

CONFLICT-RELATED SEXUAL VIOLENCE: PATRIARCHY'S BUGLE CALL

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*“He is her natural protector.” “Against what?” I inquired.
As a matter of fact, the thing a woman is most afraid to
meet on a dark street is her natural protector. Singular.¹*

I. INTRODUCTION

Sex is a weapon. Wars are gendered. Wars are gendered in that interests of men always undergird regulation of war—and against such backdrops, gender parity is more an ideal than a reality.² Protection of women, when finally introduced through law, emphasizes the “vulnerability” of women, thereby affecting the mindset with which one approaches the crimes men commit against women. In legal classifications, women are often placed with vulnerable communities and the marginalized.³ The narrative automatically transforms to one of weakness against strength. It establishes power dynamics.

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I dedicate this paper to the memory of the man who taught me to critically evaluate *everything* – including what he taught – my childhood English Literature teacher Mr. Ranjit Weeraratne.

1. CHARLOTTE PERKINS GILMAN, *THE LIVING OF CHARLOTTE PERKINS GILMAN: AN AUTOBIOGRAPHY* 72 (The University of Wisconsin Press 1991).

2. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 385 (1999) (“There is considerable empirical evidence that women are affected by armed conflict in ways that men are not.”).

3. R. Charli Carpenter, “Women, Children and Other Vulnerable Groups”: *Gender Strategic Frames and the Protection of Civilians as a Transnational Issue*, 49 INT’L STUD. QUARTERLY 295 (2005).

I argue that within this “man”-made societal structure predicated upon sexual prowess, men able to suppress their lustful feelings are perceived as the protectors of women. They are bestowed with nobility for doing no more than merely abstaining from committing that which is illegal and immoral. The ones who *cannot* abstain from committing such crimes are regarded as having committed crimes of “passion” as opposed to crimes of “grave violence.” Add conflict into the picture, and sexual violence transforms to a tool and a weapon with which women, families, communities, and at times, entire nations, are controlled.

I argue that the explained dynamic is premised on patriarchy and categorize patriarchy that contributes to conflict-related sexual violence (CRSV) under two levels. The primary level is where men attempt to establish control over the enemy by “conquering” the bodies of enemy women.⁴ This “us versus them” dynamic leads to the secondary level of patriarchy. At this level, CRSV is upsetting for most not due to it being a violent crime against humanity but due to the perceived *shame* it brings upon nations or communities of which women are victims of CRSV.⁵ These women are rendered unchaste; they have produced “non-nationals” or are incapable of reproduction,⁶ and they are therefore unsuitable to be given in marriage to *their* men. The stigma to which the victim-survivors are subsequently subjected arises through this secondary level of patriarchy.

Women’s history is often addressed with selective amnesia—and CRSV against women has been largely swept out of the annals of history. Entire nations and communities have forgotten or overlooked the many violations committed against women during liberation wars and conflicts targeted at winning ethnic or racial parity or democracy. In this light, I engage in a critical evaluation of underlying patriarchal assumptions and tones implied in laws drafted for the protection of women. I seek to establish that these laws and policies do not necessarily remove stereotypical gendered perspectives that perpetuate discrimination against women and that sexual violence has been used as a strategy as well as a justification for subsequent ostracism of victims of CRSV.

This article evaluates how closely CRSV is associated with patriarchy through a three-part analysis: an evaluation of laws, an inquiry into the temporality and the geography of the offence of CRSV, and an exploration of whether CRSV has been utilized as a tool of war. I respond to three primary questions: “how,” “when,” and “where” does CRSV occur? I explore “how” CRSV, through its various manifestations, has been employed as a strategy of warfare or a war tactic. Exploration of “when” CRSV occurs is framed as the “question of the temporal scope,” while the inquiry into “where” CRSV occurs is referred to as the “question of the geographical scope.”

4. Akachi Odoemene, *The Nigerian Armed Forces and Sexual Violence in Ogoniland of the Niger Delta Nigeria, 1990-1999*, 38(2) ARMED FORCES & SOC’Y 230, 241 (2012).

5. *Id.*

6. Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT’L L. 326, 330 (1994).

I first review the legal regime and terminology pertaining to CRSV. I then explain how sexual violence transforms into conflict-related sexual violence by establishing a temporal or geographic connection with a conflict. I posit that the assessment of whether sexual violence has transformed into CRSV is dependent on the technicalities of legal interpretation that are determined in accordance with the temporal and geographical realities underpinning CRSV. Examples from specific conflict contexts are used in this part to draw links between sexual violence and conflict. This segment also advances the position that CRSV is not solely linked to armed conflict; it can be tied to other conflict contexts such as the apartheid, freedom-struggles, and instabilities associated with post-war contexts. Thus, this exploration forms the basis for an evaluation of deep-rooted gender inequalities that cause, perpetuate, and prevent redressing CRSV against women. Finally, the third part grapples with the hypothesis that CRSV is a strategy, tactic, or tool of warfare. Through these three segments, I present the postulate that CRSV is a war against women. This entire assessment grapples with the subordination thrust upon women in law and society.⁷

The three segments make two main points *in toto*. Firstly, I argue that archaic approaches premised on patriarchy govern all aspects of CRSV. Accordingly, this article sheds light on patriarchy's dogma that encompasses the legal regime and the domestic and international approaches attempting to eliminate or deal with CRSV. Secondly, I contend that patriarchy's dogma impacts processes adopted subsequent to CRSV being committed—thus making CRSV the patriarchy's war against women.

The first argument pertaining to patriarchy is presented in two ways: first, as a norm underlying laws which continue in the form of protective mechanisms adopted for the benefit of women caught in the crossfires of two conflicting parties; and secondly, as the factor that underlies both the so-called "vulnerability" of women and the subsequent stigma to which CRSV victims are subjected. How strategies of warfare utilize "sexual consumption" of women and the presence of impunity concerning CRSV further indicate that establishing patriarchal propensities hinders women's freedoms and the processes of law and "justice."

My second argument—that CRSV is patriarchy's war against women—establishes that considering women as the "bearers of cultural identity" leads to the assumption that control over women's bodies can bring advantages in conflict contexts. The same perception leads to sexual violence in conflict, sexual violence through practices such as forced marriages framed as mechanisms preventing CRSV, and subsequent ostracism of victims of CRSV. Thus, I argue CRSV is a war against women that transcends conflict contexts.

7. This paper in no way makes an attempt to dismiss the many crimes inclusive of CRSV that are committed against boys and men. However, my sole focus on CRSV against women is justified by the innumerable sexual atrocities committed against women in conflict contexts that have been entirely disregarded or scantily dealt with in law.

Historiological and legal hermeneutical assessments of CRSV laws frame my approach in this article. A historiological approach facilitates discourse on the history of such laws. Through this discourse, I inquire into *how* legal provisions and approaches to CRSV have developed over a particular time period in history. The assessment has been temporally confined to the seven decades that followed the introduction of the four Geneva Conventions of 1949. Restricting the temporal scope was deemed necessary to focus the analysis on contemporarily applicable laws. Further, strictly positivist or textual approaches prove insufficient to generate an in-depth understanding of the nuances of how socio-cultural, linguistic, and gendered perspectives bear on CRSV. The gendered historiological approach adopted herein maintains that man-made laws influenced by centuries of gender inequality and patriarchy are incapable of leading to unbiased rationales. The historiological approach reveals broader societal and contextual issues; thus, I have adopted legal hermeneutics as an additional tool of interpretation. Legal hermeneutics aid by transcending law's strict textual meanings and questioning socio-political, socio-cultural, and socio-historical contextual realities that undergird the laws. By fusing legal hermeneutics with historiology, I explore inherent biases in the law, assess contexts that lead to CRSV, and conclude that the use of CRSV as a tool of war results in it being a *per se* war against women.

II. LEGAL REGIME AND TERMINOLOGY: A CRITIQUE

This section assesses the formal rules governing CRSV that emanate from *lex specialis* applicable in times of armed conflict. I do not venture into an assessment of the human rights perspective arising from a *lex generalis* perspective, as it transcends the scope of the paper. Further, I do not assess laws pertaining to sexual violence in conflict that predate the Geneva Conventions of 1949, as they fall outside the historiological window selected for analysis.

During an armed conflict, the parties to the conflict and the affected civilians are all governed and protected by the application of International Humanitarian Law (IHL) arising under the four Geneva Conventions of 12 August 1949⁸ and the Protocols Additional thereto of 1977.⁹ In addition to the specific principles and provisions pertaining to sexual violence in conflict and the protection

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 32–33, Jan. 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609, 614 [hereinafter Protocol II].

extended to civilians, *hors de combat*, the wounded, sick and the shipwrecked, the general principles of IHL, such as the rule against causing superfluous injury, military necessity, and military advantage,¹⁰ may cumulatively be interpreted as prohibiting sexual violence directed against the combatants of the opposing forces, as well. The basic rule that can be extracted from this cumulative approach, then, is that neither the combatant-parties to the conflict, nor the non-combatants, should be subject to sexual violence.

Protection and care extended to women during an armed conflict in the four Geneva Conventions of 12 August 1949 are restricted and do not expressly deal with prohibitions of CRSV. The provisions discuss treating women with consideration to their sex,¹¹ such as providing separate quarters from men in the event that women are prisoners of war,¹² taking the sex of the prisoner into account when utilizing labor of such person,¹³ granting special protection to pregnant women and mothers with infants,¹⁴ and taking sex into account when imposing disciplinary punishment on internees.¹⁵ Article 3 common to all Geneva Conventions (CA 3), which deals with conflicts “not of an international character,” does appear to include an implicit prohibition of CRSV. The requirement to treat individuals humanely without distinction based on *inter alia* sex implicitly creates this prohibition.¹⁶ The proposed humane treatment and the notion of equality are coupled with the absolute prohibitions of posing violence to life and person,¹⁷ outrages upon personal dignity, and humiliating and degrading treatment.¹⁸ Article 27 of Geneva Convention IV states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁹ However, the Conventions neither identify CRSV as a widely used war-time crime committed against women nor captures the expansive nature of CRSV that transcend the listed sexual offences. Furthermore, the Conventions themselves have incorporated gendered language tied to honor and indecency in the relevant provision and do not expressly incorporate the broader aspects of CRSV. These failures point toward international law’s dismissal of sexual crimes against women.

Visible in the Geneva Conventions’ implicit provisions to prevent CRSV and the gendered language associated with Article 27 are elements of patriarchal subordination of women. The inference that CRSV is an “outrage upon personal

10. *See generally id.*

11. Geneva Convention I, *supra* note 8, at art. 12; Geneva Convention II, *supra* note 8, at art.12; Geneva Convention III, *supra* note 8, at art.14; Geneva Convention IV, *supra* note 8, at art. 27.

12. Geneva Convention III, *supra* note 8, at art. 25, 29, 97, 108; Geneva Convention IV, *supra* note 8, at art. 76.

13. Geneva Convention III, *supra* note 8, at art. 49.

14. Geneva Convention IV, *supra* note 8, at art. 38, 132.

15. Geneva Convention IV, *supra* note 8, at art. 119.

16. Geneva Conventions I–II, at art. 3(1).

17. Geneva Conventions I–IV, *supra* note 8, at art. 3(1)(a).

18. *Id.* at art. 3(1)(c).

19. Geneva Convention IV, *supra* note 8, at art. 27.

dignity”²⁰ radiates a sense of patronization and gender inequality, and they contribute to the objectification of women through law. It is pertinent to question how an offence committed against an individual becomes an outrage of *such person’s* dignity. Why is a victim made to “lose” dignity for having experienced the violation—whereas the law neglects making any judgment calls on the dignity of the perpetrator who has committed such reprehensible violations? Patriarchal views of women’s *worth* being tied to their sexual *purity* is evident in this language. Such terminology coupled with societal perspectives paves the path for victims to be stigmatized subsequent to suffering the violation on the premise that their “dignity” has been “outraged.” Not only does the language of law radiate gender inequality, but it also leads to calcification of archaic social views concerning women’s sexuality and autonomy. The legal terminology thus contributes to the objectification of women—the very crime it claims to address.

Almost three decades after the entry into force of the Geneva Conventions, in 1977, an interest in protecting women has appeared in the framework of IHL by virtue of Article 76 of Protocol I Additional to the Geneva Conventions.²¹ This, on a strictly positivist approach when no value is assigned to legal hermeneutics, appears to be a direct attempt at prohibition of CRSV. According to Article 76 (1), “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault.”²² Further, pregnant women and mothers with dependent infants are to be given special care when detained or interred in relation to armed conflict.²³ Pronouncement of the death penalty against such women is prohibited to the maximum extent feasible.²⁴ Having specific provisions for the protection of women is commendable, but the issues these provisions raise are equally noteworthy.

Article 76(1) of Protocol I Additional to the Geneva Conventions raises two significant issues, one of hermeneutics and the other of temporality. The question of temporality only requires a brief description to emphasize law’s failures to respond to heinous offences that impact women. Consider the severe and mass-scale incidents of CRSV during World War II (hereinafter WWII). For instance, the army and the air force of the Russian Soviet Federative Socialist Republic faced allegations of wartime rape;²⁵ imperialist forces of Japan were reported to have maintained “comfort stations” comprised of women captured, held in detention, and forced to provide sexual services to Japanese soldiers;²⁶ and German

20. Geneva Conventions I–IV, *supra* note 8, at art. 3(1)(c).

21. Protocol I of 1977, *supra* note 9, at art. 76.

22. *Id.* at art. 76(1).

23. *Id.* at art. 76(2).

24. *Id.* at art. 76(3).

25. See generally Hsu-Ming Teo, *The Continuum of Sexual Violence in Occupied Germany, 1945-49*, 5 *WOMEN’S HISTORY REV.* 191 (1996); see also GILES MACDONOGH, *AFTER THE REICH: THE BRUTAL HISTORY OF THE ALLIED OCCUPATION* (2007).

26. YUKI TANAKA, *JAPAN’S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE U.S. OCCUPATION* (Routledge 2002); PEIPEI QIU ET AL., *CHINESE COMFORT WOMEN: TESTIMONIES FROM IMPERIAL JAPAN’S SEX SLAVES* (Oxford University Press 2013).

armed forces were alleged to have raped many thousands of Jewish women who were in their captivity.²⁷ Allied forces were also perpetrators of sexual violence in occupied Germany,²⁸ and the Red Army rampantly committed rapes and other forms of sexual violence.²⁹ Given that these violations occurred prior to the introduction of the Geneva Conventions of 1949, non-inclusion of explicit provisions prohibiting CRSV underscores the inability of law to consider gender in its response and to take into cognizance matters of contemporary relevance requiring immediate attention. Against this backdrop, one may also question whether this issue would have been addressed sooner and more firmly had those violations occurred predominantly against men.

In light of the above, I venture to analyze the terminology-related issues that Article 76(1) raises. The provision states “women shall be the *object* of special respect.”³⁰ There are three issues with this word choice. Firstly, the use of the word “object” implicates an entrenched history of women being treated as objects that belong to, and are used, possessed, controlled, and discarded by, men.³¹ Secondly, according to the provision, women are subject to “special respect.” This respect does not arise out of women’s own self-worth, but is once more tied to a man’s, a family’s, a community’s, a tribe’s, a religion’s, or a nation’s perspective of women. Thirdly, associating the word “respect” with a provision prohibiting rape, forced prostitution, and other forms of indecent assault forewarns why societies subsequently consider victims of CRSV as women who have lost their “respect.” The value initially attributed to them as “objects of respect” does not continue to apply once a woman has been subject to sexual violence; her respect is therefore given and taken by men, re-entrenching the power dynamics associated with the very offences that such provisions seek to prevent. The fundamental framework extending “protection” to women during armed conflicts uses language ridden with patriarchal condescension. This approach therefore creates, facilitates, and legitimizes subsequent stigmatization of women who have been victims of sexual violence.

The equation of women with objects is deeply entrenched in law’s and society’s patriarchal notion of women as property. Andrea Dworkin, in her seminal book, *Pornography: Men Possessing Women*, discusses how women have been treated as chattel in a chapter aptly titled “Objects”:

27. SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST (Sonja M. Hedgepeth & Rochelle G. Seidel eds., Brandeis University Press 2010); Jeffrey Burds, *Sexual Violence in Europe in World War II, 1939–1945*, 37 POL. AND SOC’Y 35, 43 (2009).

28. Teo, *supra* note 25, at 191.

29. MACDONOGH, *supra* note 25, at 25.

30. Protocol I of 1977, *supra* note 9, at art. 76 (emphasis added).

31. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 101–102 (Plume 1979); see generally Fionnuala Ni Aolain, *Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence during War*, 1 THEORETICAL INQ. L. 307 (2000).

Through most of patriarchal history . . . women have been chattel property. Chattel property, in the main, is movable property – cattle, wives, concubines, offspring, slaves, beasts of burden, domesticated animals. Chattel property is reckoned as part of a man’s estate. . . . Chattel property for most part is animate and sensate, but it is perceived and valued as commodity. To be chattel, even when human, is to be valued and used as property, as thing.³²

This highlights two aspects of Article 76’s treatment of CRSV against women. Secondly, it establishes that women are subject to sexual violence on the premise that whosoever lays their hands on a woman during an armed conflict may own such woman as property to expand their sense of victory. Second, the protection extended to women is premised on them being “objects of special respect” to men. Yet the Commentary on the Additional Protocols adds that “the rule relates to respect for the person and honour.”³³ The coupling of honor with offences of sexual violence determines many of the other consequences that victim-survivors of sexual violence, especially in conflict contexts, are compelled to undergo. When the law determines that a person loses honor through suffering sexual violence, stigma is the natural outcome.

How then is “honor” to be understood in the light of Article 76? The Oxford Dictionary of English defines honor as “high respect,” “great esteem,” “a person or thing that brings esteem,” and “the quality of knowing and doing what is morally right.”³⁴ It further states that the use of the word honor to refer to “a woman’s chastity or her reputation for being chaste” is “dated.”³⁵ Even though the chastity aspect is regarded as “dated” by linguists, it continues to be used in law. This suggests that a woman’s “honor” is lost by her being subjected to an offence. Other offences committed within or without contexts of armed conflict are not similarly tied to “honor,” “modesty,” or “dignity.” Men and women subject to torture do not lose honor. Torture is “illegal,” “inhuman,” and “degrading treatment,”³⁶ and, when committed in a widespread or systematic manner within a conflict context, it amounts to crimes against humanity.³⁷ Similarly, general principles of International Humanitarian Law address conflict-related offenses stemming from violations of proportionality, military necessity, or military advantage as war crimes, crimes against humanity, and genocide.³⁸ Those who

32. DWORKIN, *supra* note 31, at 101–02.

33. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 893 (Martinus Nijhoff Publishers 1987).

34. *Honour*, OXFORD DICTIONARY OF ENGLISH, <https://en.oxforddictionaries.com/definition/honour> (last visited Mar. 11, 2020).

35. *Id.*

36. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85.

37. Rome Statute of the Int’l Crim. Ct. art. 7, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

38. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES (Cambridge University Press 2005) Chapter 3 and 4; ANNE

have suffered violations may even be regarded as national symbols of heroic sacrifice.³⁹ Survivors of CRSV, on the other hand, face the stigmatization of lost honor, repute, or even utility as a human being. Thus, use of the word “honor” in the legal context is vague, redundant, and may be interpreted as nullifying the protective effect that the provision seeks to create.

Given the nature of the physical, psychological, and sociological trauma that sexual offences create, CRSV should be treated as no less than an act of torture. Instead, the emphasis on “honor” embedded into the law perpetuates discrimination against women. Such stereotypical approaches obstruct the transformative potential of law through which societal perceptions could be altered. This in turn sets in motion the vicious circle of normalizing and trivializing violence against women. Assessing the possibility of interpreting torture-related provisions so as to incorporate CRSV, Christine Chinkin states:

Violence against women . . . has not been readily viewed as torture, or as being imputable to the State, because of its widespread commission by private actors within the private arena of the home. Yet rape in international armed conflict, which is largely committed by military agents of the State under public authority, has also been ignored.⁴⁰

Women tortured through sexual violence therefore do not often qualify as survivors of torture. International law further inhibits the possibility of torture being raised in connection with CRSV due in part to its failure to adequately account for cultural barriers and stereotypes concerning CRSV. For example, “many Bosnian women . . . were ashamed to come forward and testify publicly about the torture they endured.”⁴¹

The commentary on paragraph 1 of Article 76 states that:

When a special reference to women was introduced in Article 27 of the Fourth Convention in 1949, the drafters of that provision had in mind the abuses perpetrated particularly during the Second World War, when countless women of all ages had been subjected to terrible outrages. Extending the protection to all women in territories involved in conflict reveals the intent to proscribe such acts in general.⁴²

QUINTIN, ANTOINE A. BOUVIER & MARCO SASSOLI, *HOW DOES LAW PROTECT IN WAR?* 10 (3 ed. Int’l Comm. of the Red Cross).

39. Toni Pfanner, *Editorial: War Victims*, INT’L REV. OF THE RED CROSS (June 2009), <https://international-review.icrc.org/articles/editorial-war-victims>.

40. Chinkin, *supra* note 6, at 334.

41. Elizabeth A. Kohn, *Rape as a Weapon of War: Women’s Human Rights during the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 204 (1994).

42. Commentary of 1987 Protection of Women art. 76 (June 8, 1977), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=933D8E1A38F44530C12563CD00436BC5> [hereinafter Commentary].

Even though said “outrages” had been overlooked in the core Conventions adopted after the end of WWII, it is commendable that an express legal provision was subsequently perceived as necessary to deal with CRSV. However, this was introduced after a lapse of several decades. Moreover, by admission of the commentary itself, Article 76 is premised on the world’s reactions to the “terrible outrages” and “abuses” to which women were subjected during World War II. “An extremely strong reaction of anger, shock, or indignation” is the definition of “outrage.”⁴³ A crime is “an action or omission which constitutes an offence and is punishable by law.”⁴⁴ The commentary neither refers to violence nor to crimes. It reduces sexual violence, forced prostitution, and the sexual enslavement of women to “outrages” and “abuses”—thereby belittling the gravity and continuing trauma of CRSV.⁴⁵

The provision further fails to list rape and forced prostitution as acts of torture. Article 75(2)(b) of Protocol I and Article 4(2)(e) of Protocol II refer to violent crimes such as rape, enforced prostitution, and any form of indecent assault as “outrages upon personal dignity.”⁴⁶ Hermeneutically, this overly simplified terminology incorporates moral judgments on the victim-survivor’s dignity into the legal provisions. Further, even if one attributes more weight to the positive aspects of the provisions, they possess no power of enforcement.⁴⁷ This negates their capacity to prevent, counter, or redress CRSV effectively. The diluted provision merely reinforces stereotypical perspectives concerning women’s worth.

The grave-breaches regime of IHL has also failed to do justice by women. Articles 11 and 85 of Protocol I do not incorporate offenses of a sexual nature as breaches of the Protocol. Commenting on the Geneva Conventions and their Additional Protocols, the United Nations (U.N.) opines that the failure to categorize sexual violence as a violent crime contributes to the trivialization of such offenses.⁴⁸ What is embodied is mere protection and prevention as opposed to penalization of such violence.⁴⁹ This trivialization is further evident in the failure of provisions on grave breaches to specifically refer to offenses of a sexual nature.⁵⁰ Omitting sexual offenses from being listed under grave breaches is perhaps a by-product of many hundreds of years of considering sexual violence against women as “collateral damage” during an armed conflict which does not require the same level of attention to detail as any direct damage would receive.

43. *Outrage*, OXFORD DICTIONARY OF ENGLISH, <https://en.oxforddictionaries.com/definition/outrage> (last visited Mar. 11, 2020).

44. *Crime*, OXFORD DICTIONARY OF ENGLISH, <https://en.oxforddictionaries.com/definition/crime> (last visited Mar. 11, 2020).

45. Commentary, *supra* note 42.

46. Protocol I of 1977, *supra* note 9, at art. 75; Protocol II of 1977, *supra* note 9, at art. 4.

47. Chinkin, *supra* note 6, at 332.

48. U.N. Women 2000, *Sexual Violence and Armed Conflict: United Nations Response* (1998).

49. *See id.*

50. Geneva Convention I, *supra* note 8, at art. 50; Geneva Convention II, *supra* note 8, at art. 51; Geneva Convention III, *supra* note 8, at art. 130; Geneva Convention IV, *supra* note 8, at art. 147.

Due to the lacunae highlighted above, liberal judicial interpretations are needed to ascertain CRSV as constituting a serious offence. Through judicial interpretations, CRSV may be presented as falling within inhuman treatment, and the willful causing of great suffering or serious injury to body or health.⁵¹ Recognizing the above reality and also taking into account the existing cultural perspectives and sensitivities concerning CRSV, the Eritrea and Ethiopia Claims Commission (EECC) stated:

[R]ape is such a sensitive matter in their culture that victims are extremely unlikely to come forward; and . . . the evidence available is likely to be far less detailed and explicit than for non-sexual offenses. The Commission accepts this . . . To do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict.⁵²

The approach of the EECC is commendable for two reasons. Firstly, it acknowledges the socio-cultural contexts within which such offenses are committed, complained of, tried, and determined. Secondly, the EECC uses its position to emphasize that CRSV cannot be regarded as collateral damage. The Court further states that rape causes “intentional and grievous harm” to victims and that it “is an illegal act that need not be frequent to support State responsibility.”⁵³

Given that IHL has failed to expressly criminalize CRSV or consider it a grave breach, it is necessary to assess whether International Criminal Law provides means of redress. Article 7(1)(g) of the Rome Statute lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as “crimes against humanity.”⁵⁴ At the drafting stage, women and men expressed different perceptions concerning how sexual offences committed in contexts of war should be addressed. Hon. Lauro L. Baja Jr.⁵⁵ of the Philippines, who was the Undersecretary of Foreign Affairs, opined that “[t]he crime of rape should be gender-neutral and classified as a crime against persons.”⁵⁶ At the plenipotentiaries, Ms. Judith Trotter, the Former Ambassador of New Zealand to the Embassy of Italy, proposed a gendered

51. Chinkin, *supra* note 6, at 332 (“States are under an obligation to make grave breaches of the Geneva Conventions and Protocols subject to the jurisdiction of their own courts and punishable by severe penalties.”).

52. Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea’s Claims (Eri. v. Eth.), 26 R.I.A.A. 291, ¶ 77 (Eri.–Eth. Claims Comm’n 2005).

53. *Id.* at 79.

54. Rome Statute of the Int’l Crim. Ct. art. 7, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

55. Mr. Baja later faced allegations of trafficking, involuntary servitude, and forced labor of Marichu Suarez Baoanan, who was lured to the U.S. by the Baja family on the promise of employment as a nurse and was subsequently compelled to work as a domestic servant. *See* Baoanan v. Baja, 627 F. Supp. 2d 155 (S.D.N.Y. 2009).

56. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Official Records Volume II*, ¶ 9, A/CONF.183/13 (Vol.11).

perspective to these offenses.⁵⁷ And Ms. Indai Sajor, an Observer for the Asian Centre for Women's Human Rights, stated:

Though rape had been clearly listed as a war crime since the end of the First World War, women had to struggle to have the crime of rape listed in the statutes of the International Tribunals for the Former Yugoslavia and Rwanda and to have resources devoted to the investigation of such crimes when those Tribunals were created. The Conference must ensure that the results of its deliberations would not be yet another setback for women victims of wars and crimes against humanity.⁵⁸

The final Rome Statute does not recognize the particular impact that sexual offenses committed in war-time contexts have on women. The differences in perspectives between men and women contributing to the drafting process highlights the ongoing dangers of confining international lawmaking to an "old boys club"⁵⁹ that—unwittingly or otherwise—perpetuates the evils of patriarchy. As outlined above, gender neutrality is not an appropriate approach, because it denies the opportunity to interpret the particularities of offenses dependent upon gendered aspects of the crime. Adopting a gender-sensitive approach would have allowed law to respond more effectively to realities of sexual violence in conflict.

The Rome Statute provides an interesting connection between war crimes under the Statute and the grave breaches of the Geneva Conventions. In Article 8 (2)(b)(xxii), rape, sexual slavery, enforced prostitution, and forced pregnancy are listed as war crimes.⁶⁰ The provision explains that those offenses and "other forms of sexual violence" constituting a grave breach of the Geneva Conventions are to be regarded as war crimes.⁶¹ Despite offenses of sexual violence not being expressly listed as grave breaches of the Geneva Conventions, the war crimes provision of the Rome Statute paradoxically refers to grave breaches of the Geneva Conventions. It is unclear whether International Criminal Law perceives CRSV to have been indirectly dealt with as a grave breach of IHL under the grave-breaches regime of the Geneva Conventions. Ms. Sajor has however argued:

The Statute of the Court must reflect the present state of international law. Rape, sexual slavery, enforced prostitution, enforced pregnancy, mass rape and other forms of sexual and gender-based persecution

57. *See id.* at 100.

58. *Id.* at 119–20.

59. Kohn, *supra* note 41, at 209 (citing DAVID P. FORSYTHE, HUMANITARIAN POLITICS 173 (1977)).

60. Rome Statute of the Int'l Crim. Ct., art 8(2)(b)(xxii), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

61. *Id.*

must be specifically listed as war crimes, crimes against humanity and grave breaches of the human rights of women.⁶²

The threshold of responsibility in International Criminal Law lies in its reliance on the mental element, or the *mens rea*, of the offence.⁶³ The pertinent question then is whether intent or lack thereof ought to be proven in establishing that CRSV has occurred in a particular circumstance. Consider the explanation of “forced pregnancy” provided in Article 7(2)(f) of the Rome Statute:

[F]orced pregnancy means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.⁶⁴

Accordingly, “widespread” and “systematic” forced pregnancies carried out within conflict contexts are automatically associated with “the intent of affecting the ethnic composition of any population.” However, in the unfortunate but likely event of the said provision being interpreted literally, there is ample room for the defense to raise the argument that there was no “intent” to alter the ethnic composition and that therefore the crime cannot be brought within the scope of crimes against humanity.⁶⁵

This gives rise to three other issues. The first relates to technical aspects of Article 6. This article fails to capture forced pregnancies even though it can amount to changing the ethnic composition of a particular population—resulting in genocide. Thus, the explanation’s reference to changes to ethnic composition are restricted to Article 7. According to the Rome Statute, genocide means “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁶⁶ However, as explained above, Article 6’s categorization of genocide does not consider forced pregnancies. The only provision which is related to pregnancies is Article 6(d), which states that measures intended to prevent births within the group are regarded as genocide.⁶⁷ Thus, an inconsistency is created when “forced pregnancies” are considered as crimes intended to affect the ethnic composition of a population without the same being regarded as a crime amounting to genocide. This disregards the fact that widespread and

62. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *supra* note 56, at 120.

63. Rome Statute of the Int’l Crim. Ct., art. 30, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

64. Rome Statute of the International Criminal Court, art. 7(2)(f), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

65. *But see generally* Allison Ruby Reid-Cunningham, *Rape as a Weapon of Genocide* 3 *Genocide Std. & Prevention: An Int’l J.* 279 (2008).

66. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

67. *Id.* at art. 6(d).

systematic forced impregnations during conflict circumstances resulting in births of “war babies”⁶⁸ changes the ethnic composition, thereby also leading to the possibility of forced pregnancies—leading to the destruction in whole or part of a national, ethnical, racial, or religious group.

Secondly, the explanation of forced pregnancies is tied to “widespread and systematic” attacks.⁶⁹ This means that forced pregnancies that do not fall within the “widespread and systematic” category could be completely ignored by International Criminal Law.

Thirdly and at a subtler level, the explanation reveals its gender biases by describing the ethnic composition of a population as based on men.⁷⁰ This is further accentuated by the public sentiment that a “war baby” is a non-national.⁷¹ “War babies” possess the nationality of the father, or are considered illegitimate persons (who are, at times, also rendered Stateless), which contributes to altering the ethnic composition of a selected group of people, thereby making forced impregnations a method of genocide.⁷² Further, women who give birth to these children are regarded as having violated an unwritten moral code and are considered to be collaborators in the offenses.⁷³ Women who are forcibly impregnated, in addition to being ostracized by society for suffering sexual violence, are compelled to raise—without any substantial support—children who are then themselves stigmatized throughout their lives. This evinces that irrespective of whether drawn from IHL or International Criminal Law, the law remains inadequate to prevent and redress CRSV.

Despite this challenging landscape, some progressive developments have emanated from the reports of the Secretary General on CRSV. The reports, which are released annually, have gradually widened the scope of what is encapsulated within CRSV.⁷⁴ The reports were first released in connection with United Nations Security Council Resolutions 1820,⁷⁵ 1888,⁷⁶ and 1960.⁷⁷ They are the end product of consultation amongst many key stakeholders, including the United Nations Action against Sexual Violence in Conflict, which consists of 13 U.N. entities

68. YASMIN SAIKIA, *WOMEN, WAR AND THE MAKING OF BANGLADESH: REMEMBERING 1971*, 4 (Oxford University Press 2011).

69. Rome Statute of the International Criminal Court, art. 7(2)(f), 2187 U.N.T.S. 90 (entered into force July 1, 2002).

70. *Id.* (“Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”).

71. See generally SAIKIA, *supra* note 68.

72. See generally DONNA SETO, *NO PLACE FOR A WAR BABY: THE GLOBAL POLITICS OF CHILDREN BORN OF WARTIME SEXUAL VIOLENCE* 32 (Routledge 2016).

73. See Burds, *supra* note 27, at 60 (“After the war, such women are generally excoriated as “sexual collaborators who provided the enemy with warmth and comfort.”).

74. U.N. Secretary General, *Report of the Secretary General on Conflict-Related Sexual Violence*, ¶ 1 U.N. Doc. A/66/657*–S/2012/33 (Jan. 13, 2012) (hereinafter U.N. Sec. General).

75. S.C. Res. 1820 (June 19, 2008).

76. S.C. Res. 1888 (Sept. 30, 2009).

77. S.C. Res. 1960 (Dec. 16, 2010).

with the goal of ending sexual violence “during and in the wake of conflict.”⁷⁸ Since 2012, these reports have produced comprehensive definitions of CRSV.⁷⁹ These definitions have transformed and expanded over the years in scope, extent, coverage, and application. The initial definitions determined whether an act amounts to CRSV in relation to the act’s temporal, geographical, or causal nexus to a conflict.⁸⁰ However, the United Nations Secretary General’s Reports of 2017 and 2018 do not subscribe to this restrictive approach.⁸¹ At present, the nexus may arise through a direct or indirect link with the conflict, through the profile of the perpetrator or the victim, a State’s climate of impunity, State-collapse, cross border consequences, or through trafficking of persons committed in times of or in connection with conflict.⁸² This is a progressive development for several reasons. First, it has widened the geographic and temporal scope that allows an act of sexual violence to be regarded as CRSV—the aggravated offense that transcends “normal” sexual violence—and acknowledges the pervasive nature of the offense. Second, this dispenses with the requirement that the offense should be expressly and apparently associated with the conflict. This introduces the notion that conflicts can have undercurrents that can lead to, cause, or perpetuate CRSV. Third, it recognizes personal attributes of the survivors and perpetrators by referring to their “profiles.”⁸³

According to the Guidance Note of the Secretary General, the temporal scope of CRSV is determined by whether sexual violence occurs “in a conflict or post-conflict setting that ha[s] direct or indirect links with the conflict itself or that occur in other situations of concern such as in the context of political

78. United Nations Action Against Sexual Violence in Conflict, *Background*, INVENTORY OF UNITED NATIONS ACTIVITIES TO END VIOLENCE AGAINST WOMEN, <http://evaw-un-inventory.unwomen.org/en/agencies/un-action> (last visited Oct. 18, 2018).

79. U.N. Sec. General, *supra* note 74, at ¶ 3. Conflict-related sexual violence refers to incidents or patterns (for the purposes of listing in accordance with Security Council resolution 1960 of sexual violence, that is rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity against women, men, or children. *Id.* Such incidents or patterns occur in conflict or post-conflict settings or other situations of concern (e.g. political strife). *Id.* They also have a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and / or causal link. *Id.* In addition to the international character or the suspected crimes (which can, depending on the circumstances, constitute war crimes, crimes against humanity, acts of genocide or other gross violations of human rights), the link with conflict may be evident in the profile and motivations of the perpetrator(s), the profile of the victim(s), the climate of impunity / state collapse, cross-border dimensions, and / or the fact that they violate the terms of ceasefire agreement. *Id.*

80. U.N. Sec. General, *supra* note 74, at ¶ 3; U.N. Secretary General, *Report of the Secretary General on Conflict-Related Sexual Violence*, ¶ 5, U.N. Doc. A/67/792–S/2013/149 (Mar. 14, 2013); U.N. Secretary General, *Report of the Secretary General on Conflict-Related Sexual Violence*, ¶ 1, U.N. Doc. S/2014/181, (Mar. 13, 2014); and U.N. Secretary General, *Report of the Secretary General on Conflict-Related Sexual Violence*, ¶ 2 U.N. Doc. S/2015/203, (Mar. 23, 2015).

81. U.N. Secretary General, *Report of the Secretary General on Conflict-Related Sexual Violence*, ¶ 2, U.N. Doc. S/2017/249, (Apr. 15, 2017); and U.N. Security Council, *Report of the Secretary General on Conflict-Related Sexual Violence*, U.N. Doc. S/2018/250, ¶ 2 (Mar. 23, 2018).

82. *Id.*

83. *Id.*

repression.”⁸⁴ CRSV may entail sexual violence occurring in contexts of armed conflict, occupation, or instability that may escalate into an armed conflict, as well as sexual violence committed against those deprived of liberty in connection with a conflict and sexual violence committed in the aftermath of the conflict—especially where rule of law, democracy, and State authority has not yet been reestablished.⁸⁵

Expanding temporality allows for a broader view of the circumstances that may lead to CRSV. Expanded temporality captures CRSV committed *during* an armed conflict as well as during political upheavals, riots, and insurgencies. CRSV that occurs in the aftermath of a conflict in societies ridden with continuous division and unrest can also form part of the expanded temporality. Some may argue that it is impossible to apply IHL to conflicts which have not met the threshold of an armed conflict.⁸⁶ While this technical objection may be applicable to other aspects of armed conflict, owing to its continuing nature and its impact on victim-survivors, IHL and International Criminal Law should continue to apply to CRSV. There is precedent for such a step; indeed, other branches of IHL transcend the temporal scope of an armed conflict, for instance in the context of missing persons.⁸⁷ IHL should consider CRSV in the same light. To propose that *lex generalis* of human rights law should deal with CRSV would result in underplaying the factors of criminality and conflict that aggravate the offense. Thus, the application of human rights law instead of IHL or International Criminal Law to CRSV would prevent the offense from being regarded as graver than a sexual offense committed in circumstances not associated with armed conflict.

Irrespective of circumstances affecting victim-survivors or perpetrators, sexual violence falls outside the parameters of permitted conduct.⁸⁸ I assert that under no circumstances should a perpetrator invoke an exculpatory or mitigatory defense in relation to the commission of CRSV. To understand this idea clearly, let’s compare the offense of CRSV with manslaughter. Even though manslaughter

84. U.N. Secretary-General, *Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence*, 2 (June 2014), <http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>.

85. See generally *id.*

86. *International Humanitarian Law: Answers to Your Questions*, ‘When Does IHL Apply,’ 18, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0703.pdf> (last visited Jan 21, 2020).

87. See generally Danushka S. Medawatte, Implementation of IHL Obligations with Regard to Missing Persons in Post-Armed Conflict Sri Lanka, in Wasantha Seneviratne and Nishara Mendis, *The Continued Relevance of International Humanitarian Law* 31 (2019); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES* 421 (2005).

88. See for instance, Geneva Convention I, *supra* note 8, at art. 50, Geneva Convention II, *supra* note 8, at art. 51, Geneva Convention III, *supra* note 8, at art. 130, and Geneva Convention IV, *supra* note 8, at art. 147. The grave breaches regime of the Geneva Conventions prohibit *inter alia* the willful causing of great suffering or serious injury to body or health not justified by military necessity. *Id.* Sexual violence could therefore, by implication, be brought within the grave breaches regime of the Geneva Conventions. *Id.*

does not occur through acts resulting from permitted conduct, law regards manslaughter resulting from self-defense or sudden provocation⁸⁹ as arising within mitigating circumstances.⁹⁰ One may posit that a person with no intent to unleash sexual violence on a woman yet facing threats to his life may have a self-defense claim that he committed CRSV under duress. However, in circumstances such as these, the one who is committing the act may also be a victim of CRSV. The perpetrator is the one who commands an individual to commit such an act. This is perhaps an instance that should be assessed through vicarious liability, which transcends the scope of this Article. However, it suffices to state that the actual perpetrator cannot claim the benefit of a defense.

Having established the dearth of mitigating circumstances applicable to CRSV, it is necessary to assess how temporality is featured in actual conflict contexts. In *Miguel Castro-Castro Prison v. Peru*, the Inter-American Court of Human Rights stated that torture is prohibited:

[E]ven under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law, or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes.⁹¹

In this case, the common intervener argued that CRSV should be coupled with the prohibition against torture.⁹² The court determined that sexual violence committed against Peruvian women during counterinsurgency measures in Peru constituted torture.⁹³ The right to be free from torture is an absolute and non-derogable right.⁹⁴ The right to be free from CRSV should also be an absolute and non-derogable right, because sexual violence—as found by the Inter-American Court of Human Rights—is no less than torture. To argue otherwise would result in undermining the universal validity of *jus cogens* and *erga omnes*⁹⁵ values interwoven with the core attributes of human rights.

In 2011, the Inter-American Commission on Human Rights acknowledged that discrimination against women emanating from patriarchal approaches lead to

89. MIKE MOLAN ET AL., *BLOY AND PARRY'S PRINCIPLES OF CRIMINAL LAW* 206 (4th ed. 2000).

90. See GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 85 (1998).

91. *Miguel Castro-Castro Prison v. Peru*, J.Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 271 (Nov. 25, 2006).

92. *Miguel Castro-Castro Prison v. Peru*, J. Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 260 (Nov. 25, 2006) arguments of the common intervener.

93. *Miguel Castro-Castro Prison v. Peru*, J., Inter-Am. Ct. H.R., (ser. C) No. 160, ¶¶ 271–76 (Nov. 25, 2006).

94. G.A. Res. 39/46, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 1–2 (Dec. 10, 1984).

95. See Int'l Law Comm'n, *Seventy-First Sess.*, Fourth report on peremptory norms of general international law (*jus cogens*), by Dire Tladi, Special Rapporteur, U.N. Doc. A/CN.4/727, at 31–35 (Jan. 31, 2019), <https://legal.un.org/docs/?symbol=A/CN.4/727>.

CRSV. The Commission stated in *Espinoza Gonzales v. Peru* that sexual violence associated with the counterinsurgency efforts in Peru was “part of a broader context of discrimination against women, who are considered vulnerable” and the use of their bodies by the perpetrators was done “with no apparent motive or any strict connection to the internal armed conflict.”⁹⁶ Identifying that structural, societal, and contextual discrimination against women is prevalent in society helps situate CRSV within the larger schema of patriarchal condescension against women. Discerning CRSV as such is necessary to effectively deal with its root causes. Discrimination augmented by patriarchy artificially creates the notion that women are vulnerable—thereby reinforcing the power dynamics between the sexes. This in turn creates the opportunity for CRSV to be used as a tool of psychological warfare against men of “enemy” States or forces by creating the impression that “*your women*” are now at the disposal of “*our men*.”⁹⁷ The “us versus them” binary that distinguishes two groups, undergirded by the perception that women of the oppressed group were “defiled” by the men of the oppressing group, adds to the stigma that is subsequently utilized in further oppressing victim-survivors of CRSV.

CRSV may be aggravated in contexts where racial or ethnic differences underscored by gender discrimination enable the commission of sexual violence with impunity.⁹⁸ Thereafter, such violence is trivialized. There is a general layer of discrimination against all women in a given society, and a “second layer” encompasses intersectionality, while a “third layer” addresses women of a particular community being subject to sexual violence by the men of their own community. Due to these layers of discrimination, women have no escape from CRSV irrespective of what group they belong to:

[Women] are raped by men from all sides – both enemy and ‘friendly’ forces. There have been reports of rapes and other forms of sexual abuse committed by members of United Nations peacekeeping forces; women are not free from interference even from those who are in the territory with an international mandate to restore international peace and security.⁹⁹

As it is not my intent to engage in a general discourse of discrimination, further analysis of this aspect is deliberately omitted from this article. Further, I do not assess the lawless conduct of peacekeeping forces or entities with international

96. *Espinoza Gonzales v. Peru*, Case No. 11.157, Inter-Am. Ct. H.R., ¶ 86 (Mar. 31, 2011).

97. See Adrienne Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 951–54 (1997) (describing the practice as the “deliberate defilement of the culture of the oppressed”).

98. See *id.*; see generally Sue Armstrong, *Rape in South Africa: An Invisible Part of Apartheid's Legacy*, 2 FOCUS ON GENDER 35 (1994); SAIKIA, *supra* note 68.

99. Chinkin, *supra* note 6, at 326.

mandates. However, I will now proceed to analyze the second and third layers of discrimination I have listed above.

The second layer of discrimination is bounded with intersectionality. In this layer of discrimination, women belonging to a particular ethnic, religious, or racial group within that society face discrimination on two counts. First, due to their ethno-religious or racial backgrounds deemed inferior in that particular society;¹⁰⁰ and, second, due to their status as a woman. This “double discrimination” creates a conducive environment for men belonging to the society’s dominant group to unleash sexual violence against women of the non-dominant group with minimal or no repercussions. Crimes of apartheid South Africa have evinced such violations.¹⁰¹

I propose that the third layer of discrimination occurs when men subject women of their own group to sexual violence with impunity, often under the guise of affording protection. To expand, I would argue that sexual violence against women committed within camps of internally displaced persons of a particular community by the men of the same community falls into this category.¹⁰² The impunity and lack of accountability in such contexts not only arise due to the exigent factual circumstances but also due to the inability of legal regimes such as IHL to effectively prevent CRSV from occurring amongst more or less homogeneous groups that are not expressly regarded as parties to the conflict.¹⁰³ Not only has IHL failed in this regard; the inadequacies of *lex generalis* mechanisms, such as human rights, to undertake an effective monitoring and evaluation role has also contributed to the creation of a legal vacuum.

Examples of sexual violence reported from several jurisdictions help substantiate the second and third layers of discrimination described above. Writing of the Holocaust from a legal perspective, Ni Aolain states that Jewish women sexually abused by Germans were immediately murdered, and that “non-attached” women “were prey to the *Judenrat* [an administrative agency imposed by Germany] for sexual favors: protection in exchange for sexual exploitation.”¹⁰⁴ Jewish women suffered sexual violence ranging from forced nudity to forced sterilization.¹⁰⁵ Laws prohibited interracial relationships—yet the wrath of those laws only engulfed victims of sexual violence, i.e., the Jewish women, but never the

100. *Id.* at 328; see also Wing, *supra* note 97.

101. Armstrong, *supra* note 98, at 35.

102. See generally Marija Obradovic, *Protecting Female Refugees Against Sexual and Gender-based Violence in Camps*, UNITED NATIONS U. (Nov. 9, 2015), <https://unu.edu/publications/articles/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps.html>.

103. Interview with a civilian (anonymized), in Padaviya, Sri Lanka (Nov. 27–28, 2018). A Sinhalese woman who was interviewed stated that she moved into Anuradhapura District from the Northern Province for her safety as her spouse deserted her during the time of the conflict. *Id.* While living in Anuradhapura District, she has been subject to sexual harassment by village-level state officials who were from the same ethnicity. *Id.* This situation provides an example of a CRSV that is somewhat removed from the temporal and geographic scope of the conflict. *Id.* However, it is impossible to apply IHL as the legal regime for protecting such women. *Id.*

104. Ni Aolain, *supra* note 31, at 317.

105. *Id.* at 320–21.

German men.¹⁰⁶ Women who had “familial male protection” were considered less vulnerable.¹⁰⁷ This highlights how men avoid committing CRSV, out of respect or fear of masculinity, in the presence of other men who are viewed as “protectors” of the women that they accompany. It is a mark of respect for a man’s property emanating from patriarchy; a woman’s right never generates the lessened vulnerability on its own accord.

In the apartheid context, CRSV was regularly committed against black women. Rape statistics escalated without comment, although “it was unquestionable that rape was intertwined with the racial injustice of the apartheid system.”¹⁰⁸ Violence “valorized as a means to achieve a justifiable end” has contributed to the perpetuation of a culture of sexual violence in South Africa.¹⁰⁹ In that light, sexual violence tied to the remnants of the apartheid regime should be treated as CRSV as opposed to being dealt with under *lex generalis* mechanisms. As one scholar argues, “there is a fundamental, structural relationship between apartheid’s legacy of violence and the sexual abuse” that South African women continue to suffer.¹¹⁰

A reading of Indian, Pakistani, and Bangladeshi history regarding the conflicts of 1971 indicates the sheer complexity of the parallel conflicts—and how that led to the trivialization of offences such as CRSV. According to Yasmin Saikia, the partitioned national histories of these three countries have entrenched a false “us and them” binary and presented the same as a personification of the good and the evil.¹¹¹ Saikia contends that the attempt to relegate blame to the “other” and selectively remembering history creates “simplistic narratives without addressing the complexities of the conditions and circumstances” of conflict.¹¹² While this was a general observation, it equally applies to CRSV. In conflicts which capitalized on ethnic and religious hatred to target the “vulnerable,”¹¹³ history has eliminated women’s experiences.¹¹⁴ The same is true for Bangladesh, where sexual violence committed upon Bengali women was a direct result of the second layer of discrimination—whereby a woman belonging to a particular ethnic, racial, or religious group is targeted in part for being a member of a particular community.¹¹⁵

The case of Sri Lanka is illustrative of each of the layers of discrimination explained above. Perpetrators have committed CRSV in Sri Lanka in connection with armed conflicts and political insurgencies.¹¹⁶ It is possible to observe six

106. *Id.* at 317.

107. *Id.* at 316.

108. Armstrong, *supra* note 98, at 35.

109. Michelle J. Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789, 791 (2000).

110. *Id.*

111. SAIKIA, *supra* note 68, at 4.

112. *Id.*

113. *Id.* at 52.

114. *Id.* at 54.

115. SAIKIA, *supra* note 68, at 4.

116. See Nimmi Gowrinathan, *Inside Camps, Outside Battlefields: Security and Survival for Tamil Women*, 9 ST. ANTHONY’S INT’L REV. 11 (2013); JOHN BRAITHWAITE AND BINA D’COSTA, *CASCADES OF*

categories of CRSV in the Sri Lankan context: (i) gender-based sexual violence committed against women during political instabilities and insurgency in 1970s–1980s;¹¹⁷ (ii) ethno-racial sexual violence targeting Tamil women in the localities of the armed conflict including violence within rehabilitation camps;¹¹⁸ (iii) sexual and gender-based violence committed by Tamil militants against Sinhalese civilian women in border villages prior to such women being brutally murdered;¹¹⁹ (iv) sexual violence perpetrated by Tamil men against Tamil women in familial settings¹²⁰ or within camps for the displaced;¹²¹ (v) sexual violence in post-war Sri Lanka to which partners of former combatants have been subjected as well;¹²² and (vi) sexual violence that continues within the post-war context.¹²³ Common across these instances is a sense of superiority either premised on masculinity or ethno-racial factors that facilitate impunity.¹²⁴

The armed forces of Sri Lanka have denied that they resorted to sexual violence as a weapon of war.¹²⁵ However, the *Krishanthi Kumaraswmy Rape Case* evinces an instance where sexual violence was unleashed by some military men. This case relates to the abduction, gang rape, and murder of a schoolgirl at a security checkpoint manned by members of the State armed forces; they were found guilty by a five-bench panel of the Supreme Court of Sri Lanka.¹²⁶ The perpetrators had raped and murdered Krishanthi, and they subsequently murdered her mother, brother, and a neighbor who had gone in search of Krishanthi.¹²⁷ The bodies were found buried behind the security checkpoint.¹²⁸ Given the nature of

VIOLENCE: WAR, CRIME AND PEACEBUILDING ACROSS SOUTH ASIA (ANU Press 2018), *Crime – War in Sri Lanka*, 363; FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS (2016) ¶ 22.

117. See generally FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, *supra* note 116.

118. *Id.* at 65.

119. Civilian interviews (anonymized), in Padaviya, Sri Lanka (Nov. 27–28, 2018). A Sinhalese woman who was a village dweller in a former border village narrated incidents of sexual violence allegedly committed by the LTTE while attacking villagers with machetes and other weapons. *Id.* She claimed to have saved her life by running into the forest and taking refuge in a pit dug in the ground. *Id.*

120. INTERNATIONAL CRISIS GROUP, SRI LANKA: WOMEN'S INSECURITY IN THE NORTH AND EAST, 29 https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_428.pdf (last visited Jan. 21, 2020).

121. Gowrinathan, *supra* note 116, at 14 (“Several unrelated families were often in the same tent, thereby exposing women to men living in the same temporary structure.”).

122. See generally CENTRE FOR EQUALITY AND JUSTICE, THE LIFE I USED TO LIVE: REALIZING REPARATIONS FOR VICTIM SURVIVORS OF SEXUAL VIOLENCE IN SRI LANKA, <http://cejsrilanka.org/wp-content/uploads/The-Life-I-Used-To-Live.pdf> (last visited Jan 21, 2020).

123. See generally SHYAMALA GOMEZ, POST-WAR SRI LANKA: SPECIFIC NEEDS OF SEXUAL VIOLENCE VICTIM SURVIVORS AND CHILDREN BORN OF RAPE (United Nations Entity for Gender Equality and the Empowerment of Women 2017).

124. FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, *supra* note 116, at 38.

125. *Id.* at x.

126. See generally Somaratne Rajapakse and Others v. Hon. Attorney General (*Krishanthi Kumaraswamy Rape Case*), [2010] 2 SRI L.R.113 (Sri Lanka).

127. *Id.* at 119.

128. *Id.* at 122–23.

the facts that surfaced during this case, it is difficult to conclude that there were no other instances of CRSV perpetrated by members of the armed forces. Indeed, the Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka (OISL Report) contains a lengthy narrative of alleged sexual violence committed by members of State armed forces.¹²⁹

The emphasis on ascertaining the guilt of members of Sri Lanka's State armed forces has arguably limited the opportunity to evaluate sexual violence perpetrated by members of the terrorist group Liberation Tigers of Tamil Eelam (LTTE). There are almost no written materials listing sexual violence perpetrated by the LTTE.¹³⁰ Narratives of sexual violence—such as those concerning Sinhalese pregnant women being stripped and strapped to trees and their breasts and stomachs being slashed—are often recounted solely by surviving relatives. Lack of directly connected relatives to file suit concerning these violations and the fact that these violations may not amount to rape, may have resulted in the mainstream notion of the LTTE's innocence with respect to CRSV. This inaccurate view is also reflected in the OISL Report:

OISL did not find any information to suggest that the LTTE was responsible for sexual violence, and different sources indicate that anyone found responsible for sexual abuse or violence risked harsh punishment by the LTTE.¹³¹

The Report makes no further attempt to provide evidence for its assumption nor does it explain what it refers to as “harsh punishments.” From the Report, it is unclear whether the LTTE's “harsh punishments” were meted out only to men of the LTTE that attempted to commit sexual offences against women of the LTTE or whether it was a consistent approach that was adopted irrespective of whether the members committed such offences against fellow combatants, civilian Tamil women, or civilian Sinhalese or Muslim women.

The Report's take on CRSV only ascertained the guilt of one party for utilizing sex as a weapon of war, namely that of the State armed forces.¹³² This may raise questions concerning the Report's impartiality, in part because it was initiated by Ms. Navanethem Pillay (former UN High Commissioner for Human Rights), who was a South African of Tamil descent.¹³³ While there is no tangible evidence

129. See generally Human Rights Council, *Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka* (OISL Report), ¶¶ 571 – 631, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015).

130. *But see* CENTRE FOR EQUALITY AND JUSTICE, *THE LIFE I USED TO LIVE: REALIZING REPARATIONS FOR VICTIM SURVIVORS OF SEXUAL VIOLENCE IN SRI LANKA*, *supra* note 122, at 3 (listing LTTE as one of the perpetrators of CRSV).

131. *Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka* (OISL Report), *supra* note 129, at ¶ 571.

132. *Id.*

133. United Nations Office of the High Commissioner for Human Rights, *Navanethem Pillay* <https://www.ohchr.org/EN/AboutUs/Pages/Navipillay.aspx> (last visited Apr. 1, 2020).

of her origins impacting the investigation, the lenient approach adopted towards the LTTE concerning CRSV did raise doubts at the local level, which was also capitalized on by certain parties in Sri Lanka.¹³⁴ The question remains whether all CRSV committed within Sri Lanka was treated with the same gravity and enthusiasm for justice. As Lord Hewart CJ aptly described, “it is not merely of some importance but is of *fundamental importance* that justice should not only be done, but should *manifestly* and *undoubtedly* be seen to be done.”¹³⁵

These details from Sri Lanka evince that “structural violence”—premised on power, race, sex, and ethnicity—buttresses CRSV.¹³⁶ The Sri Lankan example also provides evidence of sexual violence occurring within family or community settings, thus indicating a culture of impunity.¹³⁷ Yet “[t]here remains ongoing intellectual resistance to accepting the extensive empirical evidence that women’s bodies have been targeted as a method and means of war, not ancillary to military objectives, but innately linked to them.”¹³⁸ It is unlikely that any conflict could occur outside the parameters of that universal truth—or that any party to a conflict could absolve itself completely of committing CRSV.

In terms of temporality, perpetrators also commit CRSV in contexts of belligerent occupation. In such contexts, temporality is defined by the period of instability leading up to the occupation, the duration of the occupation, and the aftermath of the occupation that continues until a system of democratic governance is set up.¹³⁹ The Palestine provide an example in this respect. Palestinian women’s experience of CRSV is two-fold:¹⁴⁰ (i) violence committed by Israeli soldiers¹⁴¹ and (ii) violence when forced into underage marriages in order to *benefit* from the perceived protection that marriage brings.¹⁴² The latter approach

134. HLD Mahindapala, *Vindictive Navi Pillay Too Biased to Conduct Impartial Inquiry*, CEYLON TODAY (Apr. 2, 2014), <https://www.mfa.gov.lk/ta/4551-vindictive-navi-pillay-too-biased-to-conduct-impartial-inquiry/>; DBS Jeyaraj, *UN Human Rights Chief Navaneetham Pillay and the South African Tamil Heritage*, DBSJEYARAJ.COM (Sept. 2, 2013), <http://dbsjeyaraj.com/dbsj/archives/25079>.

135. *R v. Sussex Justices ex p. McCarthy* (1924) 1 K.B. 256 (emphasis added).

136. FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, *supra* note 116, at 37–38.

137. *Id.* at 66.

138. Ni Aolain, *supra* note 31, at 308.

139. Article 6, GC IV. *See generally* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (CUP, 2009) and Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION (2d ed., OUP 2012).

140. Wing, *supra* note 97, at 945 (“Palestinian women currently living in the West Bank and Gaza Strip must deal with the ongoing Israeli occupation that still affects almost all of them. Additionally they must silently endure violence at the hand of their own men.”).

141. Pernilla Ouis, *Honourable Traditions – Honour Violence, Early Marriage and Sexual Abuse of Teenage Girls in Lebanon, and Occupied Palestinian Territories and Yemen*, 17 INT’L J. CHILD. RTS. 445, 467 (2009) (“A particular form of sexual abuse applies to Palestinian women living under Israeli occupation. It has been reported that Palestinian women are routinely harassed, intimidated and sexually abused by Israeli soldiers and border police. The threats of being subjected to sexual violence and humiliation in public space have been part of strategies of domination by Israel.”).

142. Wing, *supra* note 97, at 962.

emanates from the patriarchal notion that a woman can only be protected by a man—this relates to the third layer of discrimination. This aspect is aptly articulated in Pernilla Ouis’s *Honourable Traditions*, which describes how Palestinian women are “routinely harassed, intimidated and sexually abused by Israeli soldiers and border police . . . [which] further encourages the practice of early marriage as a security measure”¹⁴³ These practices negate women’s agency and allow men to dictate terms to women concerning what should and should not be done for protection.

Violence against Palestinian women is often concealed by traditional practices portrayed as preserving women’s honor.¹⁴⁴ Palestinian women are regarded as “auxiliary” to men and are “seen as mothers, daughters or wives but not as independent human beings, whose existence is worthy of acknowledgement without an attachment to a male counterpart.”¹⁴⁵ In this context, auxiliary status is a result of the “direct manifestation of patriarchy.”¹⁴⁶ If a male chaperone is necessary to protect a woman, one must question from whom such protection is sought. This patriarchal paradox contributes to the complexities associated with sexual violence and laws seeking to prevent such violence, especially in conflict contexts.

Women vulnerable to “their own male communities” face problems due to lack of accountability under formal IHL mechanisms.¹⁴⁷ Black women within South Africa’s apartheid,¹⁴⁸ Tamil women in Sri Lanka’s camps for Internally Displaced Persons,¹⁴⁹ and Palestinian women and girls¹⁵⁰ have all faced similar violence, yet IHL has been unable to formally safeguard women from men of their own communities. First, the setting is conducive to rendering women vulnerable. As explained elsewhere in this paper, evidence of this type of violence often arises from camps of displaced persons, community-formed ghettos, or “border” villages.¹⁵¹ I observe that IHL may not fully apply to these settings, as they may lie outside the geographic scope to which IHL’s protection is applicable.¹⁵² Even if IHL were applicable, it is possible that pragmatic constraints obstruct objectively assessing whether the law is followed. Thus, at a minimum, the human rights framework and other constitutional guarantees could be invoked for the protection of those whose safety is threatened within such localities.

143. Ouis, *supra* note 141, at 467.

144. Tamara Tawfiq Tamimi, *Violence Against Women in Palestine and Mediocre Accountability*, 5 U.K. L. STUDENT REV. 75, 81 (2017).

145. *Id.*

146. *Id.*

147. See generally Ni Aolain, *supra* note 31, at 316–19.

148. See generally Armstrong, *supra* note 98.

149. Gowrinathan, *supra* note 116, at 14.

150. See generally Ouis, *supra* note 141.

151. See generally Obradovic, *supra* note 102; see also Armstrong, *supra* note 98, at 35; footnote descriptions of anonymized interviews conducted by the author.

152. See generally Geneva Convention Relative to the Treatment of Prisoners of War art. 2–3, Aug. 12, 1949, 6 U.S.T. 3316 (laying down the scope of application of IHL—which does not extend to the scope mentioned in the body of the related text).

However, it is necessary to bring this type of CRSV within the parameters of *lex specialis*, as the general law is not sufficiently equipped to grapple with the complexities of CRSV.

Second and third instances that prevent the application of IHL relate to issues of temporality and the profile of the perpetrator. Where civilians continue to live in camps and ghettos subsequent to the end of the conflict, concerned State parties may not allow the application of IHL on the basis that the temporal scope to which IHL applies has expired.¹⁵³ Such a technical view is possible if the temporality of an armed conflict is solely regarded as ranging from the beginning to the end of armed clashes. That restrictive approach neglects post-armed conflict realities, where it is safe to argue that ordinary civilian lifestyles often do not recommence for years after the end of armed hostilities.¹⁵⁴ Life in camps, ghettos, and areas ravaged by armed conflict carry forward the conflict legacy, thereby extending the temporal scope to which IHL's protection *should* apply. Thirdly, IHL's protection is lost when men commit sexual violence against women of the same community. This issue arises in connection with the profile of the perpetrator. In these contexts, the family or the community may dissuade the victim-survivor from reporting and seeking protection, as the perpetrator is also from the same community or the family.¹⁵⁵ The social construct of stigma is a product of the patriarchal notion that women are *defiled* by sexual conduct.¹⁵⁶ This results in women's sexual lives, even in "normal" circumstances, being microscopically analyzed. It is ironic that the crime is instigated by the same patriarchal notions that prevent its reporting.

In addition to the consequences of discrimination analyzed above, there is another, less visible aspect of gendered violence and racial discrimination: men belonging to the *non-dominant group* who are found guilty of sexual violence against a woman belonging to the *dominant group* may face comparatively higher penalties.¹⁵⁷ For similar offenses, men of the dominant group may receive lesser penalties or no penalty at all.¹⁵⁸ In such contexts, the severity of the penalty is unduly tied to considerations of profiles of the victims and the perpetrators, thereby trivializing the effect of the offense. These inequalities jeopardize subsequent reconciliation efforts. This sets in motion a vicious cycle that inversely impacts measures that seek to prevent non-recurrence of CRSV.

153. See generally *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 89 INT'L REV OF THE RED CROSS 719 (2007).

154. Vesna Nikolic-Ristanovic, *War and Post-War Victimization of Women*, 10 EUR. J. CRIM. L. & CRIM. JUST. 138 (2002).

155. See Obradovic, *supra* note 102; see also Jelke Boesten, *SEXUAL VIOLENCE DURING WAR AND PEACE: GENDER, POWER, AND POST-CONFLICT JUSTICE IN PERU* 26 (2014 Palgrave Macmillan).

156. See generally Lynne Henderson, *Law's Patriarchy*, 25 LAW & SOC'Y REV. 411 (1991); Rebecca Whisnant, *Feminist Perspectives on Rape*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017), <https://plato.stanford.edu/entries/feminism-rape/>.

157. See, e.g., Armstrong, *supra* note 98, at 35.

158. *Id.*

The above argument can be substantiated with reference to apartheid South Africa. Much like Harper Lee's presentation of how the *black* Tom Robinson was falsely convicted for the alleged rape of *white* Mayella Ewell in *To Kill a Mockingbird*,¹⁵⁹ intersectionality of inequality impacted how CRSV was viewed and dealt with in apartheid South Africa. It has been contended that "[n]o white man has been executed in South Africa for raping a black woman; however, the majority of men executed was for raping a white woman."¹⁶⁰ This racial inequality coupled with discrimination against women has contributed to aggravating the circumstances that facilitate the commission of CRSV and to then trivialize violence against women on two counts—firstly, on the basis of sex, and secondly, on the basis of them belonging to a non-dominant group in a particular society. When assessing how such contextual realities affect the temporal scope, it is observable that the pressure imposed on men of non-dominant groups during conflict contexts could translate into their attempts at exercising dominance over women of the same community.¹⁶¹ This happens through the use of sexual violence during conflict and in post-conflict settings in the guise of protection mechanisms, and women are thus exposed to CRSV both from within and outside of the community:

The men of an oppressed group are not allowed to be “men” in the culturally constructed use of the term One of the few areas where the oppressed men can exert some limited expression of their maleness is through oversight of their own women in the “inside” or private sphere.¹⁶²

This extends the temporality of conflict, because such violations may continue years after the end of armed hostilities. Oppression of non-dominant groups during conflict results in such groups losing opportunities of education and economic growth, which can restrict them to poverty-stricken existences for decades after the end of conflict.¹⁶³ In cases where men have been rendered physically or sexually disabled as a direct consequence of the conflict, they may subject women partners to sexual violence as a means of establishing control and dominance.¹⁶⁴

Extreme cases of social deprivations and CRSV created through conflicts may last across generations. The societal deprivation that challenges the traditional

159. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (Harper Perennial Modern Classics, 2006).

160. Bev Ortan, *Corrective Rapes: Rape Narratives in South Africa*, *VIOLENCE AND WAR IN CULTURE AND MEDIA: FIVE DISCIPLINARY LENSES* 260, 262 (2012).

161. See Wing, *supra* note 97, at 951.

162. *Id.*

163. See, e.g., Nico Gous, *SA Most Unequal Country in World: Poverty Shows Apartheid's Enduring Legacy*, *TIMESLIVE* (2018), <https://www.timeslive.co.za/news/south-africa/2018-04-04-poverty-shows-how-apartheid-legacy-endures-in-south-africa/>; *Sri Lanka's Conflict-Affected Women: Dealing with the Legacy of War*, *INT'L CRISIS GRP.* (2017), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/289-sri-lankas-conflict-affected-women-dealing-legacy-war>.

164. Civilian interview (anonimized) in Kurunegala, Sri Lanka (Oct. 2019).

patriarchal construct of men as providers and protectors of families and communities may contribute to inferiority amongst deprived men. Sexual violence thus becomes a tool of oppression and a mechanism of reinforcing power dynamics between the sexes. Boys who are exposed to the violence that is endured by the women of their families may grow up to be adults who do not respect women or believe that violence against women is an acceptable norm of life.¹⁶⁵ Against this backdrop, the expansive manner in which the United Nations Secretary-General has approached CRSV by stating that it can occur in contexts which are “directly or *indirectly* linked to a conflict”¹⁶⁶ is proof of the necessity to take cognizance of extended temporal scopes within which CRSV could occur.

III. CRSV AS A WAR STRATEGY, A TACTIC, OR A TOOL OF WARFARE

CRSV is used to create psychological impacts and lasting persecution against selected communities, thereby making it a war strategy, a tactic, or a tool of warfare with impacts that transcend the actual temporal or geographic scope of an armed conflict. These impacts contribute to reinforcing power dynamics between ethno-religious groups and between the sexes. A distinction is herein made between CRSV that is strategically used in warfare and CRSV which is unconnected to advancement of military goals. Sexual violence occurring in post-war or post-conflict settings are covered under the second category, as such, I argue that violence does not contribute to the direct advancement of a military goal irrespective of its association with conflict. What I intend to assess in this segment is how CRSV functions during an armed conflict as a war strategy of “weakening” the “enemy.” Through this, I also inquire into the hypothesis that CRSV is a war against women.

The legal scholar Catharine MacKinnon equates violence against women to a war in her seminal piece, *Women’s September 11th: Rethinking the International Law of Conflict*.¹⁶⁷ She contends that characterizing men’s violence against women as similar to dispersed armed conflicts, “especially in a legal context, is usually dismissed as metaphorical, hyperbolic, and / or rhetorical.”¹⁶⁸ I analogize MacKinnon’s questions as to why the international community regards violence against women less effectively¹⁶⁹ to pose the question of why CRSV-related laws remain undeveloped or underdeveloped even as many other significant aspects of IHL have progressed with effective strategic responses and more nuanced legal

165. See generally *Ten Harmful Beliefs That Perpetuate Violence Against Women and Girls*, OXFAM INTERNATIONAL (2019), <https://www.oxfam.org/en/ten-harmful-beliefs-perpetuate-violence-against-women-and-girls>; *Changing Cultural and Social Norms that Support Violence*, WORLD HEALTH ORGANIZATION (2009) https://www.who.int/violence_injury_prevention/violence/norms.pdf.

166. U.N. Secretary General, Report of the Secretary General on Conflict-related sexual violence, ¶ 3, S/2019/280, (Mar. 29, 2019).

167. Catharine A. MacKinnon, *Women’s September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT’L L. J. 1, 5 (2006).

168. *Id.* at 5.

169. *Id.* at 3.

developments. Using MacKinnon's argument, I contend that CRSV creates an atmosphere of terror that nevertheless has not been swept up in the global response to terrorism—characterized as “war against terror”—which has been overbearing in comparison to the lack of *effective* response to CRSV.

There are, of course, arguments against the proposition that sexual violence is a tactic of war. For example, Professor Elisabeth Jean Wood has contended that “when armed organizations engage in frequent rape, they often do so as a *practice* rather than as a strategy.”¹⁷⁰ Wood defines a “practice” as “[v]iolence that is not ordered (even implicitly) but is *tolerated* by commanders.”¹⁷¹ The distinction is between rape *tolerated* in an occupied village as opposed to rape *ordered* against a small fraction of political prisoners in detention.¹⁷² However, an artificially bifurcated approach such as this may lead to circumstances in which “practice” of rape in conflict contexts is cast outside of criminal sanction or protections imagined under the Geneva Conventions. Furthermore, even if rape and other forms of sexual violence are not commanded, if the authorities responsible for the conduct of subordinate officers and armed actors choose to “tolerate” sexual violence, it is questionable why such violence should not be considered as a war strategy or a tool. A commander who “tolerates” sexual violence committed by his subordinate against civilians or combatants of the opposing forces should be held liable for failing to take actions to penalize the perpetrators. Moreover, law's interpretation of command responsibility requires the imposition of liability on commanders for omissions or actions that they ought to have been aware of.¹⁷³ This rule applies irrespective of whether the commander was actually aware of the violations.¹⁷⁴ Any other interpretation would only lead to the absurd conclusion that commanders who “tolerate” sexual violence or are “ignorant” of such violations happening under their command should remain unpunished. Arguing that commanders should only bear responsibility of CRSV in circumstances where they have *expressly* and *directly* ordered the commission of such violence for strategic reasons is to suggest that the legal threshold victims have to satisfy is impossible to meet. Thus, irrespective of whether CRSV is committed under a direct order or in any other form, it should still be regarded as a tactic of war.

Wood further contends that claiming rape to be a weapon, a tactic, or a tool amounts to “simplifying assumptions [that] overlook the distinct mechanisms that contribute to a high incidence of rape.”¹⁷⁵ While this argument is made in the context of establishing a distinction between “strategic rape” committed by

170. Elisabeth Jean Wood, *Conflict-related Sexual Violence and the Policy Implications of Recent Research*, 96 INT'L REV. RED CROSS 457, 458 (2014).

171. *Id.* at 471 (emphasis added).

172. *Id.* See also Prosecutor v. Radić, Case No. X—KR-05/139, Second Instance Verdict, 170-210 (March 9, 2011), http://www.worldcourts.com/wcsbih/eng/decisions/2011.03.09_Prosecutor_v_Radic.pdf

173. Rome Statute of the Int'l Crim. Ct., 2187 U.N.T.S. 90 *entered into force* July 1, 2002, Art. 28.

174. *Id.* at Art. 28 (a)(i).

175. Wood, *supra* note 170, at 470.

armed actors and “opportunistic rape” committed by civilians, the view it seems to promote is that a “high incidence of rape” should be proven before it is considered a strategy. I assert that this argument ignores the ground realities associated with armed conflicts and the secretive manner in which sexual violence is often unleashed.¹⁷⁶ Even if sexual violence is committed in “comfort stations” or if women are subject to gang rape in public within military compounds, it is unlikely that there would remain evidence worthy of being produced in a court of law—apart from the collective narratives of victim-survivors.¹⁷⁷ While it may sometimes be unjust to propose that a single narrative should be used in imposing a criminal penalty on an alleged perpetrator, it is equally preposterous to contend that collective narratives should be disregarded. If Wood’s explanation is to be adopted, available narratives presented as evidence of sexual violence as a war strategy would more often than not be dismissed.

I now turn to how CRSV becomes a strategy of warfare. According to the latest available data compiled by the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, CRSV currently occurs in nineteen countries of concern.¹⁷⁸ This indicates the widespread and common use of CRSV. United Nations Security Council Resolution 1325 has recognized that parties to a conflict should bear responsibility to prevent CRSV and called on the parties to prevent gender-based violence.¹⁷⁹ The Resolution also requests State parties to exclude CRSV from amnesty provisions “where feasible.”¹⁸⁰

What reasons cause the use of CRSV as a weapon of war? In 2002, a study on Resolution 1325 noted that women and girls become “prime targets” in warfare, as they are “viewed as bearers of cultural identity” and “[g]ender-based and sexual violence have increasingly become weapons of warfare.”¹⁸¹ Thus, while CRSV is a violent act against physical and mental integrity of a woman, it also transforms into a weapon of warfare or a war tactic.

In order to establish that CRSV is a war tactic, the general purposes of a war tactic should be evaluated. The execution of a plan that helps a party to the conflict to advance its military objectives of exercising power over a particular

176. SAIKIA, *supra* note 68, at 4; U.N. Security Council, *Report of the Secretary General on Conflict-related Sexual Violence*, U.N. Doc. S/2018/250, ¶ 2 (Mar. 23, 2018). According to these which highlight lack of evidence pertaining to CRSV, it is possible to contend that CRSV is generally unleashed in a secretive manner.

177. *See generally*, Wood, *supra* note 170.

178. Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *9th Report of the U.N. Secretary General on Conflict-Related Sexual Violence*, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/SG-report-key-facts2018.pdf> (last accessed August 7, 2018) (listing conflict-affected settings where there has been sexual violence: Afghanistan, Central African Republic, Colombia, Democratic Republic of the Congo, Iraq, Libya, Mali, Myanmar, Somalia, South Sudan, Sudan (Darfur), Syrian Arab Republic, and Yemen. Post-conflict sexual violence occurs in Bosnia and Herzegovina, Côte d’Ivoire, Nepal, and Sri Lanka while Burundi and Nigeria are also regarded as situations of concern.).

179. S.C. Res. 1325, ¶ 10 (Oct. 31, 2000).

180. *Id.* ¶ 11.

181. U.N. Secretary-General, *Women, Peace, and Security*, 2 (2002).

territory and its people with the intent of achieving military goals amounts to war tactics.¹⁸² It can be argued that it is also impossible to divorce political aspects of war strategies from the consequences of war, as all such strategies are tied to furthering political goals through conflict.¹⁸³ Thus, tactics and their end goals seek to establish and reinforce power dynamics. The need for establishing power over the “enemy” is not restricted to politically, militarily, and physically defeating the enemy. This need also extends to psychological warfare. CRSV takes place in this backdrop. Psychological warfare is waged especially when sexual violence falling into the higher end of the spectrum of gravity such as rape, forced impregnation, and forced sterilization are used against a particular community in a systematic and widespread manner.¹⁸⁴ These offenses are typically targeted at committing ethnic cleansing or genocide resulting in the automatic alteration of the demographic balance and the ethno-racial composition of a given territory. Instances where perpetrators have made direct statements regarding the connectivity of their crimes with the expected consequences concerning ethno-racial composition abound in history.¹⁸⁵

It is erroneous to propose that an act or an omission only becomes a tactic or strategy of war when it is used systematically. Even the International Criminal Tribunal for Yugoslavia (ICTY) has adopted the view that systematic and widespread commission of sexual violence is not a prerequisite for it being determined as a crime against humanity.¹⁸⁶ However, evidence of the rampant manner in which CRSV has occurred could easily lead to the conclusion that either these violations occurred in compliance with the orders attributable to a chain of command or that there existed a chain of command which ought to have prevented such violence and is hence responsible for not preventing violence. The nexus that can be drawn with the chain of command effectively brings CRSV within the formal parameters of a war strategy. Identifying the above reality, the United Nations Security Council demanded in 2008 that all parties to armed conflict should adopt measures to protect civilians from “all forms of sexual violence” through the enforcement of “appropriate military disciplinary measures” and by “upholding the principle of command responsibility.”¹⁸⁷ A year later, the

182. Martin van Creveld, *Tactics*, ENCYCLOPÆDIA BRITANNICA (2017), <https://www.britannica.com/topic/tactics> (last visited Jan 21, 2020).

183. See generally Sara Davies & Jacqui True, *Reframing Conflict-related Sexual and Gender-based Violence: Bringing Gender Analysis Back In*, 46 SECURITY DIALOGUE 495 (2015).

184. See generally James M. O’Neil & Michele Harway, *A Multivariate Model Explaining Men’s Violence Toward Women*, 3 VIOLENCE AGAINST WOMEN 182, 182–203 (1997); Eugene Kinyanda et al., *War-Related Sexual Violence and Its Medical and Psychological Consequences as Seen in Kitgum, Northern Uganda: A Cross-Sectional Study*, BMC INT’L HEALTH AND HUMAN RIGHTS (2010).

185. See generally Beverly Allen, *Rape Warfare in Bosnia-Herzegovina: The Policy and the Law*, 3 BROWN J. WORLD AFF. 313 (1996); Kohn, *supra* note 41; SAIKIA, *supra* note 68; Patricia Viseur Sellers, *Genocide Gendered: The Srebrenica Cases*, 48 STUD. TRANSNAT’L LEGAL POL’Y 17 (2015).

186. See Michelle Jarvis & Najwa Nabti, *Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 73, 93 (Baron Serge Brammertz & Michelle Jarvis eds., Oxford Univ. Press 2016).

187. S.C. Res. 1820, ¶ 3 (June 19, 2008); see also S.C. Res. 1888, ¶ 3 (Sept. 30, 2009).

Security Council issued United Nations Security Council Resolution 1888.¹⁸⁸ The resolution recognizes the necessity of “commitment and political will to prevent sexual violence.”¹⁸⁹ It calls on commanders to not imply that “the incidence of sexual violence in conflicts is tolerated.”¹⁹⁰

Despite this rising commitment to combat CRSV through various means, it continues to be used as a war tactic in contemporary warfare.¹⁹¹ Some recognize “group bonding” through CRSV as a phenomenon that perpetuates sexual violence in conflict:

Legislative immunity for members of the armed and security forces can translate in wartime to a “license to rape.” Male control over women’s production and reproduction can pave the way for sexual violence being deemed an acceptable and effective military strategy: a reward, an entitlement and a form of group bonding.¹⁹²

History evinces how ritualistic bonding through subjecting women *inter alia* to rape and forced impregnation have furthered the military strategy of using sex as a weapon.¹⁹³ Moreover, subjecting detained women to sexual violence has occurred publicly, thus forming a group bonding ritual for perpetrators.¹⁹⁴ During the dissolution of Yugoslavia,¹⁹⁵ as well as during the Bangladesh liberation wars, women were forcibly impregnated and subject to sexual violence in public settings.¹⁹⁶

During World War II, Japanese forces used CRSV as both a war strategy and as a mechanism of establishing power dynamics between the sexes. The “three lightening strategy” or “*sanguang zuozhan*” used by the Japanese military against Chinese villages included raping and murdering women living in such villages.¹⁹⁷ The approach led to the attitude that “they could do anything to the local civilians, including rape, because they were going to eliminate them all in the end, anyway.”¹⁹⁸ This provides an example of how sexual violence has not only been used as a war strategy but as a mechanism of reinforcing power dynamics between the

188. S.C. Res. 1888 (Sept. 30, 2009).

189. *Id.*

190. *Id.*

191. See U.N. Secretary-General, *Report of the Secretary-General on Conflict-related Sexual Violence*, ¶ 11, UN Doc. S/2017/249 (April 15, 2017).

192. *Id.*

193. See Chinkin, *supra* note 6, at 332; Kohn, *supra* note 41, at 204–05.

194. See generally SAIKIA, *supra* note 68.

195. See generally Kohn, *supra* note 41.

196. See generally Redress Trust, *Torture in Bangladesh 1971 – 2004: Making International Committees a Reality and Providing Justice and Reparations to Victims* (Aug. 2004); SAIKIA, *supra* note 68.

197. TANAKA, *supra* note 26, at 46.

198. *Id.*

sexes.¹⁹⁹ The attitude of the Japanese soldiers was connected with patriarchal condescension of women that justifies the owning, possessing, using, and discarding of women.

In *Prosecutor v. Miodrag Nikačević* the Court of Bosnia and Herzegovina assessed whether Nikačević's commission of rape constituted part of an attack against Bosnian civilians in the Foča Municipality.²⁰⁰ The court issued a verdict of guilty and stated:

[a]t first glance the crime here appears to be an independent sexual assault committed by the accused on his own initiative. This is however a sexual assault committed during the time of armed conflict and, as such, must be analyzed with that perspective. One cannot separate the crime from the prevailing environment. To do so would marginalize and to a great extent minimize what took place.²⁰¹

While this case assessed rape committed by one individual, it took into consideration how the act was linked with the circumstances. The court further stated that "sexual violence as a tool of war causes mass terror . . . and forced relocation."²⁰² The creation of an atmosphere of terror through the commission of sexual violence has been explored in other cases as well.²⁰³ Had the court not paid attention to the circumstances surrounding the rape, it might have erroneously determined that this case relates to one perpetrator committing an offence against one victim. Such an approach would be devoid of broader nuances and would have resulted in a lesser penalty than what is required in accordance with war crimes jurisdiction.²⁰⁴ Instances of this nature provide evidence that perpetrators utilize CRSV as a strategy of warfare irrespective of whether it is systematic or widespread. Failure to regard CRSV in this light would result in a heinous crime being penalized in a mitigated manner ill-suited to the extent, scope, and gravity of the offence.

IV. CONCLUSION

It is limiting to view conflict-related sexual violence against women solely as an integral component of crimes against humanity that are committed in many wars. CRSV is a violent crime against women's bodily and sexual integrity, a weapon of war and conflict, and a war against women. Such violence is a

199. BOESTEN, *supra* note 155 ("Rape in war is not only about strategy or even about violence, but it can also be about sexual consumption and affirmation of power and domination independent of war objectives.").

200. See Prosecutor's Office of Bosn. & Herz. v. Miodrag Nikačević, X-KR-08/500 (Bosn. & Herz. Feb. 19, 2009).

201. *Id.* at 51.

202. *Id.*

203. See Prosecutor v. Radić, *supra* note 172, at 8.

204. See, e.g., Andrew Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 56–57 (2001).

manifestation of patriarchal views on ownership and consumption of women's bodies, which, in conflict contexts, translates into a strategy or tactic of war. In the article's first section, I unpacked notions of patriarchy that underlie the general legal framework that seeks to protect women from CRSV. In the third section, I argued that CRSV has often been utilized deliberately or with acquiescence as a strategy, a weapon, or a tactic of war.

The second section is linked with technicalities of law and language. In this segment, I established that sexual violence transforms into CRSV when it occurs within a time period or a geographic scope which is directly or indirectly linked with a conflict. A broader assessment of temporal and geographic scopes indicates that the impact of CRSV could last across generations. This results in expanding the time period to which specific conflict-related redress mechanisms should continually apply. These continuing obligations remain a necessity despite the seeming end of the conflict.

Protection for individual autonomy and bodily integrity should not be confined to idealistic principles laid out in legal texts. Nevertheless, CRSV continues to be committed with impunity due to law's lacunae, patriarchal predispositions, and traditional biases. This results in continued stigmatization of women victim-survivors of CRSV and subsequent societal ostracism once such violations come to light. Lack of effective implementation of laws and the lack of redress mechanisms contribute to the culture of impunity and create the vicious circle of discrimination founded on supposed supremacy of men. This furthers the trivialization of offences perpetrated against women. This culture of impunity functions as the patriarchy's bugle call that creates a conducive environment for committing CRSV against women in any conflict context. In the end, we should ask how many more times must the bugle call to pierce the deafening silence surrounding CRSV's war against women?