



# General Assembly

Distr.: General  
19 April 2021

Original: English

---

## Human Rights Council

Forty-seventh session

21 June–9 July 2021

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention**

**Report of the Special Rapporteur on violence against women, its causes  
and consequences, Dubravka Šimonović**

#### *Summary*

In the present report, submitted pursuant to Human Rights Council resolution 41/17, the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, describes the activities that she has undertaken and addresses the theme of rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention.



## I. Introduction

1. The present report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, is submitted to the Human Rights Council pursuant to its resolution 41/17. In the report, the Special Rapporteur addresses rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women, and presents recommendations for its prevention through the harmonization of national criminal laws with international standards and jurisprudence on rape, both in peacetime and during conflict. This report is accompanied by a framework for model legislation on rape, envisaged as a harmonization tool.<sup>1</sup>

### A. Activities undertaken by the Special Rapporteur

2. The coronavirus disease (COVID-19) pandemic has continued to affect the Special Rapporteur's activities, which continued mainly online.

3. On 14 May 2020, the Special Rapporteur hosted the eighth meeting of the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women, which was held online.<sup>2</sup> The Platform later issued a joint statement on COVID-19 and the increase in gender-based violence and discrimination against women.<sup>3</sup>

4. On 1 October 2020, the Special Rapporteur participated in person in the high-level meeting of the General Assembly on the twenty-fifth anniversary of the Fourth World Conference on Women: Action for Equality, Development and Peace, and delivered a statement calling for violence against women to be included as a standing item on the agenda of the Commission on the Status of Women, in order to accelerate its eradication.<sup>4</sup>

5. On 9 October 2020, the Special Rapporteur addressed the General Assembly by videoconference to present her thematic report on the intersection between the COVID-19 pandemic and the pandemic of gender-based violence against women, with a focus on domestic violence and the "peace in the home" initiative.<sup>5</sup> Following her presentation of the report, she engaged in a constructive dialogue with 22 Member States.

6. On 30 October 2020, the Special Rapporteur issued a call for information and data under her "Femicide Watch" initiative, while on 23 November, in a press statement supported by 50 other independent human rights mandate holders, she reiterated her yearly call for the establishment of femicide watch bodies or observatories.<sup>6</sup>

7. On 24 November 2020, the Special Rapporteur met with the working group on gender-based violence against women of the Committee on the Elimination of Discrimination against Women to discuss their joint work to develop a guide on the implementation of the Committee's general recommendation No. 35 (2017), which would serve as background for preparing an optional protocol on gender-based violence, as recommended by the Special Rapporteur, should Member States decide to do so.

---

<sup>1</sup> A/HRC/47/26/Add.1.

<sup>2</sup> See [www.ohchr.org/Documents/Issues/Women/SR/14May2020\\_EDVAW\\_Platform\\_meeting\\_report.docx](http://www.ohchr.org/Documents/Issues/Women/SR/14May2020_EDVAW_Platform_meeting_report.docx).

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), "Joint statement by the Special Rapporteur and the EDVAW Platform of women's rights mechanisms on COVID-19 and the increase in violence and discrimination against women", 14 July 2020.

<sup>4</sup> See [www.ohchr.org/Documents/Issues/Women/SR/High\\_Level\\_Meeting\\_Statement.docx](http://www.ohchr.org/Documents/Issues/Women/SR/High_Level_Meeting_Statement.docx).

<sup>5</sup> A/75/144.

<sup>6</sup> OHCHR, "Urgent action needed to end pandemic of femicide and violence against women, says UN expert", 23 November 2020.

## **B. Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls**

8. Globally, 1 in 3 women and girls has been subjected to gender-based violence, and 1 in 10 girls has been a victim of rape.<sup>7</sup> Rape has been criminalized in a large number of States and yet it remains one of the most widespread crimes, with the majority of perpetrators enjoying impunity and the majority of women victims not reporting it.<sup>8</sup>

9. Currently, the international human rights framework and jurisprudence recognizes rape as a human rights violation and a manifestation of gender-based violence against women and girls that could amount to torture. Under international humanitarian law and international criminal law, rape can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide when the other elements of the crimes are present.<sup>9</sup>

10. However, these international standards have not been fully incorporated at the national level. States criminalize rape using different definitions (based on force or on lack of consent), protecting different persons (only women or all persons), including or excluding marital rape, covering different types of penetrations, prescribing different aggravating and mitigating circumstances, setting different lengths of sentences, prescribing ex officio or ex parte prosecution of rape, and providing or not providing at all for different statutes of limitation for its prosecution.

11. Additionally, their implementation is influenced by the surrounding general context of different forms of discrimination and gender-based violence against women, myths and gender-based stereotyping on rape by the media and the criminal justice system.

12. All these factors contribute to the fact that rape is frequently not reported. If rape is reported, it is seldom prosecuted; if prosecuted, the prosecution is rarely pursued in a gender-sensitive manner and often leads to very few convictions, the revictimization of survivors and high attrition rates, resulting in a normalization of rape, a culture of rape or silence on rape, stigmatization of victims and impunity for perpetrators.

13. Governments' failure to address all the structural, normative and policy factors that result in impunity for perpetrators is now being challenged by many women's marches and protests, feminist movements, the Me Too movement and civil society movements that are breaking the silence on rape. Examples include those in Chile,<sup>10</sup> Spain,<sup>11</sup> and India.<sup>12</sup>

14. Recent reports on rape by civil society organizations have also highlighted the shortcomings of laws, policies and practices at the national and international levels. For example, Equality Now produced an overview of the main gaps in legislation on rape;<sup>13</sup> Amnesty International produced recommendations for the International Criminal Court and

<sup>7</sup> World Health Organization, *Violence against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Estimates for Non-Partner Sexual Violence against Women* (Geneva, 2021); and United Nations Children's Fund, *Hidden in Plain Sight: A Statistical Analysis of Violence against Children* (New York, 2014).

<sup>8</sup> In some jurisdictions, the term "sexual assault" is used to encompass rape and other manifestations of sexual violence.

<sup>9</sup> Security Council resolution 1820 (2008).

<sup>10</sup> A song by the Chilean group Las Tesis, "*Un violador en tu camino*" ("A rapist in your path"), has become a rallying cry across the world.

<sup>11</sup> The gang rape of an 18-year-old woman in 2016 in the *La Manada* (Wolf Pack) case resulted in a change to the definition of rape under Spanish legislation.

<sup>12</sup> In 2012, a 23-year-old woman was gang-raped and murdered on a bus, leading to intense protests and changes to legislation.

<sup>13</sup> Equality Now, *The World's Shame: The Global Rape Epidemic – How Laws Around the World Are Failing to Protect Women and Girls from Sexual Violence* (2017).

an overview of the situation in Europe;<sup>14</sup> International Women’s Rights Action Watch Asia Pacific focused on human rights standards in national legislation;<sup>15</sup> and Sisters For Change produced a report on the criminalization of marital rape and sexual violence across the Commonwealth.<sup>16</sup>

15. Many United Nations and regional human rights bodies have produced significant guidance on applicable standards on violence against women, but there is no holistic and specific thematic report on rape as a human rights violation. In the light of this, and in recognition of the general shift in perception and in public rejection of sexual violence and rape – which have not yet been followed by the necessary legal changes of mostly conservative criminal laws at the national level – the Special Rapporteur decided to dedicate this report to the theme of rape as a human rights violation, focusing on States’ responsibility to prevent and eradicate it.

16. Although many of the Special Rapporteur’s recommendations in the present report also apply to the criminalization and prosecution of other forms of sexual violence, the report is focused specifically on rape in order to reflect developments at the international level that have also distinguished it from other types of sexual violence and defined its constitutive elements. While in some States rape is criminalized as a form of sexual assault, expanded from former narrow definitions of rape, these differences in terminology are not an obstacle to comparisons related to the harmonization of its constitutive elements for its definition, criminalization and prosecution. By focusing on rape, the report also connects the constitutive elements of its definition with other equally important provisions of criminal law, such as mitigating circumstances, statutes of limitation and age of sexual consent, as well as criminal procedural provisions on the protection of victims/survivors, in order to address them as interrelated provisions of the legal framework needed for the effective criminalization of rape.

17. For the preparation of the report, on 27 May 2020 the Special Rapporteur held an online expert group meeting, in collaboration with Equality Now. The outcome of that meeting was a report on rape as a grave and systematic human rights violation and gender-based violence against women, which complements the present report.<sup>17</sup>

18. In order to collect information on the current criminalization of rape in national laws, the Special Rapporteur distributed a questionnaire to States and other stakeholders on 9 April 2020.<sup>18</sup> The 207 submissions received, along with information publicly available, reveal the significant gaps between States’ obligations and international human rights standards on rape.<sup>19</sup>

19. In this report, the Special Rapporteur addresses the primary responsibility of States to effectively and with due diligence prevent, criminalize and prosecute rape in accordance with international legal standards, applicable both in peacetime and during conflict, by:

(a) Providing an overview of applicable international human rights and criminal law standards needed for the effective criminalization and prosecution of rape, based on a victim-centred approach;

<sup>14</sup> Amnesty International, “Rape and sexual violence: human rights law and standards in the International Criminal Court” (2008) and “Right to be free from rape: overview of legislation and state of play in Europe and international human rights standards” (2018).

<sup>15</sup> International Women’s Rights Action Watch Asia Pacific, *Addressing Rape as a Human Rights Violation: The Role of International Human Rights Norms and Instruments* (Kuala Lumpur, 2007).

<sup>16</sup> Sisters For Change, *The Criminalisation of Marital Rape and Intimate Partner Sexual Violence across the Commonwealth* (London, 2019).

<sup>17</sup> Available at [http://www.ohchr.org/Documents/Issues/Women/SR/Call\\_on\\_Rape/EGM\\_EN-SR\\_Report.pdf](http://www.ohchr.org/Documents/Issues/Women/SR/Call_on_Rape/EGM_EN-SR_Report.pdf).

<sup>18</sup> The questionnaire and submissions are available at <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRVAW.aspx>.

<sup>19</sup> The Special Rapporteur is profoundly grateful to all those who made submissions, many of which went beyond the questionnaire, and to Christine Chinkin and Jane Connors, who provided their comments on the draft report.

(b) Supporting and encouraging a process of review and harmonization of national criminal laws and practices with international standards on rape;

(c) Providing recommendations on the criminalization and prosecution of rape, which, jointly with the model legislation on rape, are intended to serve as a harmonization tool for comparing and aligning national laws with international standards.

## II. International legal framework on rape

### A. Evolution of international human rights law

20. International human rights law has taken progressive steps in framing rape as a human rights violation through three main conceptual avenues: (a) as a specific form of gender-based violence against women and girls under the women's anti-discrimination framework; (b) as torture under the torture framework; and (c) as other human rights violations, such as trafficking, sale of children, slavery, forced marriage and early and child marriage. Rape is a violation of a range of human rights, including the right to bodily integrity, the rights to autonomy and to sexual autonomy, the right to privacy, the right to the highest attainable standard of physical and mental health, women's right to equality before the law and the rights to be free from violence, discrimination, torture and other cruel or inhuman treatment.

21. Rape, as a form of discrimination and gender-based violence against women, is specifically mentioned by the Committee on the Elimination of Discrimination against Women in its general recommendation No. 19 (1992) on violence against women, in which it refers to rape as a manifestation of violence against women in the family.

22. The Declaration on the Elimination of Violence against Women, the first universal international instrument that provided a definition of violence against women, included "rape" and "marital rape" as forms of violence in its article 2.

23. The Vienna Declaration and Programme of Action, of 1993, established that eliminating violence against women was a human rights obligation of States, and that rape and sexual violence in armed conflict were violations of the fundamental principles of international humanitarian and human rights law. It thus questioned the traditional divide according to which international humanitarian law applied to violence in conflict and international human rights law to rape under regular circumstances.

24. The Beijing Declaration and Platform for Action, of 1995, recognized rape as a manifestation of violence in the family and in the community, and the systematic practice of rape in conflict as a deliberate instrument of war, constituting a war crime.

25. At the regional level, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), of 1994, was the first international treaty on violence against women, identifying rape as a manifestation of such violence both in the family and in the community.

26. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), of 2003, specifically obligates States parties to enact legislation to criminalize violence against women. Under article 4 (2), States parties are required to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public, and under article 14 (2) (c), States parties are obligated to protect women's reproductive rights by authorizing medical abortion in cases of rape. The African Commission on Human and Peoples' Rights adopted in 2017 its guidelines on combating sexual violence and its consequences in Africa.

27. The mandate of the Special Rapporteur on violence against women, its causes and consequences was established in 1994 and was the first human rights mechanism entrusted to focus solely on violence against women, its causes and consequences as a human rights violation.<sup>20</sup> In the first report of the mandate holder to the Commission on Human Rights, in

<sup>20</sup> Commission on Human Rights resolution 1994/45.

1995, rape was identified as a manifestation of gender-based violence against women.<sup>21</sup> The former Special Rapporteur saw consent as the legal dividing line between rape and sexual intercourse;<sup>22</sup> presented key concerns regarding the status of the criminalization and prosecution of rape, especially marital rape; and recommended that the definition of rape be based on the lack of consent, with an expanded scope to include all types of penetration. She reviewed issues such as the evidentiary requirements for corroborating a victim's complaint; standards on prosecution of rape, including the use of a victim's sexual history during trial and mechanisms to prevent revictimization; and the sentencing of rape.<sup>23</sup>

28. In the 25 years that followed, successive mandate holders have regularly addressed shortcomings in the criminalization of rape in their reports.<sup>24</sup> For example, on Nepal, the Special Rapporteur expanded recommendations on the prosecution of rape regarding the need to review strict statutes of limitation that precluded its prosecution.<sup>25</sup> Having established that laws proscribing or imposing restrictions to abortion in cases of rape discriminate against women, the Special Rapporteur has recommended to Argentina and Ecuador that they legalize abortion in cases of rape.<sup>26</sup>

29. Other special procedures mandates holders and human rights treaty bodies have also fleshed out shortcomings in the criminalization of rape in their concluding observations, Views on individual communications and inquiries. Both the Committee against Torture and the Human Rights Committee have recognized rape as torture.<sup>27</sup>

30. Further progress has been achieved through the development of jurisprudence on specific cases of rape, as regional and international human rights bodies determined the specific nature of States' obligation to criminalize and prosecute rape. At the regional level, the Inter-American Commission on Human Rights framed rape as torture under the Inter-American Convention to Prevent and Punish Torture, and later developed the concept of rape as torture and a violation of women's right to privacy under the American Convention on Human Rights.<sup>28</sup> The Inter-American Court of Human Rights has established in its jurisprudence that sexual violence practised by State actors and by non-State actors can be considered torture.<sup>29</sup>

31. Similarly, the European Court of Human Rights first made determinations with respect to rape as a violation of articles 3 (prohibition of torture) and 8 (right to respect for privacy and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and addressed the definition of rape in the landmark case *M.C. v. Bulgaria* in 2003. The Court established the positive obligation of States to enact criminal law provisions to effectively investigate and punish rape. The Court conducted a survey of domestic and international approaches to defining rape in criminal law, with the purpose of identifying any evolving trends in relation to standards that must be met to effectively criminalize rape. It noted a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse, and explained that any rigid approach to the prosecution of those crimes, such as requiring proof of physical resistance, risked leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. It concluded that rape must be defined as any sexual penetration without the

<sup>21</sup> E/CN.4/1995/42.

<sup>22</sup> E/CN.4/1997/47, para. 36.

<sup>23</sup> E/CN.4/1999/68.

<sup>24</sup> The mandate holders have called on countries that did not criminalize rape, such as Saudi Arabia (A/HRC/11/6/Add.3), to do so.

<sup>25</sup> A/HRC/41/42/Add.2.

<sup>26</sup> See A/74/137 and A/HRC/44/52/Add.2.

<sup>27</sup> Committee against Torture, general comment No. 2 (2007); Human Rights Committee, general comment No. 28 (2000).

<sup>28</sup> See Inter-American Commission on Human Rights, *Martín de Mejía v. Peru*, Report No. 5/1996, Case No. 10.970, Merits, 1 March 1996; and *Ana, Beatriz and Celia González Pérez v. Mexico*, Report No. 53/2001, Case No. 11.565, Merits, 4 April 2001.

<sup>29</sup> See Inter-American Court of Human Rights, *Rosendo Cantú et al. v. Mexico*, Judgment, 31 August 2010; and *López Soto et al. v. Venezuela*, Judgment, 26 September 2018.

victim's consent and that "consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances".<sup>30</sup>

32. The Committee against Torture developed jurisprudence according to which rape, when perpetrated by public officials, at their instigation or with their consent or acquiescence, constitutes torture.<sup>31</sup>

33. The Committee on the Elimination of Discrimination against Women, in its Views adopted in 2010 on the landmark rape case *Vertido v. Philippines*,<sup>32</sup> concluded that myths and stereotypes regarding rape had affected the victim's right to a fair trial. In particular, the trial judge had focused on the personality and behaviour of the victim, and taken the lack of evidence of physical resistance by the victim as an indication of consent. The Committee established that a victim should not be expected to physically resist in order to credibly report rape.

34. The Committee recommended that the Philippines review the definition of rape in its legislation so as to place the lack of consent at its centre, and enact a definition of sexual assault that either required the existence of "unequivocal and voluntary agreement" and proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting, or required that the act take place in "coercive circumstances" and included a broad range of coercive circumstances.

35. Those legal advancements were capitalized on and codified and further developed in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), adopted in 2011.<sup>33</sup> The Istanbul Convention contains the first legally binding definition of sexual violence, including rape. Under article 36, States parties commit to criminalizing the intentional conduct of engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. This article also provides that consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances, and that States parties must ensure that the criminalization provisions also apply to acts committed against former or current spouses or partners as recognized by internal law. As noted in the explanatory report to the Convention, this definition establishes the obligation to criminalize and effectively prosecute any non-consensual sexual act, including in the absence of physical resistance by the victim.

36. In 2017, the Committee on the Elimination of Discrimination against Women adopted its general recommendation No. 35 (2017) on gender-based violence against women, which had been prepared in collaboration with the Special Rapporteur. The Committee and the Special Rapporteur specifically recommended that States parties ensure that rape was characterized as a crime against the right to personal security and physical, sexual and psychological integrity, and that the definition of rape, including marital rape, was based on the lack of consent and took into account coercive circumstances. It also established that any time limitations, where they existed, should give consideration to circumstances hindering the capacity of the victims to report the crime, and that rape could amount to torture.

## **B. Evolution of international humanitarian and criminal law**

37. Throughout human history, rape has been perceived as an inevitable part of conflict, resulting in its social and legal acceptance as an attribute and tool of war. The Charter of the International Military Tribunal (Nuremberg), adopted after the Second World War, did not identify rape as a war crime or crime against humanity, demonstrating that rape in conflict

<sup>30</sup> European Court of Human Rights, *M.C. v. Bulgaria*, Application No. 39272/98, Judgment, 4 December 2003, paras. 163 and 166.

<sup>31</sup> See *V.L. v. Switzerland* (CAT/C/37/D/262/2005) and *C.T. and K.M. v. Sweden* (CAT/C/37/D/279/2005).

<sup>32</sup> CEDAW/C/46/D/18/2008.

<sup>33</sup> See Dubravka Šimonović, "Global and regional standards on violence against women: the evolution and synergy of the CEDAW and Istanbul Conventions", *Human Rights Quarterly*, vol. 36, No. 3 (August 2014), pp. 590–606.

was not perceived as a significant and specific crime that required consideration by the Nuremberg Tribunal. In a similar manner, the Charter of the International Military Tribunal for the Far East (Tokyo) did not list rape as a war crime or crime against humanity, although in its judgment the Tokyo Tribunal recorded that approximately 20,000 cases of rape had occurred in the city of Nanking during the first month of its occupation.<sup>34</sup>

38. A major legal development under humanitarian law was the adoption in 1949 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). Rape is explicitly prohibited under article 27: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Though this represented an important step forward in making visible the crime of rape as a violation of international humanitarian law, its wording reflects a patriarchal view of rape as a crime against the morals of women rather than a crime against the person and their physical integrity.

39. The 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 1977, largely repeats article 27 of the Fourth Geneva Convention in its article 76, but omitting the word “honour”. Article 75 includes the prohibition of any distinction based, inter alia, on “sex”, and of acts including “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”, whether committed by civilian or by military agents. In Protocol II Additional to the Geneva Conventions of 12 August 1949, article 4 prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

40. The next important legal developments took place in 1993 and 1994, with the recognition of rape in the context of conflict as a crime against humanity in the establishment of two ad hoc international war crimes tribunals. In May 1993, the International Tribunal for the Former Yugoslavia was established by the Security Council in its resolution 827 (1993), which contained the first ever condemnation by the Security Council of rape in war.

41. The following year, in 1994, the International Criminal Tribunal for Rwanda was established. Both courts, under their respective statutes, have explicit jurisdiction over rape. The Statute of the International Tribunal for the Former Yugoslavia in its article 5 (g) and the Statute of the International Criminal Tribunal for Rwanda in its article 3 (g) identify rape as a separate crime under crimes against humanity, but without defining it.

42. According to the first Prosecutor of the International Tribunal for the Former Yugoslavia: “Substantively, one of the problems we faced in charging rape as a war crime was the absence of any definition of that crime.”<sup>35</sup>

43. Since international law at that time did not define rape, it was the jurisprudence of those tribunals that provided the definitional elements of rape as an international crime. The first case of rape that was found to constitute a crime against humanity was in the judgment of the International Criminal Tribunal for Rwanda in the case *Prosecutor v. Akayesu* in 1998.<sup>36</sup> The accused was convicted of rape as a crime against humanity, and the rapes, which had been condoned and encouraged by Akayesu, were further found to amount to the crime of genocide. The Tribunal also recognized that rape and sexual violence constituted were among the worst ways of inflicting harm on the victim, “as he or she suffers both bodily and mental harm”.<sup>37</sup>

<sup>34</sup> The former Special Rapporteur recommended that the Japanese Government take legal responsibility for the “comfort women” system that existed in Japan during the Second World War (see, for example, E/CN.4/1996/53/Add.1 and Corr.1).

<sup>35</sup> Richard J. Goldstone, “Prosecuting rape as a war crime”, *Case Western Reserve Journal Of International Law*, vol. 34, No. 3 (2002), p. 283.

<sup>36</sup> International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998.

<sup>37</sup> *Ibid.*, para. 731.

44. In this case, the Tribunal acknowledged that there was no commonly accepted definition of the crime of rape in international law and defined it as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.<sup>38</sup> The Tribunal noted that coercive circumstances did not need to be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress that preyed on fear or desperation could constitute coercion, and coercion could be inherent in certain circumstances, such as armed conflict or the military presence of the Interahamwe among refugee Tutsi women.<sup>39</sup>

45. Similarly, the International Tribunal for the Former Yugoslavia, in its judgment in the landmark case *Prosecutor v. Furundžija* in 1998, provided important advancements in the criminalization of rape in the context of international crimes.<sup>40</sup> While in the Statute of the Tribunal the only explicit reference to rape is as a crime against humanity, the defendant was charged with the crime of rape as a violation of common article 3 of the Geneva Conventions. In its judgment, the Tribunal found that rape might also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war. These findings imply that all parties to the Geneva Conventions are obliged to prosecute any person suspected of having committed rape as a grave breach of those Conventions.<sup>41</sup> Another development was the determination by the Tribunal that forced oral sex constituted rape, which represented a departure from definitions of rape in the country concerned.<sup>42</sup>

46. In terms of the definitional elements of rape, another benchmark at the International Tribunal for the Former Yugoslavia came three years later, in 2001, in its judgment in the case *Prosecutor v. Kunarac et al.*, in which the accused were charged with the crime of rape as a violation of common article 3 of the Geneva Conventions and as a crime against humanity.<sup>43</sup>

47. Noting that there was no specific definition of the crime of rape in international humanitarian law or in the Statute of the Tribunal, the trial chamber conducted a survey of basic principles for identifying the constituent elements of the crime of rape. It found that the actus reus of the crime of rape in international law was constituted by the sexual penetration, however slight, (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurred without the consent of the victim. Consent for that purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea was the intention to effect that sexual penetration, and the knowledge that it occurred without the consent of the victim.<sup>44</sup> The trial chamber concluded that sexual penetration would constitute rape if it was not truly voluntary or consensual on the part of the victim.<sup>45</sup> Lack of consent was therefore recognized as a central element of the definition of the crime of rape.

48. On appeal, the appellants argued that the use of coercion or force, as opposed to lack of consent, was a basic element of the crime of rape. The appeals chamber rejected the appellants’ argument, reasoning that force or threat of force provided clear evidence of non-consent, but that force was not an element per se of rape.<sup>46</sup> The Tribunal thus established that

<sup>38</sup> Ibid., paras. 686 and 688.

<sup>39</sup> Ibid., para. 688.

<sup>40</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998.

<sup>41</sup> There are 196 parties to the Geneva Conventions, including all Member States, the Holy See, the State of Palestine and the Cook Islands.

<sup>42</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Judgment, para. 183.

<sup>43</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001.

<sup>44</sup> Ibid., para. 460.

<sup>45</sup> Ibid., para. 440.

<sup>46</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac et al.*, Appeal Judgment, 12 June 2002, para. 129. In the case *Prosecutor v. Gacumbitsi* of the International Criminal Tribunal for Rwanda, the definition in the *Kunarac et al.* case was reconfirmed on appeal (Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006).

the lack of consent is per se a constitutive element of rape as a crime under international criminal law.

49. In addition to definitional elements of rape as an international crime, the rules of procedure and evidence of both Tribunals contained an important set of provisions for gender-sensitive and victim-centred prosecution of rape.

50. Rule 96 provided that no corroboration was required of the testimony of a victim of sexual violence. It specifically excluded the admissibility of the victim's prior sexual conduct and restricted defence based on consent, constituting significant advancements in international criminal procedural law on rape.

51. The next benchmark for the criminalization of rape and the definition of its constituent elements was the adoption in 1998 of the Rome Statute of the International Criminal Court. The Rome Statute established an important link with international human rights law in its article 21 (3), according to which the application and interpretation of law by the Court must be consistent with internationally recognized human rights. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence are enumerated under article 7 as crimes against humanity and under article 8 as war crimes in the context of both international and non-international armed conflict.

52. The Elements of Crimes of the Rome Statute contains the following definition of the crime of rape, in relation to article 7 (1) (g):

(a) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(b) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>47</sup>

53. This definition explicitly refers to consent in its second paragraph, with respect to "a person incapable of giving genuine consent", and the footnote to that paragraph clarifies that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This broadens the interpretation of incapacity by including induced incapacity, as a result, for instance, of drugs or alcohol. It also includes age-related incapacity, relating to children below the age of sexual consent.

54. There has been criticism of this definition as it only implicitly includes lack of consent, but it remains to be determined by the Court whether to consider lack of consent as a key element of the definition of rape in specific cases.<sup>48</sup> The Court is invited to implement the provisions of the Rome Statute in accordance with human rights standards, which have also evolved and now require the inclusion of the lack of consent as a central element of rape.

55. In April 2013, the Declaration on Preventing Sexual Violence in Conflict was adopted by the Group of Eight, and was later supported by 150 States. In the Declaration, ministers recalled that rape and other forms of serious sexual violence in armed conflict were war crimes and also constituted grave breaches of the Geneva Conventions and their Protocol I, and that States had an obligation to search for and prosecute (or hand over for trial) any individual alleged to have committed or ordered a grave breach regardless of nationality.<sup>49</sup>

<sup>47</sup> ICC-ASP/1/3 and Corr.1, part II.B, art. 7 (1) (g)-1, paras. 1–2.

<sup>48</sup> Submission by Eithne Dowds, pp. 6–7.

<sup>49</sup> See [www.un.org/ruleoflaw/blog/document/g8-declaration-on-preventing-sexual-violence-in-conflict](http://www.un.org/ruleoflaw/blog/document/g8-declaration-on-preventing-sexual-violence-in-conflict).

### C. Evolution of the Security Council framework on rape under its resolution 1325 (2000)

56. The Security Council, by the adoption of its landmark resolution 1325 (2000), on women and peace and security, and nine follow-up resolutions, has identified sexual violence, inclusive of rape, as a threat to international peace and security and established its framework for addressing sexual violence in armed conflict.

57. In its resolution 1820 (2008), the Security Council notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide, and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes.

58. In resolution 1888 (2009), the Security Council requested the appointment of a Special Representative of the Secretary-General on sexual violence in conflict. Implementation of the resolutions is supported by the Team of Experts on the Rule of Law and Sexual Violence in Conflict, which contributes to the annual reports of the Secretary-General to the Security Council.

59. The Security Council's efforts have significantly contributed to the visibility of sexual violence and rape in conflict-affected States, but there is a clear lack of results in prosecuting perpetrators of rape and combating widespread impunity. This lack of results could also be linked to the lack of a human rights-based approach and legal shortcomings in the criminalization of rape that existed before the conflict in the States under consideration.

60. Of the 19 States monitored by the Secretary-General in the context of his report on conflict-related sexual violence,<sup>50</sup> 17 States had ratified the Convention on the Elimination of All Forms of Discrimination against Women, while two (Somalia and Sudan) had not yet done so. Only seven of the States had ratified the Rome Statute (Afghanistan, Bosnia and Herzegovina, Central African Republic, Colombia, Côte d'Ivoire, Democratic Republic of the Congo and Nigeria), thus accepting the exclusion of a statute of limitation for the prosecution of rape during the conflict, while the 12 other States had not.<sup>51</sup>

61. According to the responses that the Special Rapporteur received to her questionnaire, of those States that had not ratified the Rome Statute, only Myanmar had no statute of limitation for rape in times of peace or conflict. Having a statute of limitation for the prosecution of rape contributes to the widespread impunity for perpetrators.<sup>52</sup>

62. For example, when the Special Rapporteur visited Nepal, which had not ratified the Rome Statute, she observed that its statute of limitation requiring rape to be reported within a year precluded the prosecution of rape cases that had occurred during the conflict, and she therefore recommended changes.<sup>53</sup> Human rights and international humanitarian and criminal law standards on rape should be interlinked in conflict-affected States.

63. There is an opportunity for the Security Council and conflict-affected States to better utilize both human rights instruments in general and, more specifically, the Convention on the Elimination of All Forms of Discrimination against Women and general recommendations No. 30 (2013), on women in conflict prevention, and No. 35 (2017), on gender-based violence against women, of the Committee on the Elimination of Discrimination against Women, as they are applicable to all of the States except Somalia and the Sudan. Rape is a widespread crime in peace and in conflict, and it cannot be successfully addressed in conflict contexts without addressing pre-existing shortcomings in its criminalization and normalization in the State concerned.

<sup>50</sup> S/2020/487.

<sup>51</sup> Article 29 of the Rome Statute prohibits statutes of limitation for crimes under its jurisdiction.

<sup>52</sup> The Special Rapporteur requested information from United Nations field presences in 19 States, and received nine responses, from Colombia, Libya, Nepal, Nigeria, Somalia, Sri Lanka, the Sudan, the Syrian Arab Republic and Yemen. Considering other sources, responses were received for 16 States in total, all but Burundi, the Central African Republic and Côte d'Ivoire.

<sup>53</sup> See A/HRC/41/42/Add.2.

64. The Special Rapporteur therefore calls for a human rights-based approach to the prevention and eradication of sexual violence and rape during conflict, as also recommended by the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women.<sup>54</sup> She additionally calls for increased cooperation with her mandate, as envisaged in Security Council resolution 1888 (2009) but which has never materialized in practice.

### III. Gaps in the criminalization and prosecution of rape at the national level and recommendations for its prevention

65. The Special Rapporteur received 207 submissions to her questionnaire on the criminalization and prosecution of rape, covering 105 States across all regions. Responses were received from 46 Governments, 19 national human rights institutions and 142 other entities, comprising civil society organizations, international organizations, academia and others.<sup>55</sup>

66. In this section, the Special Rapporteur presents a brief overview of the gaps in the criminalization and prosecution of rape in various States, highlights applicable international standards and provides recommendations for the harmonization of national laws with international standards.

#### A. Scope and constitutive elements of rape

##### 1. Protected victims, acts of rape and exemption of marital rape

67. Historically, rape was criminalized as a gender-specific crime of the vaginal penetration of women only. Today, international human rights standards have expanded the scope of rape provisions to cover all persons and all acts of penetration of a sexual nature.

68. This shift towards the protection of all persons is also happening domestically, and in most States the definition of rape is gender-neutral, covering all persons. However, in approximately a third of States, the definition of rape is still a gender-specific crime covering only women victims.<sup>56</sup> Those States often have separate criminal law provisions covering other victims, and in some States other offences that cover sexual violence committed against men and boys have often been sanctioned less severely than the offence of rape.

69. In many States, in accordance with international human rights standards, marital rape is criminalized. However, in a significant number of States, marital rape is explicitly excluded from criminalization. Historically, States first criminalized rape with a marital rape exemption, which was reproduced in many colonial laws. Changes were later made in parallel with international standards on rape, but not in all States. Today, a paradox exists in that these laws were changed in the countries where they originated, but were kept in their former colonies. Almost half of the 54 Commonwealth States still need to amend their legislation to remove the marital rape exception.<sup>57</sup>

<sup>54</sup> See the statement adopted by the Platform on 11 February 2020. Available at [www.ohchr.org/Documents/Issues/Women/SR/Statement\\_conflict\\_prevention\\_ED\\_VAW\\_platform.pdf](http://www.ohchr.org/Documents/Issues/Women/SR/Statement_conflict_prevention_ED_VAW_platform.pdf).

<sup>55</sup> The questionnaire and submissions are available at <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRVAVW.aspx>. The information presented in this section is based on the submissions, which were received from April to December 2020. Changes that have taken effect since the submissions may not be reflected.

<sup>56</sup> Armenia, Azerbaijan, Bangladesh, Bulgaria, Cuba, Cyprus, Democratic People's Republic of Korea, Egypt, Ghana, India, Indonesia, Jordan, Kazakhstan, Morocco, Myanmar, Nepal, Nigeria, Pakistan, Philippines, Russian Federation, Sri Lanka, Switzerland, Syrian Arab Republic, United Republic of Tanzania and Zimbabwe.

<sup>57</sup> See Sisters For Change, *The Criminalization of Marital Rape*.

70. Many States still exempt marital rape from criminalization, including the Bahamas, Bangladesh, India, Iraq, Jordan, Lebanon, Malaysia,<sup>58</sup> Nigeria, Samoa, South Sudan, Sri Lanka, the Sudan and the Syrian Arab Republic.

71. For instance, in India, marital rape is explicitly excluded from the offence of rape. The Criminal Law (Amendment) Act, 2013, by which important reforms to criminal provisions on sexual violence were introduced, retained the exception for marital rape. While it criminalized rape of lawfully separated partners, it introduced lighter prison sentences in that case. Likewise, in Nigeria, rape is defined in article 357 of the Criminal Code as “unlawful carnal knowledge of a woman or girl without her consent”, but “unlawful carnal knowledge” is defined in article 6 as “carnal connection which takes place otherwise than between husband and wife”, meaning that marital rape is explicitly excluded from the provision criminalizing rape. In Jordan, rape provisions under article 292 of the Penal Code apply to “any person who has sexual intercourse with a female, other than his wife, without her consent, whether by coercion or threat or deception”. In Lebanon, Law No. 293 of 2014 on the protection of women and other family members from domestic violence, in its article 7, criminalizes a spouse’s use of threats or violence to claim a “marital right to intercourse”, but does not criminalize the rape itself. In other countries, such as Nepal and Rwanda, while marital rape is criminalized, it is punishable by reduced sentences.

72. The Special Rapporteur makes the following recommendations:

(a) Criminal law provisions on rape should protect all persons, without any kind of discrimination. Men, boys and gender-diverse persons should also be covered by legislation. However, rape is a form of gender-based violence that predominantly affects women and girls, requiring a gender-sensitive application of gender-neutral provisions;

(b) The criminalization of rape should include rape between spouses or intimate partners. All States that exclude the criminalization of marital rape, contrary to international human rights standards, should urgently repeal those provisions;

(c) The criminalization of rape should explicitly include all types of penetration, however slight, of a sexual nature with any bodily part or object.

## 2. Definitions of rape based on lack of consent and/or use of force and age of consent

73. In the past 30 years, the explicit inclusion of lack of consent in the definition of rape has emerged as its central and constitutive element, as prescribed under article 36 of the Istanbul Convention, the jurisprudence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and, to some extent, the Rome Statute, and as elaborated upon by the Committee on the Elimination of Discrimination against Women in its general recommendation No. 35 (2017) (para. 29 (e)). On November 2019, the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women issued a statement entitled “Absence of consent must become the global standard for definition of rape”.

74. The submissions indicate that many States have definitions of rape based on lack of consent.<sup>59</sup> A growing number of States, including those that have ratified the Istanbul Convention, have recently changed their definition of rape and explicitly included lack of consent as its constitutive element, albeit using varied language that expresses different conceptualizations of consent.

<sup>58</sup> Ibid.

<sup>59</sup> Afghanistan, Albania, Argentina, Bahamas, Bangladesh, Belgium, Bolivia (Plurinational State of), Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Colombia, Croatia, Cyprus, Democratic People’s Republic of Korea, Denmark, Egypt, Eswatini, Ethiopia, France, Georgia, Germany, Ghana, Greece, Guatemala, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Jordan, Kazakhstan, Kenya, Lithuania, Luxembourg, Madagascar, Maldives, Mali, Malta, Mauritius, Monaco, Montenegro, Morocco, Myanmar, Nepal, Nicaragua, Nigeria, Oman, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, Sierra Leone, Somalia, South Africa, South Sudan, Sri Lanka, Sweden, Syrian Arab Republic, Togo, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and Zimbabwe.

75. For example, the Criminal Code of Germany of 2016 amended rape provisions to reflect the principle of “no means no”, defining rape as any sexual act against the “discernible will” of the victim. In Morocco, article 486 of the Penal Code criminalizes rape as an act by which a man has sexual intercourse with a woman against her will.

76. Sweden changed its definition of rape to reflect the principle of “yes means yes”. Rape provisions under chapter 6, section 1, of the Criminal Code apply to “a person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily”.

77. However, criminal law provisions in the majority of States define rape only by the use of force or threats of violence.

78. In Czechia, for example, rape provisions under section 185 (1) of the Criminal Code apply to the following: “Whoever forces another person to have sexual intercourse by violence or by a threat of violence, or a threat of other serious detriment, or whoever exploits the person’s vulnerability for such an act.”

79. Likewise, article 149 of the Criminal Code of Azerbaijan defines rape as “sexual relations with application of violence or with threat of its application to the victim [or] to other persons, or with use of a helpless condition of the victim”.

80. Similarly, article 222-23 of the Criminal Code of France provides that any act of sexual penetration, of any nature whatsoever, of another person or of the perpetrator, by violence, coercion, threat or surprise, constitutes rape.

81. Another important feature of consent is the age of sexual consent, which is among the most contentious issues related to the criminalization of rape. Usually, States set the minimum age of sexual consent through the criminalization of rape of children under a specific age, when consent is not relevant since they are not deemed capable of giving it. Criminal laws criminalize this type of rape as “statutory rape”, by establishing, for example, that any sexual act with an individual below the age of 16 constitutes statutory rape, with exceptions when there is a maximum of three years’ age difference.

82. According to the responses to the questionnaire, the majority of States set the legal age of sexual consent at 15, 16 or 18 years.

83. However, in some States the age of sexual consent is very low, at 12 to 14 years old or even lower, or there is no legal age of sexual consent. The latter is the case in France, where there is a clear reference in legislation to the age of the victim for the misdemeanour of sexual assault, but not for the crime of rape. A bill passed in March 2021 in the National Assembly would set the age of consent at 15, and still had to be passed in the Senate at the time of writing of this report.

84. In some States, particularly in Latin America, criminal law provisions establish the crime of *estupro*, which usually describes cases in which an adult has sexual relations with a minor above the legal age of consent by means of seduction or deceit. This is the case, for instance, in Ecuador, where the legal age of consent is 14. The *estupro* provisions apply to cases in which an adult has sexual relations, by means of deceit, with a child older than 14 and younger than 18, imposing a sentence of 1 to 3 years’ imprisonment, while rape and statutory rape are punishable by 19 to 22 years’ imprisonment. Likewise, in Nicaragua, while rape is punishable with sentences ranging from 8 to 12 years’ imprisonment, *estupro* (defined as carnal knowledge, by means of deceit, of a person older than 14 and younger than 16) is punishable by 3 to 5 years’ imprisonment. The existence of a less severe offence involving teenage girls contributes to the impunity of rapists, as evidence suggests that rapists tend to be charged with the lesser offence instead of rape, if they ever face prosecution.

85. The Special Rapporteur makes the following recommendations:

(a) States should explicitly include lack of consent at the centre of their definition of rape. Force or threat of force provide clear evidence of non-consent, but force is not a constitutive element of rape. States must specify that consent must be given freely, as a result of the person’s free will, assessed in the context of the surrounding circumstances. Intercourse without consent should be criminalized as rape in all definitions;

(b) Criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible; for example, when the victim is in an institution such as a prison or detention centre, or is permanently or temporarily incapacitated owing to the use of alcohol and drugs;

(c) Legislation criminalizing rape should establish that consent of children below the age of 16 is immaterial,<sup>60</sup> and that any sexual intercourse with an individual below the age of consent is rape (statutory rape), where determination of lack of consent is not required. Exceptions could include consensual intercourse between a child aged under 18 and a child older than 14 and younger than 16;

(d) *Estupro* provisions, where they exist, should be abolished.

### 3. Sentencing and aggravating and mitigating circumstances

86. Sentencing for rape is closely related to the application of aggravating and mitigating circumstances that may increase sanctions by a third or more of the imprisonment time. According to the results of the questionnaire, rape is sanctioned with imprisonment in the vast majority of States. In the majority, the minimum sentence for non-aggravated rape is between 1 and 10 years' imprisonment. In approximately a third, the minimum sentence ranges from 11 to 20 years. In a smaller group, a maximum sanction of a life sentence may be applied.

87. Fines are also used as sanctions. In many cases, they are applied in addition to the prison sentences,<sup>61</sup> while in only three States (Armenia, Indonesia and Netherlands), fines may be imposed as an alternative sanction to imprisonment. Some States have listed as an aggravating circumstance the perpetrator being a current or former spouse or intimate partner. In a minority of States, when there are aggravating circumstances, the death penalty may be applicable.

88. There are various mitigating circumstances, and many of them are not consistent with international human rights standards. Some are general: for example, a perpetrator may receive reduced sentences when tempted by the conduct of the victim,<sup>62</sup> or when the perpetrator is the victim's spouse (for example, in Myanmar, Nepal and Togo). Such mitigating circumstances are not in line with human rights standards.

89. A most worrying mitigating circumstance, entailing the reduction – or even cancellation – of sanctions, is that of a perpetrator marrying their victim, also known as “marry your rapist” provisions. While some States recently passed amendments to abolish these provisions (such as Jordan and Tunisia), others retain them (such as Iraq, Libya and Philippines). In the Syrian Arab Republic, marrying the victim may reduce a perpetrator's sentence. In Lebanon and Madagascar, there remain exceptions for statutory rape when there was a promise of marriage, and in Morocco judges have discretion to determine mitigating circumstances if the punishment is too severe, which in practice may include exempting perpetrators from punishment if they marry their victim.

90. The Special Rapporteur makes the following recommendations:

(a) Rape should be sanctioned in a way commensurate with the gravity of the offence, and the use of fines as the only sanction should be abolished;<sup>63</sup>

(b) States should include among aggravating circumstances the following situations: the perpetrator is a current or former spouse or intimate partner, or a family member, or the perpetrator abuses power or authority over the victim; the victim was or was

<sup>60</sup> States should set the age of consent at 15 or 16 years, according to the local context, but not below 15 years.

<sup>61</sup> Bangladesh, Burkina Faso, Colombia, India, Indonesia, Lebanon, Madagascar, Myanmar, Norway, Oman, Pakistan, South Sudan, Sri Lanka, Togo and United Republic of Tanzania.

<sup>62</sup> For example, in Armenia, Democratic People's Republic of Korea, Lithuania, Russian Federation and Switzerland. In Andorra, Chile and Indonesia, mitigating circumstances include the victim contributing to the crime or provoking the perpetrator.

<sup>63</sup> In accordance with general comment No. 36 (2018) of the Human Rights Committee, sanctions should exclude the death penalty.

made vulnerable, the victim was a child, or the act was committed in the presence of a child; the act resulted in physical and/or psychological harm for the victim; the act was committed by two or more people; and the act was committed repeatedly, with the use of violence, or with the use or threat of use of a weapon;

(c) States should review and abolish all mitigating circumstances that are not in accordance with human rights standards, especially “marry your rapist” provisions, and cease their application on the basis of gender stereotypes and myths on rape.

## **B. Prosecution of rape and protection of victims**

### **1. Prosecution ex officio and without undue delay**

91. In the vast majority of States, rape is prosecuted ex officio: that is, by public prosecution, not wholly dependent upon the victim’s complaint. However, in some States, rape is prosecuted ex parte. In Cuba, for example, rape is always prosecuted ex parte and prosecution is interrupted if victims withdraw their complaint. In other States, there is a mixed approach. For example, in Ecuador prosecution is ex parte in cases of *estupro* (sexual relations with a minor through deceit), and in Mexico, Slovenia and Turkey in cases of marital rape or rape by an intimate partner. Likewise, only aggravated forms of rape are prosecuted ex officio in States such as Azerbaijan and Romania, and in others, victims may pursue private prosecution if they have been denied public prosecution.

92. Non-prosecution of rape cases is generally the result of discretionary decisions by prosecutors. The criteria established by law for non-prosecution vary and may give wide discretionary power to prosecutors. Such is the case in Japan, for example, where a prosecutor may decide not to press charges if prosecution is deemed unnecessary owing to the character, age and environment of the offender, the gravity of the offence and the circumstances or situation after the offence, as is the case for all criminal offences.

93. In its general recommendation No. 35 (2017), the Committee on the Elimination of Discrimination against Women recommended that States parties apply ex officio prosecution to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner. Similarly, the Istanbul Convention requires parties to ensure that investigations and judicial proceedings are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings, and that prosecution of rape is not wholly dependent upon a report or complaint filed by a victim.

94. The Special Rapporteur makes the following recommendations:

(a) The crime of rape should be prosecuted ex officio, without the discretionary powers of prosecutors being too wide, and prosecution should not depend solely on the victim’s complaint;

(b) Prosecution should be pursued without undue delay.

### **2. Standard of proof, rape shield provisions and other protective measures**

95. The application of criminal law standard of proof, “beyond reasonable doubt”, in rape cases is closely interconnected with the definition of rape. For example, if the definition of rape requires proof of the use of force or coercion, victims bear the burden of providing such proof, which leads to impunity for perpetrators given that rape usually takes place behind closed doors and may not result in visible physical harm. On the other hand, if the definition of rape is based on lack of consent, the burden with respect to that proof is shared with or shifted in part to the perpetrator, and a different standard of proof from that of beyond reasonable doubt is therefore required.

96. Many States have definitions that are based on the use of force and coercion. Some of them have explicit provisions on requirements regarding proof; in many States, in practice it is often necessary to present medical examinations as evidence of rape, and in some, there must be witnesses, including in Afghanistan, Bangladesh, Ghana, Mauritius, Morocco, Nigeria, Pakistan and Sierra Leone. In Yemen, the law establishes that without a confession from the perpetrator, a rape victim must provide four male witnesses to establish that the

offence had been committed. This requirement makes most rape cases impossible to prove, owing to the circumstances in which rape usually takes place.

97. Another worrisome practice is virginity testing, which is still being reported in some States. For example, in Armenia, an ordinance by the Minister of Health provides for forensic medical examinations, including the identification of the sexual condition, sexual integrity and virginity or otherwise of the victim.

98. Pursuing a criminal case against a perpetrator can take a heavy toll on rape victims. Revictimization can occur as they relive traumatic experiences and suffer victim-blaming biases that still permeate societies and criminal legal systems.

99. According to the responses to the questionnaire, several States have passed legislation to include rape shield provisions, which are aimed at preventing the use of a victim's sexual history to undermine the credibility of their claims.<sup>64</sup>

100. The Special Rapporteur makes the following recommendations:

(a) The victim's testimony, supported by a physical and psychological assessment of harm and assessed alongside existing evidence, should not require further corroboration to be considered as proof;

(b) States should enact rape shield provisions to exclude from evidence information a victim's sexual history;

(c) States should take other measures to support the victim and protect the victim's privacy, avoid contact between victim and perpetrator, enable the victim to testify in the courtroom without being present or at least without the presence of the alleged perpetrator (notably through the use of communications technologies), provide legal assistance, provide interpreters when needed, and inform victims if a perpetrator escapes or is released.

### **3. Statute of limitation, extraterritorial application and data**

101. In most States, statutes of limitation as a provision of criminal procedural law preclude the prosecution of rape after a certain period, usually set at the level of the maximum duration of sanctions for the crime.

102. According to data at hand, there is no statute of limitation for the prosecution of rape in the following 15 States: Bangladesh, Canada, Cyprus, Ghana, Hungary, India, Ireland, Jamaica, Maldives, Mauritius, Myanmar, Netherlands, Pakistan, South Africa and United Kingdom of Great Britain and Northern Ireland. In the majority of States, however, statutes of limitation are in place.

103. Some States have particularly short statutes of limitation, precluding victims' access to justice. For example, it is three months in Iraq, and one year in Italy, Nepal and Venezuela (Bolivarian Republic of).

104. In cases involving child victims, some States eliminate statutes of limitation that apply to adults.<sup>65</sup> In others, statutes of limitation begin to run after the child reaches adulthood.<sup>66</sup> Other States determine specific ages up to which a child victim may report rape. In Finland, such reporting is possible until the age of 28, and in Poland, 30. In Switzerland, a victim may report until the age of 25 (if they were older than 12 and younger than 18 at the time of the assault). Lastly, rape may be prosecuted in Colombia up to 20 years and in France and Togo up to 30 years after the victim reaches adulthood.

<sup>64</sup> Canada, Colombia, Czechia, Ecuador, Eswatini, India, Ireland, Mexico, South Africa, Switzerland and United Kingdom.

<sup>65</sup> Belgium, Chile, Denmark, Ecuador, Mali and Switzerland. In the case of Switzerland, the statute of limitation is eliminated if the victim was younger than 12.

<sup>66</sup> Armenia, Bolivia (Plurinational State of), Brazil, Colombia, France, Guatemala, Luxembourg, Monaco, Nepal, Nicaragua, Norway, Slovenia, Spain, Tunisia and Turkey. In the case of Bolivia (Plurinational State of) and Nepal, the statutes begin to run four years and one year after the victim reaches adulthood, respectively.

105. The criminalization of rape should include extraterritorial application, as otherwise prosecution may be precluded in cases of rape committed by citizens in other States, including citizens serving as international or uniformed personnel connected to the United Nations and other international organizations.

106. Although there is a lack of comparable data, available data reveals high attrition rates in the prosecution of rape, reflecting the small percentage of reported cases that are investigated, prosecuted and ultimately result in convictions. Sweden has a conviction rate of 4.6 per cent for the period 2014–2018, while Nigeria secured convictions in only 0.9 per cent of cases reported in 2015. Some countries do not collect and report data on the prosecution of rape.

107. The Special Rapporteur makes the following recommendations:

(a) There should be no statute of limitation for initiating legal proceedings on rape, whether committed during conflict or in peacetime. Where statutes of limitation do exist, they should be prolonged to allow for the healing of victims/survivors and should never preclude access to justice. In the case of child victims, statutes of limitation should at a minimum allow for the initiation of proceedings after the victim has reached the age of majority;

(b) States must provide for extraterritorial jurisdiction, so that their courts can prosecute rape cases committed by their nationals outside their territory and facilitate cooperation with other jurisdictions;

(c) States should collect data on prosecution, sentencing and attrition rates, and establish rape prevention watches or observatories as part of observatories on violence against women.

#### **IV. Conclusions and recommendations**

**108. International human rights law, international humanitarian law and international criminal law on rape have advanced significantly over the past few decades, in independent yet interrelated processes resulting in advanced standards on the criminalization and prosecution of rape.**

**109. There is significant overlap between these frameworks. The international human rights framework is broader and is applicable in times of peace and conflict. Jointly, and not separately, they provide elements for the criminalization and prosecution of rape at the national level, in times of peace and conflict.**

**110. The harmonization of national standards with international standards has already started with respect to the Declaration on the Elimination of Violence against Women, general recommendation No. 35 (2017) of the Committee on the Elimination of Discrimination against Women, other recommendations provided by that Committee and by the Special Rapporteur on violence against women, its causes and consequences, and the Rome Statute (which has 123 States parties). Currently, the detailed harmonization process is being conducted under the Istanbul Convention by its 34 States parties, many of which have changed their definitions of rape in order to include lack of consent as its central element.**

**111. All States need to accelerate this harmonization process and incorporate international human rights standards on rape into their national laws on the criminalization and prosecution of rape with respect to all the constitutive elements of the crime of rape, which are interlinked and crucial for effective criminalization and prosecution, in accordance with the specific recommendations laid out in this report and further developed in and supported by the framework for model legislation on rape.**

**112. States should criminalize rape using a definition of rape that covers all persons, includes marital rape and all acts of penetration of a sexual nature, and explicitly includes lack of consent at its centre. Aggravating and mitigating circumstances should be revisited and aligned with human rights standards.**

113. Prosecution should be pursued *ex officio*. Statutes of limitation should be abolished for rape in times of peace or conflict, or, at the very least, child victims should be able to report rape after reaching adulthood. Evidentiary rules of prosecution should significantly change to decrease impunity for perpetrators and increase the rate of prosecution, while protecting victims from revictimization.

114. States should repeal other laws that discriminate against women, which directly or indirectly contribute to legal gaps and stereotypes in the criminalization and prosecution of rape. States should abolish any provisions that criminalize consenting sexual relations between adults, such as adultery, *zina* (illicit sexual relations) and same-sex relations, and those that criminalize abortion in cases of rape.

115. States should provide adequate services and support to victims of rape, including rape crisis centres, protection orders and interim relief measures in the context of both peace and conflict, including reparations to victims, in accordance with international human rights standards and reports.<sup>67</sup>

116. States must ensure the necessary training for members of the judiciary and legal and law enforcement professionals on international human rights standards and jurisprudence with respect to rape, and on the myths and stereotypes that still hinder the implementation of those standards.

117. States must ensure the age-appropriate education of children and adolescents on sexual autonomy and human rights, including the importance of understanding lack of consent (the “no means no” approach) and of promoting affirmative consent (the “yes means yes” approach).

118. States should utilize human rights standards, especially the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and general recommendations No. 30 (2013) and No. 35 (2017) of the Committee on the Elimination of Discrimination against Women, in the eradication of sexual violence and rape during conflict, and support cooperation by the Security Council with the Special Rapporteur, as envisaged by the Security Council in its resolution No. 1888 (2009).

119. United Nations agencies such as the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the United Nations Office on Drugs and Crime and the Office of the United Nations High Commissioner for Human Rights, in cooperation with the Special Rapporteur, the Committee on the Elimination of Discrimination against Women and other expert mechanisms, such as the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women, should support States in the process of harmonizing national legislation with international human rights standards, on the basis of the recommendations in this report and the framework for model legislation on rape.

---

<sup>67</sup> See A/HRC/14/22.