate in the hostilities as members of militias under specific conditions such as: responsible command, openly carried weapons, fixed emblem and respect for the laws and customs of war.[233]

The Hague Regulations recognise that "[t]*he armed forces of the belligerent parties may consist of combatants and non-combatants*".[234] According to the third Geneva Convention (Geneva III) relative to the treatment of Prisoners of War (PoW), a person can be a PoW if they are members of the armed forces in the hands of the opponent's army, or if they are part of the militias that form these tactical forces and they fall in the hands of the enemy.[235] They can also include members of militias and other military groups affiliated with the State fallen at the hands of the opponent, provided that they fulfill exhaustively the following criteria namely: responsible commandment, distinctive emblem from a distance, openly carried arms and the respect to the laws and customs of war.[236] This is why, combatants are entitled, among some others, the privileges and protection entitled to PoWs.

API also connects the combatants to PoWs as "[a]*ny combatant* [...] *who falls into the power of an adverse Party shall be a prisoner of war*".[237] API also defines armed forces as

> "*all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinate. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict*".[238]

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[233] Project of an International Declaration concerning the Laws and Customs of War (1874) (Brussels Declaration) art 39 <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874>; Oxford Manual on the Law of War on Land (1880) art. 9 <https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880/preface>.
[234] Hague Regulations II, art. 3; Hague Regulations IV, art 3.
[235] Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entry into force 21 October 1950) (Geneva III) 75 UNTS 135, art. 4.A.1
[236] Ibid., art. 4.A.2.
[237] API, art 45.
[238] Ibid., art 43.1 (internal quotation marks omitted)

Furthermore, it is recalled that "[m]*embers of the armed forces of a Party to a conflict are combatants and they have the right to participate directly in hostilities*".[239]

Customarily, the ICRC has concluded that "[a]*ll members of the armed forces of a party to the conflict are combatants*".[240] It is also noted that it is also customarily recognised that "[t]*he armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates*".[241]

This section must also make a special mention for the case of peoples "*fighting against colonial domination and alien occupation* [...] *in the exercise of their right of self-determination*",[242] who are recognised under API to be taking part in an international armed conflict. Currently, this provision can apply to two cases, namely Palestine and Western Sahara. In such cases, article 43, controversially, allows "freedom fighter"[243] to not bear a distinctive emblem to merge with civilian populations. They are allowed to retain their combatant status as long as they openly carry their weapons and comply with IHL.[244] This provision has led Israel, the occupying power of Palestinian Territories, to not even sign the API. Morocco, on the other side, has recognised, without reservation or other declaration to that effect, conventionally the applicability of the provision. The *travaux preparatoires*, as much as Israel's decline to sign the API, lead to the understanding that this provision does not reflect a customary rule of international law.[245] However, as this provision is applicable law in the case of Western Sahara, the analysis is compelled to take this case as well in due regard.

Lastly, the present analysis will evade taking into consideration questions of *levée en masse*, as it requires a collective group of individuals that upon the sight of the enemy in an non-occupied territory take up arms to fight. The ICRC in its 2020 Commentary of Geneva III that "*levée en masse, invokes the idea of a numerically significant resistance*".[246] However, it must be noted that "*a number of commentators have suggested that advances in military technology render this provision obsolete as the potential for a meaningful civilian uprising*

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[239] Ibid., art 43.2 (internal quotation marks omitted)
[240] (*Icrc.org*2023) <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule3> accessed 2 December 2023.
[241] (*Icrc.org*2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule4> accessed 2 December 2023.
[242] API, art. 1 para 4.
[243] Marouda MD (n 114), 112.
[244] API, art. 43 para. 3.
[245] Sandoz Y. and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987), 521
[246](*Icrc.org* 2023) para. 1061 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined#_Toc42431472> accessed 3 December 2023.

as envisioned in Article 4A(6) is perceived to be slight".[247] This is why, it can be a priori deduced that as the analysis addresses individual classification rather than a collective one, the examination of whether sexworkers participate in *levée en masse* falls outside the scope of the present analysis.

2. Non-International Armed Conflicts

Unlike IACs, which *ratione temporis* is covered under article 2 common to the 1949 Geneva Conventions, in NIACs, which is governed by Common Article 3, there is no specific mention of combatants.

Does this mean that there can be no combatants in NIACs? Despite the pronouncement in the 1987 Commentary of APII that Common Article 3 and the APII do not " *confer* [...]*combatant* [...] *status*",[248] in 2005 the ICRC concluded that practice is mixed in order to conclude a definite answer.[249] Nevertheless, participation in *organized armed groups* should not be confused with the notion of *direct participation in hostilities*. It is indeed true that it is easy to meddle and confuse these two notions, as there is no concrete clear provision that recognises the status of combatant in NIACs.[250] Nevertheless, these two notions are different, as in the case a member of the organized armed groups is in continuous combat function and is a legitimate military target, while civilians are not protected only for as long they take direct part in hostilities. After all, if we were to accept that these two notions are in fact the same, it would be virtually impossible to truly apply the principle of distinction, which is a cardinal principle of IHL.[251] It is clear that the notion of civilians and members of an armed group are mutually exclusive,[252] as it is also indicated that the term "*members of the armed forces*" under Common Article 3 encompasses both the armed forces of the State as well as the forces of the non-state actor participating in the armed conflict.[253]

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[247](*Icrc.org* 2023) para. 1063 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined#_Toc42431472> accessed 3 December 2023.
[248]Sandoz Y. and others (n 245), 1344.
[249] (*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule3> accessed 2 December 2023.
[250]Melzer N, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009), 27.
[251]*Legality of the Threat or Use of Nuclear Weapons (n 96)*, para. 78; see also: Melzer N (n 250), 28.
[252]Ibid., 27-30.
[253] Dörmann K and others (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1st edn, Cambridge University Press 2016), 186.

While it is easy to understand that the members of the regular armed forces are protagonists during the hostilities even in a NIACs, and whose classification criteria are previously elaborated above, the difficulty is in the identification of an individual when it is a member of the non-state armed group. For the ICRC "*the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities*",[254] which, though, "*does not imply de jure entitlement to combatant privilege*".[255] The member of the armed group is trained, equipped and must have a lasting integration, where they prepare, execute or command orders relating to the hostilities.[256] The ICRC has explained that continuous combat function is established based on the carriage of uniform, distinctive emblems, certain weapons, and other conclusive behaviors.[257]

It must also be noted that the continuous combat function begins the moment that the military operation starts to be planned. This means that members of the organized armed groups are also legitimate targets not only for the time that they participate in the military operations of the non-State armed group, but also for the time they participate in the group which is the planning phase of its military operations. This timeframe includes equally the time when individuals are trained to become members of the group.[258] If they leave right after their training and reintegrate in civil life, they resume their civilian status.[259]

3. Direct participation in hostilities

It is indeed historically accurate to argue that civilians have always participated one way or another in the war effort of States. As all the more conflicts shift towards the civilian population, it has causally led to a higher plausibility of a direct participation of more civilians to hostilities.[260] However, as these people are not members of a party to an armed conflict, they are by default considered civilians.[261] As a matter of fact the APII affirms that

[254]Melzer N (n 250), 33.
[255]Ibid,, 33.
[256]Ibid., 34
[257]Ibid, 35.
[258]Ibid, 34
[259]Ibid, 34
[260]Ibid., 11.
[261]Ibid, 14.

"[c]*ivilians shall enjoy the protection unless and for such time as they take a direct part in hostilities*".[262]

While it is evermore difficult for armies to distinguish between civilians, members of organized armed forces and direct participants to hostilities,[263] the ICRC concluded an Interpretative Guidance on the latter notion. Specifically, the ICRC supported that the notion of civilians' direct participation in hostilities is met when the three following criteria are met exhaustively, namely: the acts of the civilians must meet the threshold of harm, there must be a direct causal link between the act and the harm likely to occur, and there must be a belligerent nexus, where the civilian uses force for the detriment of the opposing armed group.[264] It is noted that the interpretation of the application of these criteria must be with limited elasticity.[265] When civilians are taking direct part in hostilities, for the duration of their participation, they lose the protection IHL affords them.[266]

Having now presented all the relevant facts to be taken into consideration, the fact that prostitution can be linked to warfare as a weapon and a tactic and having elaborated on the means of participation to armed conflicts, the analysis can now proceed to answer on the merit of the academic subquestion concerning the participation of sexworkers in armed conflict(s).

b. Discussing sex in armed conflicts

This subchapter is dedicated to the discussion of the above considerations concerning whether sexworkers, when they are engaging in sexual activities with members of the opposing belligerent party, can be either considered combatants or direct participants to hostilities. The discussion of these two questions leads the present chapter to be divided into two sections: i) there will be an examination on whether sexworkers meet the necessary criteria to be considered a combatant in a IAC or a member of an organized group in NIACs, and ii) the analysis will examine whether sexworkers can participate directly in hostilities as such.

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[262] APII, art. 13.3.
[263]Melzer N (n 250), 12.
[264]Melzer N (n 250), 15.
[265]Ibid, 42.
[266] (*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6> accessed 2 December 2023; See also *Juan Carlos Abella v. Argentina*, Case No. 11.137, Inter-American Commission of Human Rights Report No. 55/97 (18 November 1997) OEA/Ser/L/V/II.98, para. 178.

Before starting, though, the following analysis, it is important to finally summarize the theoretical premises upon which the following analysis will base itself. It can be considered plausible during armed conflict that a sexworker, which is under the traditional interpretation of IHL a civilian, might engage freely and with genuine consent in sexual acts with an individual from the opponent's group. It is recalled that it is equally plausible that there is indeed a link between prostitution and warfare in the sense that prostitution can be used as both a tactic of warfare, as well as much as a weapon of conflict *per se*. Therefore, the question is begged whether one can argue that sexworkers might be considered combatants or direct participants to hostilities when they are using this weapon of war, especially when they willfully transmit during sexwork STDs to the opponent's soldiers, that it will lead them causally to be considered in the foreseeable future sick and *hors de combat*, if not dead, and who might even be unaware of the health status of the sexworker they have intercourse with. Of course, it must, also, not evade the analysis' attention that there are still STDs that until today can not be cured, such as -and not limited to- HIV infections, which can lead in cases where there is no reliable access to healthcare, even to death.

i. Sexworkers can not be considered combatants in an armed conflict under International Humanitarian Law

It is generally understood that not everyone, but in fact only a small group of specially designated people is entitled to participate *durante bello* in hostilities.[267] This is why both customary and conventional law attempt to regulate the belligerent participation of individuals as well as the question of who are these that participate, in the context of the humanisation of conflict and the setting boundaries to a spiral of limitless violence that may occur during armed conflicts.[268] The question that this analysis is poised to answer is whether sexworkers are part of the group that is entitled to use force during hostilities. As IHL applies in cases of both IACs and NIACs, even if the latter form of armed conflict there is no reference to the notion of combatant *per se*, the present analysis will examine this question in both forms of armed conflict in two separate sections, each devoted to one type of conflict. The analysis will: i) discuss the plausibility of the recognition of combatant status to

[267]Marouda MD, 'Διεθνές Ανθρωπιστικό Δίκαιο Των Ενόπλων Συρράξεων' in Konstantinos Antonopoulos and Konstantinos Magliveras (eds), *Το Δίκαιο της Διεθνούς Κοινωνίας* (3rd edn, Nomiki Vivliothiki 2017), 783.
[268]Marouda MD (n 114), 27-8.

sexworkers in IACs, and ii) it will examine the plausibility in the participation of sexworkers in non-State organized armed groups participating in NIACs.

1. International Armed Conflict

As it has been demonstrated in the relevant part of the previous subchapter, IHL sets specific criteria for the participation of an individual as a combatant during armed conflict(s). It is recalled that an individual has to be either a member of the regular armed forces, or a member of a militia recognised by the State and following four criteria exhaustively, namely: responsible command, distinctive emblem, openly carried weapons and conformity to IHL rules.

To begin with, it is noted that until the day the present analysis is drafted, there is not a single case or instance where there are regular armed forces that incorporate willing sexworkers in their ranks. After all, a member of the armed forces, which is regulated by municipal law,[269] can be considered every person who is part of the "*military personnel under a command that is responsible to a Party to the conflict*".[270] It is thus, indeed difficult for this criterion to be met, as there is no relevant practice. While it remains within the sphere of plausibilities, it can be very difficult to safely conclude that sexworkers can be combatants as members of the regular armed forces of the State during an IAC.

The analysis now turns to whether sexworkers are combatants as members of a militia which is recognised by the State during IACs. Firstly examining the criterion of 'responsible command', the analysis understands that it implies that there is a hierarchy where there are commanders that are responsible for their subordinates, so that the belligerent parties can ensure that even armed militia perform their duties in a consistent manner vis-à-vis the application of IHL.[271] While the hierarchy of the group can be somewhat flexible for the function of the group,[272] this indicator is necessary to establish the existence of a responsible commander. If we were to apply this criterion to the above elaborated theoretical construction, the analysis concludes that this criterion can not be met, as the sexworker has

[269](*Icrc.org* 2023) para. 977 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined#_Toc42431472> accessed 3 December 2023.
[270]*Ibid.*, para. 976.
[271](*Icrc.org* 2023) para. 1013 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined#_Toc42431472> accessed 3 December 2023.
[272]Ibid.,para. 1014.

acted on its own. Also, as it has been mentioned before, there is no relevant reported practice where military commanders will use sexworkers in order to plan and execute their plan for the obtention of a military advantage and render soldiers of their enemy *hors de combat*, or kill them.

Secondly, sexworkers do not bear a specific distinctive emblem that distinguishes them from other civilians. There is no known report where sexworkers in fact possess a distinctive *fixed*, hardly removable sign in the uniform, which they also do not possess.[273]

Thirdly, sexworkers do not openly carry their arms. The 2020 per article ICRC commentary on Geneva III uses the terms weapons and arms interchangeably. By applying the interpretation of the ordinary meaning under the VCLT,[274] a 'weapon' is "[a]*n instrument used or designed to be used to injure or kill someone*"[275] and arms is understood as a synonym of weapons.[276] While prostitution, as established above, through a feminist reading can be considered a weapon for the context of warfare, it is evident that it does not fall within the scope of this criterion, as it can not be "*openly carried*" and it is not meant to injure or kill someone.

Fourthly, respect for the laws and customs of war can not be met. While universally accepted conventional law remains silent, custom does not. ICRC's findings on Customary Rule 93 specifically prohibit rape and other forms of sexual violence. The *Democratic Republic of Congo v. Burundi, Rwanda and Uganda* case is of relevance as the African Commission in that case concluded that the rape through unprotected sex between of HIV-negative civilian women by HIV-positive Ugandan soldiers mounted to violations of international law.[277] Hence, through an *a contrario* argumentation, it can be concluded that the wilful transmission of an STD to another person during an armed conflict can be considered a violation of IHL.

For all these reasons sexworkers can not be considered as combatants in IACS when they are wilfully transmitting STDs to enemy soldiers, without the later knowing it, leading to their rendering *hors de combat* if not dying. The same conclusion derives for the case of

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[273](*Icrc.org* 2023) para. 1016-9 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined#_Toc42431472> accessed 3 December 2023.
., para. 1016-9.
[274] VCLT, art 31.
[275] Garner BA (ed) (n 202), 1732.
[276]Ibid., 122.
[277] *Democratic Republic of Congo v. Burundi, Rwanda and Uganda* (Decision of the African Commission on Human and Peoples' Rights) [2004] AHRLR 19, paras 5, 79, 86, and 88-9.

Western Sahara, as under the API the criteria for combatants to openly carry their arms as well as complying to IHL can not be met, as it is suggested by the above analysis. The analysis will now proceed to the examination of whether sexworkers can be members of organized armed groups in NIACs.

2. Non-International Armed Conflict

As it has been established above, States when regulating matters relating to NIACs, refrained from recognising that there are combatants in NIACs, much to the dismay of the Appeals Chamber of ICTY in Tadic where the Chamber found as far as the scope of protection IHL extends to all human beings the "*State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach*",[278] thus actively endorsing the general principle of law *hominum causa omne jus constitutum est*.[279] As the distinction between interstate and civil wars had begun losing its meaning when it came to the protection of human beings the Chamber wondered

> "[w]*hy protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight*".[280]

It is clear that the Appeals Chamber, in the context of the progressive humanisation of international law,[281] has blurred the lines between the scope of rights one should enjoy during an IAC and NIAC. Naturally, it has also to go without saying that this category has to include all those that are armed and participate in the conflict, for they are also human (and human

[278] *Prosecutor v. Tadic* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), IT-94-AR72, A Ch (2 October 1995), para 97.
[279] Ibid.
[280] *Prosecutor v. Tadic* (n 280), para 97.
[281] Meron T, *The Humanization of International Law*, vol 3 (Martinus Nijhoff 2006), 32-3.

rights are universal)[282] and while they are combatants or at least members of belligerent organized armed groups, they retain their human rights to the full, to the degree they are not derogated by IHL acting in some cases as *lex specialis* to human rights law.[283]

Concerning the relevant actors, apart from the armed forces that take part in NIACs, there should also be at least one other opposing organized armed group. It is noted that as the full scope of application of Common Article 3 is not exactly settled,[284] apart from the time that there is an armed conflict between the State and a non-State actor, there might be cases where an organised armed group is in armed conflict with another organized armed group.[285] In any case, in order for a sexworker to be participating in the NIAC they have to either be a member of the armed forces of the State and of the armed militia affiliated to it that take part in the NIAC, or be part of the opposing organized armed group(s).

As the previous section examined the question of sexoworkers' combatant status as a member of the armed forces of the State and of the affiliated militia to it, the analysis will satisfy itself by simply repeating that sexworkers as described in the theoretical construction above do not meet the criteria to be classified as combatants and member of these groups. This is why, the present section shall only examine the possibility of a sexworker to be a member of an organized armed group participating in a NIAC.

In order for the sexworker to be able to participate as a member of the organized armed group in the NIAC they have to be in continuous combat function. This function is demonstrated through the lasting integration to the group, which must be organized.[286] While some degree of organization suffices,[287] the members of the armed group must be "*making up an organised and hierarchically structured group*"[288] with "*a chain of command and a set of rules as well as the outward symbols of authority*",[289] where the members not only do not act alone but also have a commander which is the "*head of the group*".[290] It is this group that will also train, equip, prepare, order the execution of and command orders relating to the

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[282]UN Human Rights Committee 'Concluding observations on the second periodic report of Turkmenistan' (20 April 2017) UN Doc CCPR/C/TKM/CO/2, para. 9.

[283] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (n 161)*, para. 106; *Legality of the Threat or Use of Nuclear Weapons* (n 96), para. 25.

[284] Dörmann K and others (eds) (n 253), 142.

[285]*Prosecutor v. Boskoski and Tarculovski* (*Judgment*), IT-04-82-T, T. Ch II (10 July 2008), para. 175.

[286]Ibid., para. 175; *Prosecutor v. Tadic (n 280)*, A Ch (2 October 1995), para 70; *Prosecutor v. Limaj, Bala and Musliu* (*Judgment*) IT-03-66-T, T Ch II (30 November 2005), para 83.

[287] *Prosecutor v. Boskoski and Tarculovski* (n 285), para 196.; *Prosecutor v. Limaj, Bala and Musliu* (n 286), para 89.

[288] *Prosecutor v. Tadic* (*Appeals Judgment*), IT-94-1-A, A Ch (15 July 1999), para 120.

[289]Ibid.

[290]Ibid.

hostilities.[291] On top of that, wearing a uniform also establishes membership in the group where the individual exercises continuous combat function.[292]

From the theoretical construction above, though, such criteria are not met as sexworkers act alone without a premeditated and organised plan with the contribution of a military or administrative superior. It is also nowhere reported that sexworkers have to wear a special uniform with distinctive emblems on it; hence this criterion is equally not met. Furthermore, to the day of the drafting of the present analysis, there is no recorded practice where a non-state armed group uses consenting prostitutes as weapons in order to transmit STDs to their enemies as part of their greater strategy. For the foregoing reasons, it can be concluded that sexworkers when they sexwork are not in continuous combat function during a NIAC. This means that it is not possible to have them classified as a member of an armed group participating in the armed conflict either from the side of the regular armed forces of the State and the militia affiliated to it, or of the side of the non-State organized armed group(s).

ii. Sexworkers are not taking direct part in hostilities when sexworking

In the previous part the last mentioned form of participation in hostilities *durante bello* was the form of civilians taking direct part in hostilities. The APII, as elaborated above, satisfies itself by only mentioning that "[c]*ivilians shall enjoy the protection unless and for such time as they take a direct part in hostilities*".[293] It is recalled that this provision was also pronounced in 2005 by the ICRC to be reflectring customary international law.[294] It is also recalled that, as there was little clarity on the matter, the ICRC issued an Interpretative Guide, where they elaborated on the notion of direct participation in hostilities, concluding that three criteria had to be exhaustively met in order for civilians to lose their protection, namely: the threshold of harm, direct causal link between the act and the harm likely to occur, and belligerent nexus.

Firstly, it must be examined whether the transmission of an STD during the sexual services by the sexworker to the enemy soldier reaches the threshold of harm. The ICRC

[291] Melzer N (n 250), 34
[292] Ibid., 35.
[293] APII, art. 13.3.
[294] (*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6> accessed 4 December 2023

resolved that the threshold is met when "*a specific act* [is] *likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack*".[295] As a matter of fact, it must be highlighted that the "*qualification of an act as direct participation does not require the materialization of harm reaching the threshold but merely the objective likelihood that the act will result in such harm*".[296] This means that the threshold of harm can be met with the determination of the likeliness of a harm being caused. In order for the likeliness to be met, it is expected that the harm may "*reasonably be expected to result from an act in the prevailing circumstances*".[297]

This, indeed, very low threshold leads to the understanding that the threshold can be met without taking into consideration the quantitative element of harm,[298] while a wide range of weapons and other methods to produce harm to "*human or material enemy forces*"[299] can be used. This explanation provided by the ICRC is indeed drafted on very broad terms. Taking, now, into consideration that through a feminist push sexual violence has been all the more visualzed, and that through the use of feminist lenses there is some degree of safety to conclude that sexworkers have been proven to plausibly enjoy agency when sexworking, should they transmit when sexworking an STD in order to render the enemy soldier *hors de combat*, such actions can theoretically fall within the scope of this criterion as they are injuring the enemy.[300]

It seems *prima facie* that this threshold can be met, if the analysis remains blind to the element of *foreseeability* on behalf of the enemy soldier. In fact, even if the sexworker wishes not only to cause any "*consequence adversely affecting the military operations or military capacity of a party to the conflict*"[301] that may amount to the will to cause injury or even death, such plan has a very slim margin of likelihood. While the analysis remains mindful that the transmission of HIV through rape was used in the case of Ugandan soldiers in the Democratic Republic of Congo, as well as during the Rwandan genocide,[302] the precedent set by Nyiramasuhuko in Rwanda remains equally important, as she personaly gave orders as

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[295] Melzer N (n 250), 47.
[296] Ibid.
[297] Melzer N (n 250), 47
[298] Ibid.
[299] (*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6> accessed 4 December 2023
[300] Melzer N (n 250), 50.
[301] Ibid., 47.
[302] *Prosecutor v. Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011), para. 2331.

well as condoms to Hutu soldiers in order to rape Tutsi HIV-positive women.[303] At this point, it must be stressed that for many years now various States have been fighting against the transmission of STDs of their soldiers and frequently advocate for the use of condoms when soldiers come in contact with prostitutes near the battlefield.[304] Therefore, there are reasonable obstacles that discourage from safely concluding that there is a likelihood of harm to occur and by extension, of the threshold of harm to be met.

Secondly, the analysis must examine whether there is direct causation between the sexworkers actions and the harm that occurred. Direct causation has to be established "*between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place*".[305] Furthermore, the ICRC notes that for the satisfaction of direct causation "*it is neither necessary nor sufficient that the act be indispensable to the causation of harm*",[306] in the sense that the harm in question would not occur but for (emphasis added) the specific act in question. It is also highlighted that direct causation also contains an element of time.[307] This must be read in light of the fact that "*it has become quite common for parties to armed conflicts to conduct hostilities through delayed weapons-systems*",[308] "*causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal* [...] *proximity*".[309] Upon close inspection, indeed, one can safely conclude the criterion of direct causation can be met in the case of sexworkers, as the enemy soldiers in order to contract an STD need to engage in sexual activity, the exact same act which the sexworker engages in. It should also be stressed that some STDs have a longer incubation period than others, meaning that the symptoms might take longer to show, especially during the first period close to the date of the unprotected date of sexual contact. As sex has been recognised as a weapon, and the use of delayed weapons does not negate the direct causation between act and harm that occurs, it seems that STD transmission through prostitution can satisfy *in principle* the direct causation criterion.

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[303] *Prosecutor v. Nyiramasuhuko et al* (n 302), paras 4935 and 4967.
[304] See indicatively: Korzeniewski K, Juszczak D and Paul P, 'Sexually Transmitted Infections among Army Personnel in the Military Environment' (2020) 71 Sexually Transmitted Infections 207; See also: Hankins CA and others, 'Transmission and Prevention of HIV and Sexually Transmitted Infections in War Settings' (2002) 16 AIDS 2245; Lewis B and Warnaby G, 'The Contribution of Posters to the Venereal Disease Campaign in Second World War Britain' (2021) 36 Contemporary British History 487;VONDERLEHR RA, 'Adaptation of the Venereal Disease Control Program to National Defence.' (1941) 32 Canadian Public Health Journal 454; Edwards P, 'The World War II Battle against STDs' (*Vox* 21 December 2018) <https://www.vox.com/videos/2018/12/21/18151718/world-war-ii-venereal-disease> accessed 4 December 2023
[305] Sandoz Y. and others (n 245), 516.
[306] Melzer N (n 250), 54.
[307] Ibid., 55.
[308] Ibid.
[309] Ibid.

Lastly, the analysis turns to the belligerent nexus criterion that must be satisfied. In the attempt to identify the existence of this nexus, one has to examine whether the act was "*specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another*".[310] For the examination of this criterion the ICRC warns against meddling the notion of subjective and hostile intent with belligerent nexus. The latter is understood as an objective criterion which has to be directly linked to the specific act, and has to be "*expressed in the design of the act or operation and does not depend on the mindset of every participating individual*".[311] The safe identification of belligerent nexus is a very intricate task, as many activities are in grey areas "*where it is difficult to distinguish hostilities from violent crime*"[312] during armed conflicts. The ICRC suggests that

> "*the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party*".[313]

It follows, of course, that "*in situations of doubt, the person concerned must be presumed to be protected against direct attack*".[314] When applying these principles in the above theoretical construction, there can, indeed, be an honest argument which links genuinely the sexworker's action to the harm and the detriment of their opponent. After all, the analysis has established that sexworkers even in conflict may enjoy some margin of agency.

However, one should not eagerly disregard the dark clouds of doubt that cover the theoretical construction. There are compelling questions which in times of an armed conflict can bring reasonable doubt to the mind of the reasonable commander. How will the soldier which is engaging in sexual activities with a sexworker, know that this specific sexworker, which has to genuinely consents to sexwork, has an STD and they wish to have unprotected sex - regardless of the soldier's orders to have protected sex- in order to able to to transmit it to them and render them *hors de combat* or even kill on the long term them through the transmission of an STD which can lead to death, such as HIV/AIDS? This is a very big and in fact arbitrary stretch of thought as there is a great difficulty in finding credible information

[310]Melzer N (n 250), 58.
[311]Ibid., 59.
[312]Ibid,, 63.
[313]Ibid., 63-4.
[314]Ibid., 64.

that firstly this sexworker truly suffers from an STD and secondly, they wish to transmit it to enemy soldiers without them knowing it, and thirdly that they genuinely consent to that sexual activity at that precise moment. Sexworkers, even if it is recognised that genuinely consent to sexwork *durante bello*, are allowed to be able to support the belligerent group they wish, without this support being weaponized against them, for they are entitled to show a preference without it being considered as part of the nexus for the establishment of the direct participation to hostilities.[315]

This is why, the analysis, at this point, while it can understand that *in principle* the belligerent nexus can be met under some circumstances, it also remains mindful that the decision to recognise a civilian as a direct participant "*must always be deduced from objectively verifiable factors*",[316] It further recalls the practical difficulties of the identification of the nexus from objective factors, when in fact, if one applies the above mentioned principles to the present theoretical construction much of the evidence that the reasonable commander shall have will be circumstantial and subjective. While through a feminist analysis what Irma did in Rouen with the Prussian soldiers could be evident, her contemporaries (both French and Prussian) could not even phantom what she did. Therefore, the connection between prostitution and detrimental harm for the enemies group, while in theory can be established, practical problems should cause several reasonable doubts to the reasonable commander who will be deciding whether the sexworker shall be seen as a legitimate military target, since they will be stripped from the protection IHL provides to civilians due to their direct participation to hostilities. This orthodox course of action is further supported if one considers that one of IHL's fundamental goals if to "*diminish the evils of war so far as military necessities permit*"[317] and it should not "*be left to the arbitrary judgment of the military commanders*"[318] to decide the scope of protection individuals are entitled when they are at the hands of their opponents, especially when they are civilians (or at least presumed so) who have to be protected from "*from arbitrary action on the part of the enemy*".[319]

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[315]Melzer N (n 250)., 59.
[316]Ibid., 53.
[317] Hague Regulations II, Preambule
[318] Ibid.
[319](*Icrc.org* 2023) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/title/commentary/1958?activeTab=undefined> accessed 12 December 2023

For the foregoing reasons, as not all three criteria can be fully met, sexworkers can not be considered direct participants to hostilities, they remain civilians and they do not lose their protection as such.

4. Conclusion

The present analysis has attempted to examine the alteration in the understanding of some laws and customs of war which may be caused by the incorporation of feminist critical perspectives to the traditional interpretation of IHL. From the above examination it can be concluded that feminist critical approaches to IHL in fact do not alter the ordinary understanding and the validity of the rules of this body of law. This approach, though, has significantly helped academia, practitioners and all relevant stakeholders to recognise that "*the reality on the ground is appalling*",[320] as it has managed to capture a larger picture of the violence, especially of sexual violence, which occurs *in the battlefield*.

Through the use of feminist and gender sensitive lenses, the analysis recognises the great success of the international community by adopting the Rome Statute to address its previous gendered shock, where men were only the perpetrators and women were exclusively the victim. However, the promise of the ICC has remained to a great extent quite empty, as very few cases have been brought forward, and even less have been successful in the conviction of the accused.

The present analysis remained mindful that through the use of this wider frame that feminist perspectives offer, more victims become visible. Above, it was elaborated on why *prima facie* this finding itself can be misleading and be considered as indicative of a new State practice which may lead to a customary rule which overrules the prohibition of sexual violence. However, this contention is far from the truth. In fact, while one has to concede and recognise that indeed there are more victims that are visible, simultaneously this does not safely lead to a new form of State practice, because this element has been clear enough for the ICRC to conclude to the pronunciation of Customary Rule 93. Also, the rich historical dimension of the recognition of the moral abhorrence of sexual violence was presented as an equally strong evidence of consistent and uniform State practice supporting the findings of the ICRC. Of course, practice through the United Nations also remained pertinent for the

[320] Gaggioli G, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 International Review of the Red Cross 503, 537.

purposes of the present analysis in order to identify State practice. Through the United Nations organs state have pushed for resolutions, both binding and non-binding, that explicitly prohibit sexual violence.

It is evident that the feminist approaches provide an insight to the better identification of victims of war, rather than a *carte blanche* to blindly challenge existing rules. It could be even argued that through the push of the feminist scholars that heavily criticised the lack of gender sensitivity in the craft of international law, IHL's interpretation effectively progressed to protect more people, as the Geneva IV and API and APII extend protection from sexual violence only to women, while the Rome Statute recognises that both men and women can be victims of sexual violence, position which was echoed in the findings of the ICRC. This position, read together with the numerous resolutions of the United Nations General Assembly that can demonstrate *opinio juris*, leads to the safe conclusion that the psychological element necessary for the overturning of Customary Rule 93 is not existent. What this practically means is that through the incorporation of feminist perspectives in our understanding of sexual violence under international law, and especially in light of the *Ntagnada* and *Ongwen* cases, the ICC seems to reaffirm that the rules prohibiting sexual violence "*will stand the test of time*".[321]

Moreover, through the incorporation of feminist critical approaches to the mainstream interpretation of IHL, the analysis observed that women, who are traditionally perceived as victims, have historically participated in armed conflicts as combatants. Based on this finding, the question that was begged, in light also of the special interest that feminist critical scholars pose on sexual violence, was whether a sexworker can be considered either a combatant or a direct participant in hostilities, should they willfully transmit STDs to enemy soldiers in order to render them *hors de combat* or kill them on the longterm. The analysis concluded in the negative for both cases.

In order to come to this result, the analysis firstly delineated the outer limits of the theoretical construction it based itself into. For the purposes of the construction, a great deal of support came from the naturalistic fantasy of Maupassant, who narrated the story of Irma, a woman who after being raped by Prussians and infected with syphilis by them, she became sexually affiliated with them so that she can make as many soldiers sick with that STD as she possibly could. This story, in fact, uses mainly the basis of the construction, accompanied

[321] Schwöbel-Patel C, 'The Core Crimes of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020), 769; See also: Schabas W., 'Atrocity Crimes' in William Schabas (ed), The Cambridge Companion to International Criminal Law (Cambridge University Press 2016), 203.

with an attempt to examine whether sexworkers can truly give their genuine consent and sexwork during an armed conflict. The analysis concluded that genuine consent can *in principle* be given, by virtue of the application of the *Lotus* principle, remaining mindful of the small plausibility of that scenario. Before proceeding to the presentation of the criteria for the classification of individuals either as combatants or direct participants in hostilities, the analysis linked the use of prostitution to means and methods of warfare, despite the lack of real life data to complement this finding.

Having examined the above, as well as the criteria for the recognition of the status of combatant to IACs, member to the armed groups in NIACs, and of the civilian directly participating in hostilities, it was concluded that sexworkers do not meet the criteria to be classified as any of the above categories. It is noted that sexworkers are neither members of the regular armed forces of the State, nor can they be considered members of State-affiliated militia as they do not meet exhaustively the criteria of: responsible command, distinctive emblem, openly carried weapons and compliance to IHL. It is noted that sexworkers in the present theoretical construction act alone, for this reason they bear not any uniform or any other emblem. Of course, as the weapon they use is the sexual intercourse to transmit an STD, this can not be held openly, and this attempt violates a priori the laws and customs of war. As none of these criteria are met, the analysis concluded that sexworkers can not also be considered combatants for the purposes of wars against colonial oppression.

It was also concluded that in NIACs, sexworkers can not be considered as members of the organized armed groups, either of the State or any other non-State actor(s) that are in conflict. This understanding stems from the fact that in order to recognise this form of membership, it is essential for the individual to demonstrate a continuous combat function, which in the case of sexworkers can not be met. It is also noted that membership to an organized armed group and direct participation in hostilities are two mutually exclusive notions.

Thirdly, the analysis found that sexworkers can not be considered civilians participating directly in hostilities. The analysis found that it was not plausible that the threshold of harm to can be met, as its likelihood to cause detrimental harm to the opponent is based on an assumption that the sexual encounter between enemy soldier and sexworker is unprotected so that there can be a possibility of the transmission of the STD. The criterion of direct causation can be met, as it is interpreted loosely, therefore encompassing the necessary passing of time for the symptoms of the STD to show. This criterion is also met as STDs are transmitted mostly via sexual encounter and it is most probable that one will be infected after

an unsafe sexual encounter. Thirdly, there can be reasonable doubts whether the criterion of belligerent nexus can be met, since it is very difficult to practically find credible objective information that can concretely establish that this sexworker, which is normally perceived as civilian, is engaging in sexwork with genuine consent and through their actions they aim to cause harm to the enemy soldiers by either injuring them, by infecting them with the STD, or by killing them, due to the nature of the STD. As in cases of doubt, as it is mandated by the fundamental *raison d'être* of IHL concerning the protection of civilians during an armed conflict, sexworkers can not be construed as direct participants to hostilities. For this reason they remain being recognised as civilians and they continue to enjoy the full protection IHL offers them.

The above questions of general international law as well as IHL could not have been answered without the significant contribution of the reflections of the feminist critical scholars, simply because these questions could not have been posed.[322] Such questions concerning agency could not have been posed without the significant contribution of feminist academics and practitioners on the field of international politics, exactly because it is them who give a great emphasis in reflecting who acts and how these agents act. The present analysis attempted to use these deconstructive tools in order to interpret these questions that can be equally applicable to IHL through the perspective of international law. In this attempt, the present analysis elaborated on its main argument that believes that the use of gendered lenses in the interpretation of IHL will broaden, deepen and enrich our current understanding of international law, without altering the rules of IHL. Instead of an alteration of the rules of IHL, the feminist perspectives effectively allow the interpreter and the scholar to understand more perfectly the full scope of protection human beings are entitled to, despite the great difficulty in the application of IHL since "*if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law*"[323].

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[322] 'Lecture Series - Ms. Hilary Charlesworth' (*Un.org*2023) <https://legal.un.org/avl/ls/Charlesworth_IL.html#> accessed 24 November 2023.

[323] 'The United States' Practical Approach to Identifying Customary Law of Armed Conflict' (*EJIL: Talk!*31 August 2023) <https://www.ejiltalk.org/the-united-states-practical-approach-to-identifying-customary-law-of-armed-conflict/> accessed 5 December 2023

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