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## *Torture, Crimes Against Humanity and the Abuse of International Law*

**Abstract:** In 2014, United Nations *Committee Against Torture* raised the possibility that the Vatican's handling of sexual abuse cases involving Catholic priests constituted torture under international law. A victims group even filed a petition with the International Criminal Court accusing Pope Benedict XIV and other Church officials of "crimes against humanity" and urged that they be prosecuted for their alleged role in the crimes.

Without defending the perpetrators of the abuse, this paper argues that the identified cases do not meet the legal standards to constitute either torture or crimes against humanity under international law. While those individuals who are guilty of abuse should be punished, neither they nor the Church officials who dealt with them (or failed to do so) are responsible for torture or crimes against humanity. Arguments to the contrary have been advanced in bad faith.

**Keywords:** juvenile harassment, rape, torture, the Catholic Church

**Abstrakt:** W 2014 r. Komitet Przeciwko Torturom Organizacji Narodów Zjednoczonych uznał, że rozpatrywane przez Watykan sprawy dotyczące wykorzystywania nieletnich przez katolickich księży mogą podpadać pod pojęcie tortur w rozumieniu prawa międzynarodowego. Grupa ofiar złożyła nawet petycję do Międzynarodowego Trybunału Karnego oskarżając papieża Benedykta XVI i innych urzędników Kościoła o „zbrodnie przeciwko ludzkości” i wezwała ich do ścigania za rzekomą rolę w zbrodniach. Nie broniąc sprawców nadużyć, autor dowodzi, że zidentyfikowane przypadki nie spełniają norm prawnych, które zgodnie z prawem międzynarodowym stanowią tortury lub zbrodnie przeciwko ludzkości. Podczas gdy osoby, które są winne nadużyć, powinny zostać ukarane, ani oni, ani urzędnicy Kościoła, którzy podejmowali działania w tej sprawie (lub je zaniedbali), nie są odpowiedzialni za tortury czy zbrodnie przeciwko ludzkości. Argumenty przeciwne zostały przedstawione w złej wierze.

**Słowa kluczowe:** gwałt, Kościół Katolicki, molestowanie nieletnich, tortury

## I. Introduction

In 2014, the United Nations Committee Against Torture (CAT) questioned the Vatican regarding its handling of the sex scandal that dominated the news more than a decade earlier [Davies 2014a; Kington 2014; Moloney 2014]. The argument it advanced was that individual acts of sexual abuse (or rape) by Catholic priests constituted “torture” under international law.<sup>1</sup> The “Survivors Network of those Abused by Priests” (SNAP) even filed a petition with the International Criminal Court accusing the pope, the Vatican secretary of state, and two other Vatican officials of “crimes against humanity” and urging prosecution at The Hague [Rychlak 2010; Robertson 2010].<sup>2</sup>

There is certainly no defence for those who commit rape or other sexual abuse, especially when the perpetrators are in positions of authority. That does not mean, however, that rape in and of itself equates to torture or crimes against humanity. For legal and logical reasons, these arguments are completely untenable. Moreover, they seem to have been advanced in bad faith. While those individuals who are guilty of abuse should be properly punished, neither they nor the Church are responsible for torture or crimes against humanity under international law. Arguments to the contrary have been made in bad faith.

## II. The Scandal

In the 1980s and 1990s, many reports came forward of sexual abuse of minors by Catholic priests. Magnifying the horror were accounts of bishops sheltering the abusers and sending them to new locations where they were able to find new victims. Eventually the Church conducted investigations, developed policies, and implemented programs to minimise the chance of similar things happening in the future. Additionally, settlements were reached and payments were made to many of the victims.

In 2002, the United States Conference of Catholic Bishops (USCCB) enlisted the Jon Jay College of Criminal Justice to examine the rates and characteristics of the sexual abuse within the Catholic Church. Researchers found that a total of 10,667

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<sup>1</sup> The Vatican representative who faced the questioning was Archbishop Silvano Tomasi, Apostolic Nuncio in Geneva.

<sup>2</sup> Geoffrey Robertson debated the late Mr. Robertson: *Resolved: Pius XII did too little to save the Jews from the Holocaust*, The Royal Academy, London (sponsored by Intelligence Squared), 14 November 2012. Other participants included William Doyno and John Julius Norwich.

individuals made allegations of child sexual abuse against 4,392 Catholic priests (4% of all priests in American dioceses) between 1950 and 2002.<sup>3</sup> Most of the alleged acts took place between 1960 and 1984.<sup>4</sup> Charges against 2,511 priests were found to have merit; in the case of 1,881 priests, the charges were unsubstantiated.<sup>5</sup> An unsubstantiated allegation was defined as “an allegation that was proven to be untruthful and fabricated” as a result of a criminal investigation.<sup>6</sup>

The majority of victims of priestly sexual abuse were male (81%), and most of them (almost 75%) were between the ages of 11 and 17.<sup>7</sup> In addition to being a breach of trust and a mortal sin in the eyes of the Church, this sexual activity would likely constitute sexual abuse under domestic criminal laws.<sup>8</sup> In minority of cases that involved actual penetration, since the victims were younger than the legal age of consent, it would in the eyes of the law likely constitute statutory rape.

### The Church’s Response

In June 2002, the USCCB approved a Charter for the Protection of Children and Young People and decreed Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons. The bishops pledged to provide a safe environment for children. They also pledged to develop uniform procedures for handling sex-abuse allegations. The thrust of this

<sup>3</sup> More than half of the priests had only one allegation brought against them [Terry et al. 2014, prepared by the John Jay College of Criminal Justice for the U.S. Conference of Catholic Bishops. The USCCB issued its first guidelines for reporting alleged offenses in 2002. Titled the “Charter for the Protection of Children and Young People,” it was revised in 2005, 2011, and 2018 [USCCB 2002].

<sup>4</sup> A small fraction (3.5%) of priests accounted for 26% of victims [Terry 2014].

<sup>5</sup> This rate of false accusations is much higher than found in the general population [Terry 2014].

<sup>6</sup> The net result was that, contrary to the general perception, priests committed sexual offenses at rates similar to teachers, ministers of other faiths, and the general population [Terry 2014].

<sup>7</sup> Archbishop Carlo Maria Viganò wrote in his August 2018 letter to Pope Francis, “evidence that is now obvious to all: that 80% of the abuses found were committed against young adults by homosexuals who were in a relationship of authority over their victims” [Harlan 2018]. In the general population, however, females are more likely to be sexually abused. This suggests that part of the problem is a hebephilia homosexual orientation on the part of priests, which makes adolescent boys their most likely victims. Therefore, the accurate clinical term for priests who were guilty of the charges is *hebephiles* (sexual preference for children in their early years of adolescence)—rather than pedophiles [see Cantor 2018].

<sup>8</sup> Yet, only 217 or 5.4% of those priests were criminally charged by civil authorities. Of the 217 priests that had criminal charges brought against them, 64% were convicted. John Jay Report, *supra* note 3.

charter was the adoption of a “zero tolerance” policy. Background checks became mandatory for most employees and many volunteers. In the event of a charge of sexual abuse, the accused was removed from duty and dioceses were required to alert the authorities and to conduct an investigation. The Church also issued new rules disallowing ordination of men with “deep-seated homosexual tendencies” [Mullady 2011: 294-305].<sup>9</sup> In 2002, Pope (now Saint) John Paul II stated that “there is no place in the priesthood and religious life for those who would harm the young” [John Paul II 2002].<sup>10</sup>

By 2008, the Catholic Church in the United States had trained 5.8 million children to recognise and report abuse. It had run criminal checks on 1.53 million volunteers and employees, 162,700 educators, 51,000 clerics and 4,955 candidates for ordination. It had also trained 1.8 million clergy, employees, and volunteers in creating a safe environment for children.<sup>11</sup>

According to the Jon Jay report, 75% of the incidents of sexual abuse took place between 1960 and 1984, and almost 70% of the abusive priests were ordained before 1970. The study noted a sharp decline in abuse incidents after 1984 and a declining percentage of accusations against priests ordained in recent years.<sup>12</sup>

The Holy See’s Permanent Observer at the United Nations at The Hague provided information to the CAT showing that between 2004 and 2013, the Congregation for the Doctrine of the Faith (the Vatican congregation charged with investigating abuse claims) received “credible accusations” against 3,420 priests. In the majority of cases, the alleged abuse occurred between 1950 and 1989. During the 2004 to 2013 time period, the Holy See dismissed 848 priests from the priesthood due to these allegations being found to be true. In another 2,572 cases, mainly involving elderly priests, the men were ordered to have no contact with children and were

<sup>9</sup> “Pope Benedict XVI noted that the Vatican has repeatedly stated that men with a homosexual orientation should not be admitted to the priesthood even if they performed no homosexual acts”.

<sup>10</sup> Father Hans Zollner, S.J., Vice-Rector of the Pontifical Gregorian University, President of the Centre for Child Protection, and Member of the Pontifical Commission for the Protection of Minors, recently told the newspaper *La Stampa* that “in most cases it is a question of homosexual abuse.” Letter of Archbishop Carlo Maria Viganò, *supra* note 7.

<sup>11</sup> Catholic News Service (19 December 2008 – 1 January 2009).

<sup>12</sup> Abuse, of course, continues in some places. See Joshua Pease, *The sin of silence: The epidemic of denial about sexual abuse in the evangelical church*, *The Washington Post*. 31 May 2018 (focusing on evangelical churches but also noting that Larry Nassar used his prestige as a doctor for the USA Gymnastics program to sexually assault young women) [Pease 2018].

ordered to retreat to a life of prayer and penance [Wooden 2014; Vatican Radio/CNS 2014].<sup>13</sup> Overall, it seems that the Church's many actions have helped curtail abuse.<sup>14</sup>

### III. The Convention Against Torture

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the *Convention*) is an international instrument, under the purview of the United Nations [UN 1984]. The *Convention* aims to prevent torture and cruel, inhuman degrading treatment or punishment around the world. It requires member nations to take steps to prevent torture within their borders, and it forbids states to transport people to any country where there is reason to believe they will be tortured. One hundred and fifty-five nations, including the Holy See, have signed on to the *Convention* and thereby have become State Parties.<sup>15</sup>

The Committee Against Torture (CAT), is a body created by the *Convention* to monitor implementation of the *Convention* by State Parties. State Parties periodically provide reports on implementation of the *Convention*. The CAT examines these reports and may also consider complaints or communications from other sources. It then sets forth its concerns and recommendations for the State Party in the form of "concluding observations". The CAT is the panel that called the Holy See forward to explain its handling of the sex scandal, and some of its members have suggested that the individual acts of sexual abuse and rape committed by Catholic priests constitutes torture for which the Church is responsible under the *Convention* [Davies 2014b].

The fundamental argument advanced by at least one member of the CAT was that when priests coerced or seduced minors into having sex, this constituted rape,<sup>16</sup> and that – in and of itself – though lacking any indication of a desire to torture or other markers (like captivity, extreme brutality, extraction of information, military or police actors, etc.), legally amounted to torture for which the Vatican should be held responsible. This was a horribly strained reading of the *Convention*.

<sup>13</sup> Around this same time, Pope Francis appointed a Commission for the Protection of Children [Vatican Radio/CNS 2014].

<sup>14</sup> The 2018 Pennsylvania grand jury report confirms this timeline [see Gately 2019].

<sup>15</sup> The *Convention* is said to be binding not only on its signatories, but also on all states as a codification of customary international law [Burgers, Danelius 1988].

<sup>16</sup> This is not a disputed point; it constitutes statutory rape in United States' jurisdictions.

The *Convention* both prohibits torture and requires State Parties to take effective measures to prevent it within their borders and territories under their jurisdiction [UN 1984]. Article 1 of the *Convention* defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions [UN 1984: 1.1.].

No fair interpretation of this language could make it apply to individual acts like those charged in the Catholic Church sex scandal, but the American government went even further to make this clear.

The American delegation at the negotiations for the *Convention* proposed that in order to be guilty of torture, the prosecutor must prove that the perpetrator specifically intended to torture. While that proposal was not adopted in the *Convention*, it was adopted by the U.S. Senate as a limiting interpretation for domestic purposes [Burgers, Danelius 1988; Copelon 2008]. Thus, “with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain...”<sup>17</sup> That does not seem to have been the intent of the accused in these cases.

The relevant federal regulation for the *Convention*, 8 C.F.R. § 208.18 (Implementation of the Convention Against Torture), provides:

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<sup>17</sup> *Convention Against Torture* (Declarations and Understandings made upon ratification), reservation II(1)(a). See *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (noting that rape and domestic violence may constitute sufficient persecution to support an asylum claim, but that, to rise to the level of torture under the Torture Convention, the same acts would require the court to consider “the intent of the persecutor(s), whether the suffering will be imposed for one of the purposes specified ... and whether it will likely be inflicted with the knowledge or acquiescence of a public official with custody or control over the victim”).

- (a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention...
- (2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture...
- (4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:
- (i) The intentional infliction or threatened infliction of severe physical pain or suffering;
  - (ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (iii) The threat of imminent death; or
  - (iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.
- (5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.
- (6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.
- (7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

Obviously, the individual sex acts that some members of the CAT have suggested as a potential violation of the *Convention* would not rise to the level of torture as understood by the United States or the United States Senate [Shafer 2003].

#### **IV. Rape, by Itself, Does not Constitute Torture**

As a starting point, it seems very unlikely that the international community would actually want rape (especially statutory rape) to equate with torture [Copelon 2008:

259].<sup>18</sup> If rape truly constituted torture, a defendant likely could be charged with one or the other but not both crimes.<sup>19</sup> That, of course, would also mean that once a perpetrator had committed torture, there would be no additional punishment for also raping the victim. Similarly, after committing rape there would be no additional punishment for torture. Surely that would not serve the best interests of the international community. From the earliest points in modern international law, as with domestic law, torture and rape have been considered distinct crimes.<sup>20</sup> Perpetrators who commit both crimes have been eligible to be punished for both of them, not just one or the other. The law should stay that way.

### A. Traditional Legal Analysis

Criminal law is based on elements of a crime. To secure a conviction, the prosecutor must prove each element. Sometimes the elements of one offence are entirely included within the elements of another crime. Thus, the crime of aggravated assault includes all of the elements of simple assault. In that case, simple assault is said to be a lesser included offence. If the defendant is convicted of the greater offence, he may not also be convicted of the lesser one, as that would constitute double jeopardy. By comparing the elements of two crimes, one can determine whether the elements of one crime are completely included in the elements of the other. If so, a perpetrator may be punished for one crime or the other, but not both. As long as each crime has at least one element that is not included in the other, they may be separately charged and punished upon conviction.

Under the *Convention's* definition of torture [UN 1984: 1.1] the elements of the charge are: 1) the intentional infliction on a person; 2) of severe physical or mental

<sup>18</sup> Noting that punishing gender violence as torture “may be insufficient and even counterproductive to the goal of preventing gendered torture” [Copelon 2008: 259]. If the CAT were to rule against the Church it “would represent a legally unsupportable position and perverse interpretation of the treaty, actually weakening its effectiveness” [Rivkin, Casey 2014].

<sup>19</sup> Double charging in such a case, when all of the elements of one crime are totally encompassed in the elements of the other crime, would constitute double jeopardy. In addition to being a violation of the U.S. Constitution, Article 14 (7) of the International Covenant on Civil and Political Rights provides: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

<sup>20</sup> Torture is also listed as one of the grave breaches of the Geneva Conventions of 1949 [ICRC 1949]. While the Geneva Conventions also prohibit rape, it is not treated the same as torture. See *Id.*, art. 76 of Protocol I (specifying obligations for protection of women against rape) [see also Aswad 1996] (noting that under international law rape, even by government officials, “is categorized as cruel, inhuman, or degrading treatment” and that it “does not rise to the level of torture”).



pain or suffering; 3) for such purposes as interrogation, punishment or intimidation or coercion or a third person, or “for any reason based on discrimination of any kind”, and 4) when perpetrated or instigated by or with the consent or acquiescence of a State official or person acting in official capacity [Copelon 2008: 231].

The traditional elements of the crime of rape are: sexual penetration,<sup>21</sup> force, and lack of consent.<sup>22</sup> Many modern jurisdictions have eliminated the element of force, relying solely on lack of consent, but either way, rape has elements not included in torture, and torture has elements not included in rape. As such, they are distinct crimes.<sup>23</sup>

While rape is not included within the definition of torture, it is easy enough to see how it can serve as an element of torture. Rape is a horrific, degrading act. It is no less of a torture (indeed it may be a greater torture) for a prisoner to be taken out of a cell on a regular basis to be publicly raped than it would be for that same prisoner to be taken out and publicly beaten [Kooijmans 1986]. In other words, a brutal rape may be a way to intentionally inflict “severe mental or physical pain or suffering” [Amnesty International 1991],<sup>24</sup> and thereby constitute an element of torture, but that does not mean that every rape by itself legally constitutes torture.

## B. The Evolution of the False Argument

The movement to punish rape under international law really grew out of the women’s movement in the 1980s [Cherneva 2011; Copelon 2008: 231].<sup>25</sup> There

<sup>21</sup> “Most of the alleged victims were not raped: they were groped or otherwise abused, but not penetrated, which is what the word ‘rape’ means. This is not a defense—it is meant to set the record straight and debunk the worst case scenarios attributed to the offenders” [Donohue 2018].

<sup>22</sup> The International Criminal Court’s definition of the War Crime of rape sets forth the following elements:

- 1) 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.
- 2) The invasion was committed by force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such a 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.

Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter Elements of Crimes], art. 8(2) (b) (xxii)-1.

<sup>23</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>24</sup> “In some countries rape by government agents is a common method of torture inflicted on women detainees”). For several examples, see Rychlak, Adolphe 2017.

<sup>25</sup> Noting that Catherine MacKinnon was on this campaign by 1993.

was concern that rape was not seen as a truly serious crime. By bringing it into international law discussions, it elevated the seriousness with which it would be seen and increased the punishments that would be available [Aswad 1996; Cherneva 2011; Sellers 2008; Copelon 2008: 231].<sup>26</sup> In fact, one author who strongly urged that “rape is always torture” explained her basis for that position: “defining rape as torture triggers incomparable advantages [to the prosecution] under law” [Cherneva 2011: 339].<sup>27</sup> That is not, however, how a just legal system operates [see McGlynn 2008].<sup>28</sup>

There is logic in viewing abusive violent rape, usually by police or military officials against women held in captivity, as an element of a war crime, an element of a crime against humanity, an element of genocide, or an element of torture if the other elements of the relevant crime are also present. It is not unusual for oppressive regimes to use rape as a form of torture [Rychlak, Adolphe 2017]. It is not, however, necessary or appropriate to shoehorn the crime of rape into a statute or a definition where it does not belong, just to be sure that perpetrators are punished. International law “is already sufficiently clear to allow prosecution of rapists. Nearly every treaty, convention, and agreement that deals with human rights incorporates a rule of law prohibiting attack on the honor of women and protecting against rape.” [Aydelott 1993: 606-607]. Article 27 of the Fourth Geneva Convention, for instance, states that women are: “protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault” [ICRC 1949: III, 1, 27<sup>29</sup>].

The Geneva Conventions provide a sound basis in positive law for the proposition that human rights are to be protected, but they do not define rape as torture, unless it meets very specific conditions. In Article 147, “torture” refers specifically to “the infliction of suffering on a person in order to obtain from that person or from another person, confessions or information.” One could use rape for that purpose

<sup>26</sup> “These developments are the result of the global woman’s human rights movement’s insistence” [Copelon 2008: 231].

<sup>27</sup> Going on to argue that all rapes are the same and should be treated as such [Cherneva 2011: 339].

<sup>28</sup> Rejecting the idea that all rape is torture, suggesting that the label ‘torture’ might be reserved for those rapes in which state officials are participants.

<sup>29</sup> This is one of four multilateral conventions signed on 12 August 1949 in Geneva. Taken together, these documents are referred to as the Geneva Convention. See arts. 7(1)(g) and 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute, describing rape as also constituting a grave breach and serious violation of the Geneva Conventions [Rome Statute 1998].

and thereby be guilty of torture, but not every rape (much less, every groping or fondling) is like that. As such, rape by itself does not provide all of the necessary elements to make out a case of torture.

Some commentators have looked to the occasional situations where rape satisfied an element of torture, and due either to sloppy analysis or political motivation, they have argued that since rape has been held to constitute torture in some cases, rape itself legally is torture [Cherneva 2011].<sup>30</sup> That is simply not correct, but that seems to be the argument that came from the CAT.

Felice Gaer was the U.S. representative and a vice-chair of the CAT. She was also the author of a paper urging that rape constitutes torture [Gaer 2012: 293, 296]. Her argument was largely based on the CAT's General Comment No. 2 [General Comment No. 2 2008], a statement intended to enhance the States Parties' ability to prevent torture. According to Gaer, "A key outcome of General Comment No. 2 was... to include the name rape as a form of torture" [Gaer 2012: 296]. In fact, she claimed that the CAT had "embedded the concept of rape as torture in its ongoing work, procedurally" [Gaer 2012: 303]. She documented her claim by noting that the committee had referred to rape at least 46 times in compliance reviews between 2002 and 2011. Of course, as others have noted, the references to rape by the CAT began only after Gaer joined the CAT.<sup>31</sup> Moreover, the overwhelming invocation of the *Convention* in these cases was by potential victims seeking to prevent removal to a place where they would likely be raped.<sup>32</sup> That was not a legitimate concern with the cases involving the Catholic Church.

<sup>30</sup> An example of a paper that might add to this confusion is Pierce 2002. Early in the paper, Pierce writes that the "particular issue of this study... is to highlight the series of situations wherein the role and the function of the rape is unmistakably enacted as torture and should be recognized as such." *Id.* at 538. Later, however, she uses language that could easily be misunderstood as applying to any rape:

It is vital to understand this sexual violence as torture not only when it provides a part of the episode of torture but when it is the only form of torture being applied and furthermore when the torture being applied consists solely of conventional rape, that is to say that other than being raped the victim is not subjected to any other form of torture.

*Id.* at 539. Peirce's logic holds up, but it takes a careful reading to understand that she is not saying all rape is torture.

<sup>31</sup> After she joined the CAT, it "began frequently to question States parties regarding various forms and incidences of gender violence both in official custodian situations, in institutional contexts beyond prisons, and in non-State violence, including rape..." [Copelon 2008: 231].

<sup>32</sup> See *In re Extradition of Santos*, 795 F. Supp. 2d 966 n.4 (C.D. Cal. 2011) (noting that the courts can review the Secretary's decision to extradite, referencing 5 U.S.C.A. § 706(2)(a)).

Looking at those 46 specific references to rape by the CAT, most related to rapes of prisoners, rapes committed by law enforcement, rapes committed by militia and other state actors, and at least one was a positive reference to Finland's efforts to assist rape victims [Gaer 2012: 304-305]. In other words, the CAT did not say that rape constituted torture, but it appropriately took note of brutal cases where rape might be used to satisfy one of the elements of a war crime. None of the 46 cases came anywhere close to being a "statutory rape" or anything else comparable to the allegations in the Catholic Church sex scandal.

To read Gaer's article, one would think that General Comment No. 2 was a broad policy announcement regarding a new understanding of rape in international law. When, however, one reads the single spaced, seven (plus a bit more) pages of General Comment No. 2, one finds only two references to rape. The first comes in paragraph 18, which states that the CAT has held governmental authorities responsible for encouraging or permitting "gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking." The second reference comes in paragraph 22, which notes particular concern about female victims. It goes on, however, and says that "Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse." Comment 2 does not establish new crimes or elevate the crime of rape to a higher level. The logical analysis is that rape – in a context such as repeated rapes of a prisoner – can be an element of torture. It is not, as Gaer suggested, a matter of equating rape with torture.

### **C. International Definitions**

While commentators can make claims and arguments, perhaps the best evaluation of rape and torture comes from looking at international legislation and decisions from international tribunals. Such an investigation reveals that international law does not and never has held that the crime of rape, standing alone, legally constitutes torture.

#### **1. The International Criminal Court**

Perhaps the most significant gathering of international criminal law experts in history has taken place over the past few decades with the development, establishment, and ultimate operation of the International Criminal Court (ICC).<sup>33</sup>

<sup>33</sup> The ICC was created through the Rome Statute, a treaty adopted on 17 July 1998 [Rome Statute 1998]. By 11 April 2002, the sixty countries necessary for the Rome Statute's entry into force ratified the treaty. The entry into force occurred on 1 July 2002 [Rychlak 2017;

The ICC is a permanent court established to investigate and try individuals for serious violations of international humanitarian and human rights law. In an unprecedented international “statute”, these experts defined the crimes within the ICC’s jurisdiction (genocide, crimes against humanity, war crimes, and the crime of aggression) by translating human rights norms into the language of criminal law.<sup>34</sup> These experts did not, however, equate rape with torture.<sup>35</sup>

The Rome Statute of the ICC identifies rape, along with “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as a crime against humanity, when it is carried out in a widespread or systematic attack against any civilian population.<sup>36</sup> Obviously it is a grave crime, but even when carried out in a widespread manner, it does not dissolve into the charge of torture, and no case at the ICC has held otherwise.

## 2. Other International Tribunals

While the ICC’s structure is persuasive, there have been no cases brought before the ICC that deal with this matter. There is, however, relevant precedent in two long-standing international tribunals, The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

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Rychlak, Czarnetzky 2018; Czarnetzky, Rychlak 2003]. In an address to the U.N. General Assembly, President Donald J. Trump said: “The United States will provide no support and recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority” [Dillon 2018].

<sup>34</sup> This is obvious from the names of the crimes: genocide, crime of aggression, war crimes, and crimes against humanity. The legislative action involved in drafting the Rome Statute is, therefore, an example of what Thomas Aquinas called a *determinatio*: the legislator’s attempt to translate a precept of “natural law” (e.g., “murder is wrong”) into positive law to help foster the common good (e.g., the Model Penal Code’s delineation of the elements of various types of homicide, *see* Model Penal Code §§ 210.0–210.4 (1985)).

<sup>35</sup> That has not, however, stopped some from arguing criminal liability for the Church and the pope. *See Accusing Pope Benedict*, *supra* note 3 (Attorneys for the accusers “are misusing this new and fragile instrument of international law as a political tool—in other words, they are using it in precisely the way that the ICC, at its inception, was intended to avoid. Indeed, the filing of the petition itself was organized as a media event—the kickoff to a major ‘European tour,’ replete with... press conferences in European capitals. The [accusers’] attorneys are not acting as lawyers; they are facilitating a publicity stunt. That is shameful behavior that brings disrepute to the legal profession and, because the petition itself is fallacious, ultimately will not advance the interests of abuse victims.”)

<sup>36</sup> Like the Tribunal for Rwanda, the ICC adopted the exact language of the Genocide [Rome Statute 1998: art. 6; Genocide Convention 1948: 754; Statute of the Rwanda Tribunal 1994: art. 6].

### a. The International Criminal Tribunal for the Former Yugoslavia

Rape was widely used as a weapon in the former Yugoslavia, and it was prosecuted as a war crime.<sup>37</sup> Article 5 of the ICTY legislation [Statute of the International Criminal Tribunal for the Former Yugoslavia 2008], entitled Crimes Against Humanity, reads:

The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other their inhumane acts.

In other words, despite the horrific nature of the charges, the statute lists rape and torture as separate crimes, which they are.

Rape, of course, can be an element of torture, an element of war crimes, an element of genocide, and more.<sup>38</sup> As early as 1999, Judge Vohrah explained that acts of forcible penetration: can constitute an element of a crime against humanity, (enslavement under Article 5(c), torture under Article 5(f), rape under article 5(g), violations of the laws and customs of law (torture under Article 3 and Article 3(1)(a) of the Geneva Conventions, and a grave breach of the Geneva Conventions (torture under Article 2(B)) [Callamard 1999].

Note, however, that the act of penetration is only *an element* of the crime.

Among the first judgments from the tribunal that addressed the topic of torture was *Prosecutor v. Delalic* (the *Celebici* case).<sup>39</sup> The case concerned a Muslim-run

<sup>37</sup> In the former Yugoslav republic of Bosnia-Herzegovina, rebel Serbs were charged with using mass rape as part of their plan to “ethnically cleanse” Bosnia of all non-Serbs. [Aydelott 1993].

<sup>38</sup> For some horrific examples, see Rychlak, Adolphe 2017. See also Rychlak 2018, quoting an escaped female prisoner of ISIS: “That night, I was married to eight different men and divorced eight times. Each man raped me three or four times. When all this was over, we were taken back to the room where all the girls were being held. They made us walk naked through the big room where all the men were sitting. We were barely able to walk. This scenario was repeated every week—it was like a nightmare.”

<sup>39</sup> *Prosecutor v. Delalić et al.* (Čelebići case), Judgement, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998.

detention camp that held Serbian victims. The judgment found that the camp's deputy commander raped two Serbian female prisoners in order to intimidate the other female detainees and to discourage dissent among the prisoners. In her article *Sexual Torture as a Crime under International Criminal and Humanitarian Law* [Sellers 2008], Patricia Viseur Sellers used the *Celebici* case to describe the horror when "a person, usually a woman, suffers rape in a detention setting":

Sexual penetrations or rapes, in a detention center are usually forced upon women who have not bathed in days, who have not brushed their teeth in weeks, who are starving, who are recovering from or are still in shock from seeing loved ones killed or mutilated, or who have witnessed their houses burned down. The actual rape is usually perpetrated upon a person who is utterly and physically exhausted and terrorized. Her body is stiff. Her mind sends no hormonal signals to release lubricating fluids to the body. The person is forced to witness and participate in her own torture--the forceful penetration. The victim is also forced to engage in unwanted touching, fondling, and kissing. Usually the victim is forced to be nude during the rape and to listen to the perpetrator insult her, her race, or her ethnic group. The rape is often committed in public, even if only one other person is present, maybe another guard at the side of the perpetrator who waits for his turn. Such facts certainly amount to the infliction of severe pain and severe mental suffering even before a victim-survivor is stricken with Post Traumatic Stress Disorder. Rape as torture is an act of sexual penetration that is separate and differentiated from, and unrelated and adverse to the sexual relations one experiences in their everyday life.<sup>40</sup>

No one could deny this would constitute torture. The physical act of penetration (the actual rape) provides one of the elements toward the crime of torture, and the other elements are there as well. When viewed this way, consideration of rape as an element of torture makes perfect sense, but that does not equate rape with torture.

The rape that these victim/survivors endured is in no way akin to allegations made in the Catholic sex scandal. Victims in the *Celebici* case were prisoners, and they were raped (or forced into other sexual situations) as an alternative to (or

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<sup>40</sup> The Trial Chamber held that rapes like this amounted to torture as a war crime under Article 3 of the Yugoslav Statute [see also Rychlak, Adolphe 2017].

perhaps in addition to) being beaten, starved, and physically mistreated in other ways. Sellers went on to explain that in addition to the two victim/survivors in the *Celebici* case that suffered the torturous rape described above, other prisoners had equally horrifying experiences, quite unlike the charges filed against even the worst priests.<sup>41</sup> Horrific sexual abuse should be punished, and it is quite logical that it will sometimes serve as an element of the crime of torture.<sup>42</sup> By itself, however, rape—especially in the manner described in almost all of the allegations against the Catholic Church—does not include all of the elements to constitute the crime of torture.

### **b. The International Criminal Tribunal for Rwanda**

The ICTR was established in 1994 by the UN Security Council in order to investigate the Rwandan Genocide and other serious violations that took place in Rwanda in 1994, when members of the Hutu majority, many of whom were associated with the government, slaughtered 500,000 to 1,000,000 Tutsi and others over the course of about 100 days. Rape and sexual violence were extensively used as military and political tools [Haffajee 2006].

The structure and jurisdiction of the ICTR is governed by the Annex to Security Council Resolution 955 [Statute of the Rwanda Tribunal 1994]. That Annex gives the ICTR subject matter jurisdiction over crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>43</sup> Article 3(g) of the statute of the ICTR identifies rape

<sup>41</sup> As one commentator wrote after this case, international law “evinces a momentum towards addressing through the legal process, the use of rape *in the course of a detention and interrogation* as a means of torture” [Strumpfen 1999].

<sup>42</sup> See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, 21 July 2000 (horrific rape in an effort to extract information from the victim); *Prosecutor v. Kunarac*, : IT-96-23-T&IT-96-23/1-T, Feb. 22, 2001(women raped and sold into slavery).

<sup>43</sup> The Annex provides:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;...
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

Id. at Art. 4.



as a crime against humanity if the rape was “committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial, or religious grounds” [Statute of the Rwanda Tribunal 1994: art. 3 (g)]. In an appropriate case, rape may be prosecuted at the ICTR as an outrage on personal dignity, a crime against humanity and the customs of war, or a form of genocide [Pierce 2002: 545].

The foundational ICTR case for prosecuting rape was *Prosecutor v. Akayesu*.<sup>44</sup> In that case, the former bourgmestre (mayor) of Taba Commune was prosecuted for gang rape and individual rape, which Akayesu oversaw. The indictment included 207 charges of rape and other inhumane acts as crimes against humanity in addition to referencing rape in the genocide counts. In its decision, the tribunal made several important findings with regards to crimes of sexual violence.

For current purposes, the most important aspect of the *Akayesu* decision is that the ICTR analysed rape and sexual violence using the conceptual framework of torture. It did not convict on these grounds, but the chamber stated that rape can constitute torture under Article 3(f) of the ICTR Statute 37, because it can be used for “purposes such as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity”.<sup>45</sup>

In a later case, *Prosecutor v. Musema*,<sup>46</sup> the ICTR (Trial Chamber I) affirmed the definition of rape asserted in *Akayesu*, saying: “the essence of rape is... the aggression that is expressed in a sexual manner under conditions of coercion...” Notwithstanding the adoption of a broad definition for rape, the ICTR demanded a high burden of proof for the crime of rape. As one analyst explained: “In *Musema* and subsequent cases, the ICTR trial chambers have required a high burden of proof on the prosecution to prove rape under both the individual and command responsibility provisions of the ICTR Statute” [Haffajee 2006]. In terms of command responsibility (holding officials responsible for rape committed by

<sup>44</sup> *Prosecutor v. Akayesu* (Akayesu Judgment), Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998). See Also *Prosecutor v. Gagic*, Indictment, Case No. IT-96-23, Indictment, P 4.8 (26 June 1996). [indictment/english/foc-ii960626e.htm](http://indictment/english/foc-ii960626e.htm).

<sup>45</sup> *Akayesu* Judgment, Case No. ICTR-96-4-T 597.

<sup>46</sup> *Prosecutor v. Musema* (Musema Trial Chamber Judgment and Sentence), Case No. ICTR-96-13-A, Judgment and Sentence, 226-229 (Jan. 27, 2000); see also *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14, Judgment and Sentence (16 May 2004) (endorsing Akayesu).

those under their command), in the absence of a direct order to rape, the ICTR (Trial Chamber II) found it “impossible to infer” that the superiors knew or had reason to know rapes or “other inhumane acts” were committed based on general orders to kill or to exterminate [Haffajee 2006: 209].

So, the experience of the ICTR is that rape can be punished under international law. Rape can also be part of a prosecution for genocide and similar crimes. It must be recognised, however, that in all of these cases, the actual rape constitutes only one element of the crime in question. Once again, rape by itself does not legally constitute torture [Wood 2004: 274].

#### **D. The Vatican Cannot be Held Responsible for these Individual Acts**

CAT’s General Comment No. 2 provides “The Convention imposes obligations on State Parties and not individuals” [General Comment No. 2 2008: section IV]. It goes on, however, to say that State Parties “bear international responsibility for the acts and omissions of their officials and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law”. The General Comment further notes that responsibility could relate back to the State for individual acts in those cases where the State’s indifference or inaction amounts to a form of encouragement or *de facto* permission [General Comment No. 2 2008: section V].

In her article, Gaer writes: “The obligation of the State party to prevent torture necessarily extends to identifying and assigning responsibility for impermissible acts by non-state or private actors. Such acts are covered if a state fails to exercise due diligence” [Gaer 2012: 297]. She continues: “there is indeed an array of circumstances in which the acts of private individuals triggers [sic] state responsibility for torture or ill treatment under the CAT.”

Importantly, General Comment No. 2 expresses concern about situations “where the state authorities or others... know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish.” Such inaction even can be understood to constitute a form of encouragement or *de facto* permission.

This, of course, is the analysis that Gaer uses to suggest that the Vatican itself is responsible for acts of abuse committed by individual priests, but it is not a viable argument.

As an initial matter, the priests who have been accused of abuse come from all around the globe. Few if any are residents of the Vatican City State, and none or virtually none of the crimes took place in Vatican City. Thus, under basic jurisdictional principles that the United States Constitution provides to all defendants, criminal prosecutions should not take place at the Vatican. Yet only there does the Vatican have a police force and the ability to enforce criminal law. Only there would the pope have the ability to have people jailed. His jurisdiction over priests and bishops around the world pertains solely to spiritual matters. As Archbishop Silvano Tomasi, Apostolic Nuncio at the United Nations in Geneva, explained to the CAT:

While the Holy See does not have the competency or the ability to initiate criminal proceedings against crimes that are committed in territories outside Vatican City State, it makes every effort to conduct ecclesiastical proceedings against clerics against whom credible accusations of sexual abuse of minors have been presented. This is done without substitution for or prejudices of other processes that are to be applied by the competent judiciary system in the state in which the accused person resides. Civil law regarding the reporting of the crime to the authorities should always be followed [Vatican Radio/CNS 2014].

The most the Vatican can do is defrock a priest or suspend him. Even canonical penalties are essentially voluntary, because the Holy See has no effective way to enforce its orders outside of the Vatican City State.<sup>47</sup>

All of the accused priests are subject to the criminal laws of the nation where they reside or where the alleged crime took place. They are entitled to be prosecuted at that location, not shipped halfway around the world, away from all witnesses and evidence. In fact, if the pope were to summon accused priests to Rome, he would

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<sup>47</sup> Saint Basil the Great, a Doctor of the Church, writing in the 4th-century, described how the early Catholic Church dealt with those guilty of sexual abuse among the clergy.

Any cleric or monk who seduces young men or boys, or who is apprehended in kissing or in any shameful situation, shall be publicly flogged and shall lose his clerical tonsure. Thus shorn, he shall be disgraced by spitting in his face, bound in iron chains, wasted by six months of close confinement, and for three days each week put on barley bread given him toward evening. Following this period, he shall spend a further six months living in a small segregated courtyard in custody of a spiritual elder, kept busy with manual labor and prayer, subjected to vigils and prayers, forced to walk at all times in the company of two spiritual brothers, never again allowed to associate with young men [Scheel 2018].

likely make criminal prosecution by the state much more difficult. Victims of actual torture certainly would not want that.

### **E. False Motivation and Abuse of Authority**

The strained reading of the *Convention*, the refusal to recognise efforts by the Church to create a safe environment, the rejection of precedent and logic, and the willingness to deny basic rights to potential criminal defendants raises the question of the CAT's impartiality.<sup>48</sup> According to news accounts, Chairman Claudio Grossman considered recusing himself from this matter due to a potential conflict because of his open support for abortion and same-sex marriage [Balan 2014]. The more serious concern, however, relates to Vice Chair Felice Gaer.

Gaer is on the record as being “fiercely pro-choice” when it comes to abortion [Balan 2014]. According to the Catholic Family and Human Rights Institute, “Felice Gaer told a New York audience how she planned to use her position on the UN torture committee to push abortion.”<sup>49</sup> That seems to be precisely what she did. As noted earlier, she advocated for her agenda (that rape constitutes torture) at the CAT hearings, and in her law review article she cited the CAT proceedings to argue that the law is evolving in the direction that she advocates. In other words, she created her own precedent.

In her law review article, Gaer bragged about the CAT criticizing countries for their strict abortion laws [Gaer 2012: 305]. In fact, When Gaer was interrogating Archbishop Silvano Tomasi, Apostolic Nuncio at the United Nations in Geneva, she worked from a report prepared by an anti-Catholic abortion rights group [High Commissioner for Human Rights at the United Nations 2014; Ertelt 2014]. She said: “This committee has found repeatedly that laws that criminalize the termination of pregnancy in all circumstances can violate the terms of the Convention” [Johnson 2014]<sup>50</sup>. According to news accounts, her argument was that the Church's

<sup>48</sup> “From what I am reading, this is no more than UN propaganda trying to make the Catholic Church seem ‘extreme’ for not advocating for abortion in the case of rape or sexual assault” [Johnson 2014; Gennarini 2014].

<sup>49</sup> C-FAM, *Friday Fax*, 9 May 2014: <http://www.wfmd.com/onair/the-frederick-faith-debate-7038/vatican-turns-table-on-torture-committee-12336184/> (letter from Wendy Wright, Vice President for Government Relations and Communications for the Catholic Family and Human Rights Institute).

<sup>50</sup> Nuncio Silvano Tomasi, the Permanent Observer of the Holy See to the United Nations in Geneva, said the Church's pro-life position protected human rights. “The Holy See condemns the torture of anyone, including those tortured and killed before they are born”.

refusal to endorse abortion rights amounted to “psychological torture” of women and therefore should be repealed [Bedard 2014].

At the end of the two-day hearing, Gaer asked Archbishop Tomasi whether the Holy See viewed sexual abuse as a form of torture as defined by the *Convention*. Later, Gaer spoke to the media and suggested that Tomasi agreed with her that the *Convention* should be interpreted along the lines that she has advocated in her law review article and elsewhere. “According to the AP, Tomasi didn’t dispute the United Nations’ argument that raping children could be considered torture” [McCoy 2014]<sup>51</sup>. Gaer said afterward that she considered Tomasi’s response to be a clear admission by the Holy See that sexual violence can be a form of torture.”<sup>52</sup> This was so unfair and such a breach of protocol that the Holy See Mission in Geneva sent out a press release,<sup>53</sup> the Catholic League for Religious and Civil Rights filed a formal complaint asking to have Gaer removed from the case [High Commissioner for Human Rights at the United Nations 2014],<sup>54</sup> and Tomasi released his own letter, in which he wrote:

It is troubling that a Co-Rapporteur of the Committee would, in advance of the issuance of concluding observations, speak publicly about the proceedings surrounding a review, interpret the representations of a State Party to reinforce that Committee member’s previous non-official statements, or seek to telegraph a particular interpretation of the Convention that may be relevant to the Committee’s ultimate findings and conclusions. Rightly or wrongly, an outside observer could readily interpret such an outside communication by a Committee member—and one delivered so soon after the presentations—as evidencing both a predetermined view and an intention to generate public sentiment or pressure in the midst of internal Committee deliberations and drafting. If the Addis Ababa Guidelines to which the Committee is bound make anything clear, it is that the Committee must ensure that the review process and individual Committee members are independent

<sup>51</sup> Also noting that the Vatican’s chief spokesman, Rev. Federico Lombardi, said last week that linking the child abuse scandal with torture would be “deceptive and forced”.

<sup>52</sup> John Heilprin and Nicole Winfield (Associated Press), *Vatican defrocks 848: Is sex abuse of children torture?*, Christian Science Monitor, 6 May 2014.

<sup>53</sup> Communiqué to the Press, Geneva, 9 May 2014.

<sup>54</sup> The Solidarity Center for Law and Justice also sent a letter to Claudio Grossman, Chairman of the United Nations Committee against Torture, asking that he prohibit Gaer from further participating in that review (8 May 2014).

of outside influence, and a reasonable observer must see them as such [High Commissioner for Human Rights at the United Nations 2014].

Unfortunately, this is just part of a pattern of misbehaviour and bias reflected in Vice Chair Gaer's interactions with the Catholic Church.

## V. Conclusion

Sexual abuse of minors is a terrible crime. The Catholic Church teaches that it is a mortal sin. The Church has responded to the recent scandal and has made things better. The Vatican does not have police authority or jurisdiction around the globe, but credible allegations are referred for handling to domestic authorities, and wrongdoers are being punished.<sup>55</sup> Moreover, the Church is continuing to develop plans and effective programs that are being modelled by other institutions, like schools, youth groups, and sports teams where the potential of abuse is a concern [Bedard 2014].

<sup>55</sup> In the 11<sup>th</sup> century, St. Peter Damian wrote a lengthy treatise, Letter 31, the Book of Gomorrah (*Liber Gomorrhianus*), examining and condemning sodomy in general and clerical homosexuality and pederasty in particular. One of the main points of the book was his insistence on the responsibility of the bishop or superior of a religious order to curb and eradicate these vice from their ranks. In a letter to Pope Leo IX, Saint Peter Damian demanded that priests be handed over to secular authorities for punishment, and other actions to weed out the cancer of sexual abuse in the Church. He wrote:

Listen, you do-nothing superiors of clerics and priests. Listen, and even though you feel sure of yourselves, tremble at the thought that you are partners in the guilt of others; those, I mean, who wink at the sins of their subjects that need correction and who by ill-considered silence allow them license to sin. Listen, I say, and be shrewd enough to understand that all of you alike are deserving of death, that is, not only those who do such things, but also they who approve those who practice them.

The pope responded with general agreement, but with a degree of leniency. He said that clerics, caught up in the "execrable vice" of sodomy "profess, if not in words, at least by the evidence of their actions, that they are not what they are thought to be." Continuing, the pope wrote: "So let it be certain and evident to all that we are in agreement with everything your book contains, opposed as it is like water to the fire of the devil." He said that this "foul impurity" must not be allowed to spread. "[T]hose who, of their own free will, have practiced solitary or mutual masturbation or defiled themselves by interfemoral coitus, but who have not done so for any length of time, nor with many others, shall retain their status, after having 'curbed their desires' and 'atoned for their infamous deeds with proper repentance'. However, there was no retaining of clerical status for those who "have defiled themselves by either of the two kinds of filthiness which you have described, or, which is horrible to hear or speak of, have sunk to the level of anal intercourse" [Blum, Damian 1990: letters 31-60; Scheel 2018].

Rape is also a horrid crime and a mortal sin. Sometimes it is used as a weapon of war or an implement of torture. In those most heinous of situations, rape appropriately can be an element of the crime of torture, genocide, war crimes, or crimes against humanity. That does not, however, mean that every rape can or should legally be classified as torture. To hold such, even if it suited the political motivations of some judges and commentators, would defy all logic and legal analysis, and ultimately—by eliminating separate punishment for the separate crimes—it would make victims less safe.

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