FACULTY OF LAW
Lund University

Tyson Nicholas

Sexual violence in non-international armed conflict: a *tactic* of warfare or an act of *torture* under international law?

JAMM07 Master's thesis

International Human Rights Law
30 higher education credits

Supervisor: Letizia Lo Giacco

Term: Spring Semester 2019

Contents

Summary

Conflict-related sexual violence should not be regarded just a symptom of war or evidence of its violent excess. It is criminalised as a violation of international law, as a war crime, a crime against humanity and, in some cases, as a component of genocide. It brings overwhelming social, psychological and economic consequences to survivors, families, communities and nation states. Conflict-related sexual violence exacerbates tensions and is a direct threat to the principles of human dignity and integrity of the person.

In 2008 the UN Security Council adopted Resolution 1820, following on from the earlier adoption of the UN Women, Peace and Security agenda under UN Security Council Resolution 1325 (2000), recognised that conflict-related sexual violence particularly targets women and girls and constitutes a threat to international peace and security. For the first time in formal UN policy, conflict-related sexual violence was characterised as a *tactic* of warfare that is used to target and terrorise a civilian population.

In classifying conflict-related sexual violence as a *tactic* of warfare, the UN Security Council created legal uncertainty due to the implications for the use of such a term. Furthermore, the UN Security Council missed a significant opportunity to reaffirm the well-established international legal position that conflict-related sexual violence constitutes *torture*, a conscious crime of concern to the international community given its special nature under international law. Characterising conflict-related sexual violence as torture, vice a tactic, would have served to improve the accountability for criminal acts of sexual violence in armed conflict.

This study identifies lacunae within international law and provides recommendations to help shape the discourse on the topic of accountability for acts of conflict-related sexual violence.

Preface and acknowledgements

This master's thesis is dedicated to (non)survivors of conflict-related sexual violence. I am inspired by the strength and courage of survivors, and dedicated to ensuring the world doesn't forget their suffering.

As a member of the profession of arms I have spent much of my adult life in austere and armed conflict environments in the Middle East, Asia and Africa. I have borne witness to the best and the worst of humanity. It was whilst serving in Africa in 2015, as a military expert on the UN Mission in South Sudan, that I was confronted with the brutality of conflict-related sexual violence.

My reaction to the widespread and systematic use of conflict-related sexual violence in South Sudan was strong and visceral. I felt anger and frustration towards the perpetrators and towards the international system that, at least in my eyes, did very little to assist vulnerable people most at risk of exploitation and sexual violence. This anger and frustration, coupled with a desire to make a change, led me to contemplate a career as a humanitarian in the field of human rights law and to specialise in issues of human security, conflict-related sexual violence and the protection of civilians.

I once wrote of my own experience of combat:

> *"War remains for most an abstract concept, a diversion from daily life and first-world problems. For those that have experienced it there are no words, only knowing… Those who view this war from a purely theoretical perspective will never fully understand the sacrifices and hardships endured… This war has shaped me beyond words, but I refuse to let it define me. That said, some things can never be unseen and my experiences will resonate with me always; sometimes visiting me in my sleep or influencing my subconsciousness…"*

In this master's thesis I have sought to harness this anger and frustration, combining it with my experiences and understanding of combat in order to address legal issues around conflict-related sexual violence. My intention here is to identify lacunae within contemporary international law and to make suggestions to address accountability for crimes of conflict-related sexual violence. This study is not just aimed at the abstract reality of legal theory, but rather intends to make practical observations to help shape the discourse of international law.

The writing of a thesis is by no means an individual endeavour, and I am eternally grateful to my family and friends for their love, support, and inspiration. I am also thankful to my colleagues in the profession of arms and at the Faculty of Law, Lund University and the Raoul Wallenberg Institute for their encouragement and advice. To my supervisor, Assistant Professor Letizia Lo Giacco, thank you for your guidance, sage counsel, and for setting the bar high. Your legal mind and your ability to impart your knowledge of international law is the standard I aspire to. I am indebted and eternally thankful to you all.

Abbreviations

API	Protocol I additional to the Four Geneva Conventions, 1977
APII	Protocol II additional to the Four Geneva Conventions, 1977
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIL	Customary International Law
CIHL	ICRC Customary International Humanitarian Law Study
CoC	Chain of Command
CRSV	Conflict-related Sexual Violence
C2	Command and Control
GCs	Geneva Conventions, 1949
GC I	First Geneva Convention, 1949
GC II	Second Geneva Convention, 1949
GC III	Third Geneva Convention, 1949

GC IV	Fourth Geneva Convention, 1949
HRC	Human Rights Council
HRD	UNMISS Human Rights Division
IAC	International Armed Conflict
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC St	Rome Statute of the International Criminal Court
ICL	International Criminal Law
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NIAC	Non-International Armed Conflict
NSS	South Sudanese National Security Service

PoC	Protection of Civilians
SPLA	South Sudanese Peoples Liberation Army
SPLA-IO	South Sudanese Peoples Liberation Army – In Opposition
SPLM	South Sudanese Peoples Liberation Movement
SSPS	South Sudanese Police Service
UN	United Nations
UNMISS	UN Mission in South Sudan
UNGA	UN General Assembly
UNSC	UN Security Council
UNSCR	UN Security Council Resolution
UNSG	UN Secretary General

1.0 Introduction

1.1 Purpose

The thesis provides legal analysis of the characterisation of conflict-related sexual violence in contemporary international law, it identifies lacunae within international law, and it provides recommendations as to the most conducive international legal framework for addressing conflict-related sexual violence. In this respect the purpose of this thesis is to frame conflict-related sexual violence as *torture*; a conscious crime of concern to the international community as a whole, more than just a symptom or strategy of warfare.

Much political and legal analysis has been undertaken in the area of conflict-related sexual violence, in particular, post the armed conflicts in Rwanda and the Former Yugoslavia, and since the commencement of the UN Women, Peace and Security agenda.[1] However, the regrettable and confronting reality on the ground is that conflict-related sexual violence remains a prevalent and challenging issue in the context of the modern battlefield. So much so that the 2019 Report of Secretary General to the UN Security Council noted that:

> *"Despite the increased attention of the international community to ending impunity for sexual violence crimes, accountability remains elusive*."[2]

Legal discourse on this topic serves not only to highlight the issues, but to look towards ways to implement accountability. This thesis seeks to provide an analysis of the issues with a view to assessing the current state of play in international law, and to make suggestions for where the law might be clarified or applied in an ingenious way to improve the accountability for acts

[1] *UN Security Council Resolution 1325* of 31 October 2000, S/RES/1325 (2000) and associated Resolutions.
[2] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 22.

of conflict-related sexual violence, in a manner befitting the contemporary expectations of the international community.

In particular, this thesis will review the implications of UN Security Council Resolution 1820 (2008) characterising conflict-related sexual violence as a *tactic* of warfare, offering a critical perspective on this characterisation. It will argue that conflict-related sexual violence should have been characterised as *torture* within UN Security Council Resolution 1820 (2008). Such a characterisation would have been able to draw upon international treaty, customary and case law, and would have served to further clarify and give special standing to acts of conflict-related sexual violence. It will argue that characterising conflict-related sexual violence as torture is the most conducive way to frame conflict-related sexual violence within international law for deterrence.

1.2 Methodology and materials

The methodology of this thesis is to apply a traditional legal method to interpret the relevant components of contemporary international law relating to conflict-related sexual violence. This legal positivism approach will include interpreting treaties, conventions and customary international law, reviewing case law from relevant international courts and tribunals, looking to the resolutions and reports of qualified and regarded international bodies (such as UN Security Council Resolutions, and reports of the UN Secretary General and UN treaty bodies), and presenting the scholarly work of respected and well published jurists.

This method will be combined with feminist[3] social theory, military sociology,[4] and international human rights norms to ground the study in the

[3] For the purposes of this master's thesis feminism is defined as advocacy of female rights on the grounds of the equality between genders.
[4] For the purposes of this master's thesis military sociology is the employment of sociological concepts, theories, and methods to analyse the internal organisation, practices, and perceptions militaries and their relationships with other social institutions.

contemporary social and political discourses that interact with the law on this issue. It will be applied through the lens of a gender perspective[5] to assess the operational, sociological, ideological and political influences on the contemporary international legal framework relating to conflict-related sexual violence.

This study will seek to answer the following broad research questions:

1. What *are* the implications of qualifying conflict-related sexual violence as a *tactic* of warfare under UN Security Council Resolution 1820 (2008)?
2. What *would be* the implications had UN Security Council Resolution 1820 (2008) qualified conflict-related sexual violence as *torture*?
3. What conclusions can be drawn under international law for mechanisms to address conflict-related sexual violence?

It is important to note that this thesis study is not intended to produce new quantitative data on conflict-related sexual violence, either in the context of non-international armed conflict or with reference specifically to South Sudan. All quantitative data presented in this master's thesis is drawn from existing empirical literature and reporting of international authorities on the subject. The principle aim of this thesis is, rather, to identify opportunities within international law to improve accountability for acts of conflict-related sexual violence and to discuss accountability in the context of the social and political issues underpinning the problems associated with combating the issue.

[5] A gender perspective is a way to assess an issue or situation through the gender-based differences of women and men as reflected in their social roles and interactions, in distribution of power and in access to resources. It aims to take into consideration the particular needs of men and women. In this paper a gender perspective will be applied to consider how recommendations as to the most conducive international legal framework for the prosecution of perpetrators of conflict-related sexual violence will impact the various gender roles of a given society.

1.3 Delimitations

This thesis study is limited to analysis of conflict-related sexual violence in the context of non-international armed conflict, and will specifically examine and provide analysis in relation to a case study on the non-international armed conflict in the Republic of South Sudan (South Sudan). Whilst parallels may be able to be drawn in order to apply the same lines of argumentation to international armed conflict, or armed conflicts in other nations, this is incidental and beyond the scope of this study.

Limiting this study to non-international armed conflict is a conscious decision, given the majority of conflicts in recent times can be classified as being not of an international character whereby both state and non-state actors continue to be responsible for a significant number of reported incidents of conflict-related sexual violence.[6] Furthermore, the international law that governs non-international armed conflict is not as widely codified via treaty law vice international armed conflict, and is thus more reliant on customary international law.[7] Accordingly, there exists greater opportunity for a master level researcher to identify lacunae within international law with respect to armed conflicts not of an international character.

Specifically focusing upon South Sudan via case study is a conscious decision given my personal reflections and experiences serving in the UN Mission in South Sudan. The conflict in South Sudan has been typified by the scale, intensity and brutality of the use of conflict-related sexual violence to advance political and strategic objectives and yet little has been done to adequately address this issue. A recent report of the Military Gender and Protection Advisor of the UN Mission identified that:

[6] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 12.
[7] Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, 2018), pp 37-39 and Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Nijhoff, 2006), pp 15-23.

> *"The situation in South Sudan remains dire, especially for women and children, with rape and other forms of sexual violence continuing to be used as a tactic of war and a driver of forced displacement."*[8]

In addition, recent reporting on South Sudan[9] has stated that the situation has deteriorated since 2017, with an increase in reporting of conflict-related sexual violence.[10] It is thus timely and relevant, noting the tentative steps towards the implementation of a peace process in the country, to identify lacunae within international law to address the widespread and systematic use of conflict-related sexual violence in the situation of South Sudan.

Due to space limitations this thesis will not comprehensively address each individual crime that constitutes conflict-related sexual violence, nor conduct an extensive review of the jurisprudence of international courts and tribunals with respect to cases of sexual violence in non-international armed conflict. A detailed analysis of such issues would be very complex in nature and would need to be addressed separately and comprehensively by another thesis study. Instead, this paper will provide an overview of these issues and focus on several ground-breaking cases in the jurisprudence of international courts and tribunals in order to set the conditions for understanding the challenges of defining conflict-related sexual violence as a *tactic* of warfare and for the framing of it as *torture*. The ultimate goal is to provide recommendations on deterrence and the holding to account of perpetrators of crimes constituting conflict-related sexual violence.

---

[8] Report of the *Military Gender and Protection Advisor for the UN Mission in South Sudan – OP ASLAN – Observations, Insight, Lessons,* dated 9 February 2019, at 1 (Enclosure 1).
[9] See Human Rights Council, *Report of the Commission on Human Rights in South Sudan* of 12 March 2019, A/HRC/40/69.
[10] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 78.

1.4 Structure

The structure of this thesis study is divided into several parts of substantive research. Chapter two provides a broad understanding of conflict-related sexual violence in contemporary international criminal law in terms of how it is defined and criminalised, and an overview of the jurisprudence of international courts and tribunals that focuses on transformative case law. This aims to provide an introductory level background on the criminalisation and prosecution of conflict-related sexual violence related crimes in international law.

Chapters three and four comprise the main body of this paper, seeking to draw conclusions for improving accountability for crimes constituting conflict-related sexual violence. Chapter three seeks to explore the legal implications of qualifying conflict-related sexual violence as a *tactic* (method) of warfare, identifying how it has been characterised as such and identifying the problems associated with characterising it in such a manner. Chapter four frames conflict-related sexual violence in non-international armed conflict as *torture,* examining the legal implications of doing so in terms of additional deterrence measures and holding to account perpetrators of such crimes.

The final substantive part of this thesis is the case study on conflict-related sexual violence in South Sudan. The purpose of this case study will be discussed in the below discussion on the 'relevance' of this master's thesis.

1.5 Relevance

The nature of conflict since the Second World War has changed significantly. State-on-state international armed conflict, where large military forces from opposing nations stand, manoeuvre and seek to force a decisive engagement with an enemy with clear echelons and a defined 'front line' is no longer the norm. The prevailing nature of contemporary armed conflict is that of non-

international armed conflict, in the form of insurgencies, guerrilla campaigns, terrorism and revolutions by non-state actors using irregular and asymmetric warfare tactics, techniques and procedures to target both state and non-state actors.

Non-international armed conflict, with its mix of state and non-state actors, and a wide range of political and military agendas, provides for both a complex operating environment and for the existence of much grey in-between the relatively permissive black and white rules-based framework of armed conflict. This is true both at a military operational level and at the political strategic level. It is clear in contemporary situations of non-international armed conflict that sexual violence is used as a means to deliberately target vulnerable people. Moreover, whether conflict-related sexual violence occurs in a systemic and widespread manner or emerges as a crime of opportunity, perpetrators often benefit from institutionalised or circumstantial impunity.

Legal academic literature and broader political, human security and protection debate on the issue of conflict-related sexual violence is rapidly evolving under the UN Women, Peace and Security agenda, feminist activism and the human rights movement. To be clear, however, this is not a 'women's issue', but rather a human issue that jeopardises the moral fabric of societies and is a direct attack on universal principles of human dignity and integrity of the person. Whilst crimes of conflict-related sexual violence disproportionately affect women and children, men can also be the targets of such acts. Furthermore, conflict-related sexual violence *"can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security."*[11] For these reasons the UN Security Council has taken the matter on notice and determined to remain seized on issue.

[11] *UN Security Council Resolution 1820* of 19 June 2008, S/RES/1820 (2008) at 1.

Conflict-related sexual violence should not be regarded as just a symptom of war or evidence of its violent excess, but a conscious crime of concern to the international community as a whole.[12] It is criminalised as a violation of international law, as a war crime, a crime against humanity and, in some cases, as a component of genocide. It brings overwhelming social, psychological and economic consequences to survivors, families, communities and nation states. The impact on societies traumatised by war and sexual violence can be devastating, feeding a cycle of crisis, instability and conflict. Conflict-related sexual violence exacerbates tensions and is a direct threat to international peace and security.

If peace is not merely the absence of conflict but the presence of justice, then studies like this are crucial and relevant as a means to address the legal aspects of conflict-related sexual violence as a path to lasting international peace and security. Seeking to identify lacunae within international law and providing recommendations as to the most conducive international legal framework improving accountability for these international crimes might sound very legalise, but make no mistake such discourse is grounded in the desire to address conflict-related sexual violence for (non)survivors:

> *"First they killed her husband. Then the soldiers killed her two sons, ages 5 and 7. When the uniformed men yanked her daughter from her hands next, Mary didn't think it could get any worse… five of them held her down and forced her to watch as three others raped her 10-year-old daughter. Her name was Nyalaat. When the men were done, Mary says, "I couldn't even see my little girl anymore. I could only see blood." Then the men took turns with Mary. Nyalaat died a few hours later. "I wanted to die too."*[13]

[12] Susan Brownmiller, *Against our Will: Men, Women and Rape* (Simon and Schuster, 1975), pp 32-33.
[13] Aryn Baker, 'War and Rape: The most shameful consequence of conflict comes out into the open', *Time Magazine,* 18 April 2016, 36, pp 36-37.

The experience of survivors like Mary, and the desire to end the impunity of individuals who commit crimes of conflict-related sexual violence make this study relevant to the discourse of international law.

2.0 The criminalisation of conflict-related sexual violence

This chapter seeks to provide a broad understanding of conflict-related sexual violence in contemporary international criminal law in terms of how it is defined and criminalised, and to introduce the jurisprudence of international courts and tribunals. It will review the normative development of conflict-related sexual violence by reviewing how such crimes are criminalised in international law as war crimes, crimes against humanity, and as constituent crimes to the crime of genocide. It will also look at international jurisprudence for crimes constituting conflict-related sexual violence by reviewing several transformative cases.

2.1 Historical development of conflict-related sexual violence crimes

It is widely acknowledged that throughout the history of conflict, sexual violence has been associated with the waging of war.[14] Rape and sexual abuse, sexual trophies of war, sexual slavery and sex trafficking, amongst other acts of sexual violence, have historically disproportionately impacted women and children during times of armed conflict, acted as a driver for conflict, and served as an inhibitor to peace and security and post-conflict reconciliation.[15] Whilst such crimes have historically disproportionately impacted women and children, it is also noted that the men have been subjected to acts of sexual violence in recent conflicts. Irrespective of who is targeted, when conflict-related sexual violence occurs it is necessary to make it clear on an international level that such crimes will be punished and that

[14] Rhonda Copleon: 'Gender crimes as war crimes: integrating crimes against women into international criminal law', *McGill Law Journal*, Volume 46, Issue 1 (2000), 217, p 220.
[15] Amy Palmer: 'An evolutionary Analysis of gender-based war crimes and the continued tolerance of 'forced marriage', *Northwestern University Journal of International Human Rights*, Volume 7 (2009), 128, p 129.

perpetrators will be held accountable. This acts to deter individuals from committing such crimes in future armed conflicts, it contributes to the realisation of sustainable peace, and it is as a mechanism in which conflict-related sexual violence survivors can attain justice.

It is important to note then that for much of human history sexual violence in armed conflict has often not garnered the same degree of attention within international law as other crimes committed in association with or in the context of armed conflict. The prosecution of crimes of sexual violence in the context of armed conflict was often not prioritised against other types of war crimes and crimes against humanity. For example, despite acknowledgement that rape and forced prostitution were widespread issues in the conduct of the Second World War, the International Military Tribunals in Nuremberg and Tokyo paid little attention to crimes of sexual violence.[16]

In more recent years the criminalisation and prosecution of crimes constituting conflict-related sexual violence has gained traction in international law due the intersection of strong advocacy by feminists and human rights groups, developments in international criminal law by specific *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia, the implementation of the UN Women, Peace and Security agenda, and the establishment of the International Criminal Court.

It is noteworthy to acknowledge that the criminalisation and prosecution of crimes constituting conflict-related sexual violence has almost exclusively been conducted at the international level for crimes committed within the

[16] For example, the systematic sexual enslavement and rape of as many as 200,000 women by the Japanese Imperial Army was completely ignored at the Tokyo trials. See Kelly Dawn Askin: 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003', *Human Rights Brief*, Volume 11, Issue 3 (2004), p 16. See also Andrea Phelps: 'Gender-based war crimes: Incidence and effectiveness of international criminal prosecution', *William and Mary Journal of Women and the Law*, Volume 12, Issue 2 (2006), 499, p 512 and Anne Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia: 2005), p 8.

context of non-international armed conflict or internationalised non-international armed conflict. Whilst there is not sufficient capacity to comprehensively address this issue within this research study, it can be noted that, *prima facie*, there are strong linkages between developments in international law and the shifts in global power structures since the end of the Cold War that have resulted in a reduction in conventional warfare threats towards those threats posed by guerrilla, revolutionary, insurgent, militia and irregular warfare non-state actors. The challenge for international humanitarian law being that this has meant that the vast majority of more recent wars have been non-international armed conflicts, which are the subject of far less codification compared to that of international armed conflict.

This chapter seeks to provide a broad understanding of conflict-related sexual violence in international criminal law in terms of defining it and outlining how it is criminalised in contemporary international law. It will also provide an overview of the jurisprudence of international courts and tribunals on acts amounting to conflict-related sexual violence in the context of non-international armed conflict.

2.2 Defining conflict-related sexual violence in non-international armed conflict

2.2.1 Defining acts of sexual violence

Defining conflict-related sexual violence is not in and of itself a straightforward matter. Whilst international law prohibits conflict-related sexual violence, a comprehensive definition of what constitutes such acts varies depending upon the authority cited. There is no reference to conflict-

related sexual violence in international humanitarian law treaties, and its usage is not strictly confined to legal terminology. The UN and international tribunals have sought to define conflict-related sexual violence in the absence of a consistent definition in international treaty law. From a legal perspective the term conflict-related sexual violence is broadly a synonym for sexual violence that amounts to a violation of international humanitarian law. The UN defines conflict-related sexual violence as:

> *"... rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict."*[17]

In *Akayesu* the ICTR Trial Chamber defined sexual violence broadly, by stating that:

> *"[t]he Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."*[18]

The ICTY followed the judgement in *Akayesu* in the *Omarska, Keraterm & Trnopolje Camps,* defining sexual violence in terms of the acts constituting it:

[17] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 4.
[18] ICTR, case ICTR-96-4 *Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998, at 688.

> *"[...] broader than rape and includes such crimes as sexual slavery or molestation."*[19]

Adding the footnote, which clarified that:

> *"[s]exual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization' and other similar forms of violence."*[20]

The 'Elements of Crimes' to the Rome Statute of the ICC clarifies sexual violence as "an act of a sexual nature" committed by perpetrator against victims either directly or by the use of:

> *"force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power... or by taking advantage of a coercive environment or... person's or persons' incapacity to give genuine consent."*[21]

In this regard the 'Elements of Crimes' to the Rome Statute of the ICC has maintained a broad definition of sexual violence as an act of sexual nature, and integrated case-law evolutions referring to coercion, coercive environment and the lack of consent as guiding elements to identifying crimes incorporating sexual violence. Accordingly, it is accurate to say that the international community generally accepts the ICC's broad and contemporary definition of conflict-related sexual violence as authoritative.

---

[19] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps),* Trial Chamber Judgment of 2 November 2001, at 180.
[20] ICTY, case *IT-98-30/1 Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps),* Trial Chamber Judgment of 2 November 2001, footnote to 180.
[21] ICC, Elements of Crimes for Articles 7(1)(g)-6 and 8(2)(b)(xxii)-6 of the *Rome Statute of the International Criminal Court*.

2.2.2 Defining conflict-related

Even when committed during a time of armed conflict, sexual violence is not always necessarily 'conflict-related'. Conflict-related sexual violence is not defined in international treaties, but it is a synonym of the crime of sexual violence that has a nexus, direct or indirect, that has a *"temporal, geographical and/or causal link"*[22] with a conflict or political strife, and that can be established through the following means:

> *"That link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities; the profile of the victim, who is frequently an actual or perceived member of a political, ethnic or religious minority group or targeted on the basis of actual or perceived sexual orientation or gender identity; the climate of impunity, which is generally associated with State collapse, cross-border consequences such as displacement or trafficking, and/or violations of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence or exploitation, when committed in situations of conflict."*[23]

It thus stands to reason that conflict-related sexual violence is quite often a key component of the commission of related crimes, whereby it is carried out for the purpose of destabilising populations, destroying family and community bonds, supplying combatants with sexual services (sometimes in lieu of monetary payments), as a way to target an enemy and their will to fight or perhaps their centre of gravity, and as a means of advancing ethnic cleansing. It also stands to reason that conflict-related sexual violence can

[22] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 13 January 2012, S/2019/280, at 3.
[23] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 4.

result from opportunistic or random acts of sexual violence during times of armed conflict.

This thesis will proceed on the assumption that acts of conflict-related sexual violence are distinguished from other crimes of sexual violence by their nexus to an armed conflict, and thus a linkage to international humanitarian law and international criminal law for war crimes and other violations of international humanitarian law, irrespective of whether the acts form part of a systematic and widespread attack on a civilian population or as opportunistic or random criminal acts of sexual violence during times of armed conflict. Such crimes, based upon the egregious nature of their commission and the threat they pose to sustainable international peace and security, are of interest to the international community.

2.2.3 Defining non-international armed conflict

Non-international armed conflicts are broadly defined in contemporary international law as:

> *"... armed conflicts not of an international character and [...] [not] situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."*[24]

This definition is designed to distinguish non-international armed conflicts from other forms of violence and civil unrest that is not covered by the

[24] *Rome Statute of the International Criminal Court,* Article 8(2)(f).

framework of international humanitarian law.[25] Whether a specific situation will be characterised as a non-international armed conflict, in general terms, depends on the intensity (or protracted duration[26]) of the conflict and organisation of the parties.[27]

2.2.4 International humanitarian law applicable in non-international armed conflict

In situations of non-international armed conflict, Article 3 common to the Geneva Conventions, 1949 provides the "elementary considerations of humanity" applicable in all types of armed conflicts,[28] and applies to all persons not (or no longer) taking an active part in hostilities. This protection applies without gender distinction, meaning it applies equally to both men and women. Despite common Article 3 contains no explicit prohibition against conflict-related sexual violence, it presumably prohibits such acts implicitly through the outlawing of *"violence to life and person, in particular ... mutilation, cruel treatment and torture"* as well as *"outrages upon personal dignity, in particular humiliating and degrading treatment."* The explicit reference to torture in this Article will be discussed in more detail in chapter 4.

Protocol II additional to the Four Geneva Conventions, 1977 applies to non-international armed conflict and prohibits attacks on civilians and persons no longer directly participating[29] in the armed conflict,[30] explicitly prohibiting

[25] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary* (Cambridge University Press: 2004), p 385.
[26] ICTY, case IT-96-21 *Prosecutor v Mucić et al (Čelebići Judgement),* Trial Chamber Judgment of 16 November 1998, at 184.
[27] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor),* Trial Chamber Judgment of 07 May 1997, at 562.
[28] ICJ, case, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* Judgment, ICJ Reports 1986, at 218.
[29] See ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law,* (2008) 90 IRRC 991, at 1031 and 1034-1035.
[30] Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law.* International Review of the Red Cross, (96/894), 2014, p 513.

rape and other forms of conflict-related sexual violence without distinction between women and men. The wording of Protocol II prohibits the following:

> *"... outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault [for] all persons who do not take a direct part or who have ceased to take part in hostilities."*[31]

Customary international law also applies in the context of non-international armed conflict. The authoritative guide to customary international law in the context of armed conflict is the ICRC study on the rules of customary international law applicable in armed conflict, applying in international and in non-international armed conflicts. Rule 93 of this ICRC study[32] prohibits rape and other forms of sexual violence in non-international armed conflict.

2.3 The criminalisation of conflict-related sexual violence, including ground-breaking jurisprudence of international courts and tribunals

In broad terms, the various individual crimes of rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage and any other crime of a similar gravity that constitute conflict-related sexual violence may take on the international legal character of crimes against humanity,[33] war crimes[34] or be constituent crimes forming part of the crime of genocide.[35] The UN Security Council has been clear to *note* that:

---

[31] Protocol II additional to the Four Geneva Conventions, 1977, Article 4(2)(e).
[32] ICRC *Customary International Humanitarian Law Study.*
[33] *Rome Statute of the International Criminal Court*, Article 7(g).
[34] *Rome Statute of the International Criminal Court,* Article 8(2)(e).
[35] *Convention on the Prevention and Punishment of the Crime of Genocide*, Article 2, and *Rome Statute of the International Criminal Court,* Article 6(b),(c) and (d).

> *"... rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide..."*[36]

Whilst it is not the intention of this thesis paper to delve into each of the individual crimes that constitute conflict-related sexual violence in non-international armed conflict due to space limitations, it is enough for the reader to be aware that crimes constituting instances of conflict-related sexual violence may, broadly, be criminalised in international law through these header crimes.

2.3.1 Nexus to armed conflict

It is important to note that whilst there is no need to prove a nexus to armed conflict for a crime against humanity to substantiated,[37] a crime against humanity that constitutes an act of conflict-related sexual violence will invariably have a nexus to armed conflict. Any absence of a nexus to armed conflict does nothing to detract an act of sexual violence being a crime against humanity, but it does mean it will not be one that is conflict-related. This is an important distinction. Sexual violence exists in many contexts and at varying scales, but this particular study is focused on those instances of sexual violence with a nexus of non-international armed conflict.

---

[36] *UN Security Council Resolution 1820* of 19 June 2008, S/RES/1820(2008), at 4.
[37] See both Friman Cryer and Wilmshurst Robinson, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010), p 235 and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor),* Trial Chamber Judgment of 7 May 1997, at 627 and Appeal Chamber Judgment of 15 July 1999, at 282-288.

2.3.2 Contextual elements

Whilst it is not the intention of this thesis to delve into the contextual elements of crimes against humanity, war crimes of genocide due to space limitations, it should be noted by the reader that acts and crimes that are the subject of international criminal law (including those that fall within the definition conflict-related sexual violence) are only those whereby the criminal acts are committed within certain contextual elements. These contextual elements separate "ordinary" criminal acts from those which are of concern to the community of nations as a whole, thus rendering them the subject of international criminal law. In the case of crimes against humanity,[38] war crimes[39] or genocide[40] these contextual elements are laid out in the ICC Elements of Crimes.

2.3.3 International jurisprudence

The jurisprudence of *ad hoc* international tribunals is important to the background understanding of the criminalisation of conflict-related sexual violence. The ICTR and ICTY were the first international criminal law bodies to extensively deal with the crimes constituting conflict-related sexual violence in the context of non-international armed conflict,[41] and thus will be the focus of the discussion in this section. The *Akayesu* and *Kunarac* cases are worthy of discussion in any introduction to the jurisprudence of international courts and tribunals on matters amounting to conflict-related

[38] ICC Elements of Crimes for Article 7 of the *Rome Statute of the International Criminal Court*.
[39] ICC Elements of Crimes for Article 8(2)(e) of the *Rome Statute of the International Criminal Court*.
[40] ICC Elements of Crimes for Article 6 of the *Rome Statute of the International Criminal Court*. The contextual element for the crime of genocide was implicitly introduced in this elements of crime provision, which states that *"the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."*
[41] Wolfgang Schomburg and Ines Peterson: "Genuine Consent to Sexual Violence under International Criminal Law" in *American Journal of International Law*, Volume 101, Issue 1 (2007), 121, p 122.

sexual violence. These two cases will be discussed with a view to setting the conditions for follow on chapters discussing conflict-related sexual violence as either a *tactic* of warfare and/or as *torture*.

Whilst both *Akayesu* and *Kunarac* dealt with the crimes of rape, it is important to note that conflict-related sexual violence also encompasses crimes relating to sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity.[42] It is worth mentioning that international tribunals like the ICTR and ICTY generally prosecuted other acts of sexual violence as crimes against humanity of "other inhumane acts",[43] whilst acknowledging they could also constitute outrages upon personal dignity and serious bodily or mental harm.

2.3.4 Prosecutor v Akayesu

Akayesu represents the first time in international criminal law that the crime of rape was defined, and the first time that rape was classified as genocide.[44] In this case the accused stood trial at the ICTR and was convicted of crimes against humanity for acts of sexual assault. Furthermore, it was established that rape (a form of conflict-related sexual violence) was an essential element of the commission of the crime of genocide in the armed conflict in Rwanda.[45] In its judgement the Trial Chamber stated that:

---

[42] UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280, at 4.
[43] See Article 5(i) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* and Article 3(i) of the *Statute of the International Criminal Tribunal for Rwanda*. See also William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press: 2010), p 275.
[44] ICTR, case ICTR-96-4 *Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998.
[45] Jocelyn Campanaro: 'Women, war and international law: the historical treatment of gender-based war crimes', *Georgetown Law Journal,* Volume 89, Issue 8 (2001), 2557, p 2569.

> *"[...] rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. [...] The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."*[46]

The judgement of the ICTR in *Akayesu* was praised by feminists, human rights groups, and victims' advocates for focusing on how individuals can be coerced or intimidated into acts constituting sexual violence, and in particular how power imbalances and issues of gender inequality are exacerbated during conflict to the detriment of vulnerable persons most likely to targeted by sexual violence.[47] The *Akayesu* judgement made it clear that the non-consent of victims to the sexual violence they were subjected to did not need to be proved by the prosecutor to establish the existence of the crime. Further, it established that the commission of conflict-related sexual violence crimes constitute more than just a physical act. The judgement did so by emphasising that violence of a sexual nature, and particularly during conflict, attacks the humanity of an individual and targets the destruction of families and communities, and the social and economic fabric of society. This jurisprudence was confirmed in several subsequent cases before the ICTR, such as *Musema,*[48] *Gacumbitsi*[49] and *Muhimana.*[50]

---

[46] ICTR, case ICTR-96-4 *Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998, at 597-598.
[47] Kiran Grewal: 'The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape' in *Journal of International Criminal Justice*, Volume 10, Issue 2 (2012), 373, p 374.
[48] ICTR, case ICTR-96-13 *Prosecutor v Musema,* Trial Chamber Judgment of 27 January 2000, at 908.
[49] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi,* Trial Chamber Judgment of 17 June 2004, at 291-293.
[50] ICTR, case ICTR-95-1B *Prosecutor v Muhimana,* Trial Chamber Judgment of 28 April 2005, at 512-519.

2.3.5 Prosecutor v Kunarac

Kunarac[51] represents the first indictment based solely on crimes of sexual violence against women and the first time that enslavement was charged as a crime of sexual violence (sexual slavery).[52] On the other hand, the *Kunarac* judgement was heavily criticised by feminists, human rights groups, and victims' advocates for re-focusing on consent and making it an integral element for establishing the crime of rape. This criticism seems justified when considering that the commission of rape and other forms of sexual violence, in the context of armed conflict, is generally connected to situations of power imbalance, fear, intimidation, and unequal access to resources.

Sexual violence constituting either crimes against humanity, war crimes, or constituent crimes in the crime of genocide, are most serious crimes that are of importance to the international community as a whole. The prohibition of these crimes protects supranational values, and thus the standard in which to prove their commission should not be dependent on an individual actively non-consenting to the sexual violence they are being subjected.[53]

[51] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Trial Chamber Judgment of 22 February 2001.
[52] Jocelyn Campanaro: "Women, war and international law: the historical treatment of gender-based war crimes", *Georgetown Law Journal,* Volume 89, Issue 8 (2001), 2557, p 2568.
[53] Wolfgang Schomburg, Wolfgang and Ines Peterson: "Genuine Consent to Sexual Violence under International Criminal Law" in *American Journal of International Law,* Volume 101, Issue 1 (2007), 121, p 125.

3.0 Conflict-related sexual violence as a *tactic* of warfare in non-international armed conflict

This chapter seeks to explore the implications of qualifying conflict-related sexual violence as a *tactic* of warfare. It will identify how conflict-related sexual violence has been characterised as such, and it will address the problems associated with characterising it in such a manner. The following issues will be addressed in this chapter:

1. Conflict-related sexual violence as a tactic of warfare.
2. Tactic is a synonym for a method of warfare.
3. The problems with characterising conflict-related sexual violence as a tactic of warfare.

3.1 A *tactic* of warfare

In 2008 the UN Security Council adopted Resolution 1820, following on from the earlier adoption of the UN Women, Peace and Security agenda under UN Security Council Resolution 1325 (2000), recognised that conflict-related sexual violence particularly targets women and girls and constitutes a threat to international peace and security. This development owes much to the persistent efforts of the human rights advocates and the feminist movement, all of which have done much to highlight the widespread nature of sexual violence and the suffering of (non)survivors. Resolution 1820 (2008), for the first time in formal UN policy, characterised conflict-related sexual violence as a tactic of warfare that is used to target and terrorise a civilian population. The Resolution particularly noted that:

> *"... women and girls are particularly targeted by the use of sexual violence, including as a **tactic** of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities..."*[54]

The Resolution went on to *stress* that:

> *"... sexual violence, when used or commissioned as a **tactic** of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security..."*[55]

UN Security Council Resolution 1820 (2008) is considered to be a watershed document in the UN Women, Peace and Security agenda, and a strong and visceral reaction to the targeting and exploitation of vulnerable peoples during times of armed conflict. It highlighted what many knew to be true of the brutal and bloody nature of the battlefield, that conflict-related sexual violence can be operationalised as a means of overwhelming and weakening an adversary and their will to fight, either directly or indirectly, by targeting the civilian population perceived as supporting the enemy and as a driver to forced displacement. This is particularly the case when it is carried out in a systematic manner and covered by a chain of command, or where a chain of command ought to have known of its use but did not take appropriate actions to address it. It is in this sense that conflict-related sexual violence has been referred to as a tactic of warfare. But this the characterisation of conflict-related sexual violence as a tactic of warfare is problematic from a legal

[54] *UN Security Council Resolution 1820* of 19 June 2008, S/RES/1820(2008), preamble.
[55] *UN Security Council Resolution 1820* of 19 June 2008, S/RES/1820(2008), at 1.

perspective, and it is problematic that the UN Security Council did not see fit to clarify the use of this term in the Resolution so as to avoid any ambiguity.

In international humanitarian law terms, the word tactic is a synonym for method and thus the use of the term invokes consideration of issues of military necessity, proportionality and distinction. Furthermore, defining conflict-related sexual violence as a method of warfare does nothing to further criminalise or further contribute to the prosecution of such acts under either international law. It may aid the normative development of how such crimes are viewed within the international community from a policy perspective, but such a characterisation does nothing from a legal perspective to further deter or punish the commission of acts constituting conflict-related sexual violence in non-international armed conflict. Additionally, the existence of widespread conflict-related sexual violence in non-international armed conflict does not necessarily, in and of itself, indicate that such acts are being employed operationally as tactics of warfare.

3.2 Tactic is a synonym for *method*

The terms *tactic* is a synonym for a *method* in international law terms. In this respect, a method relates to the specific conduct, or tactic, when engaging in hostilities in armed conflict.[56] Put another way, a method of warfare is generally understood to be how a weapon is used,[57] or the specific tactics used to take the fight to an enemy in armed conflict.[58] For the purposes of this study method and tactic will be used interchangeably and can be taken by the reader to be synonymous with each other.

[56] Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contempoary Practice in International Humanitarian Law*, 3rd Edition (ICRC: 2011), p 280.
[57] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, (ICRC: 1987), at 1957.
[58] Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contempoary Practice in International Humanitarian Law*, 3rd Edition (ICRC: 2011), p 280.

3.2.1 Methods have limits

Methods by which parties to an armed conflict may wage warfare are not unlimited. Methods are subject to certain limitations in international humanitarian law.

In this respect methods of warfare are restricted by Article 35 of Protocol I additional to the Four Geneva Conventions, 1977.[59] Article 35 affirms the principle of *military necessity*, requiring that parties to an armed conflict consider the balance between humanity and the military necessity of any action.[60] Furthermore, parties to an armed conflict must consider the *proportionality* of their actions by weighing the likely amount of injury and suffering their method will cause against the likely military advantage to be achieved.[61] The aim here is to avoid unnecessary suffering, defined by the ICJ as:

> *"... a harm greater than that unavoidable to achieve legitimate military objectives."*[62]

Methods of warfare are also restricted by Article 51(4) of Protocol I additional to the Four Geneva Conventions, 1977[63] that prohibits indiscriminate attacks. This restriction requires parties to an armed conflict to be able to make the *distinction* between those directly participating in the armed conflict and

[59] Article 35 to Protocol I additional to the Four Geneva Conventions, 1977 is considered customary international law and is applicable in non-international armed conflicts. See Rule 70 of the ICRC *Customary International Humanitarian Law Study*.
[60] Commentary to Protocol I additional to the Four Geneva Conventions, 1977, at 1386.
[61] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press: 2010), p 270.
[62] ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Rep 226, at 238.
[63] Article 51(4) to Protocol I additional to the Four Geneva Conventions, 1977 is considered customary international law and is applicable in non-international armed conflicts. See Rule 71 of the ICRC *Customary International Humanitarian Law Study.*

those not (or no longer) directly participating in the armed conflict, and between military and civilian targets.[64]

3.2.2 Methods subject to an assessed of their legality

In international humanitarian law a method or tactic of warfare is subjected to an assessment of its legality based upon the test of military necessity, proportionality and distinction. The logical question raised by framing conflict-related sexual violence as a tactic, or method, of warfare is thus 'how does one apply the test of military necessity, proportionality and distinction to determine legality, if the *tactic* in question is already unlawful criminal behaviour?' This question will be discussed in the next section on the problem with characterising conflict-related sexual violence as a tactic of warfare.

3.3 Problems with characterising conflict-related sexual violence as a *tactic* of warfare

Characterisations of rape as a tactic or method of warfare are nowadays very commonly made in the international discourse on conflict-related sexual violence and the broader narrative of the UN Women, Peace and Security agenda. The use of this term is widely accepted, at least in a non-legal manner, as a way of highlighting that such acts are not just a by-product of war, but that they may form part of the strategic and operational effects that armed groups and militaries seek to enact in order to shape and influence the battlespace. Whilst such a definition might be acceptable to the layman, the characterisation of conflict-related sexual violence as a tactic or method of

[64] ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Rep 226, at 257.

warfare is problematic from an international law and military sociological perspective. These problems will be addressed in this section as follows:

1. Acts of sexual violence are criminalised.
2. Acts that are criminalised in international law cannot be subjected to a test as to their legality as a method in armed conflict.
3. The characterisation of conflict-related sexual violence as a tactic of warfare creates confusion between the conduct of hostilities and the lawfulness (or unlawfulness) of the methods of warfare.
4. Characterising conflict-related sexual violence as a tactic of warfare does nothing add to the prohibition of such acts under international law.
5. Defining conflict-related sexual violence as a tactic of warfare does nothing to alter how such crimes are considered post-conflict.
6. Sexual violence in conflict that does not fit the narrative of a tactic.

3.3.1 Acts of sexual violence are criminalised

From an international law perspective (and in almost all domestic jurisdictions), sexual violence is unlawful and criminal behaviour. International law criminalises the specific acts of conflict-related sexual violence through various provisions of treaty, international custom and jurisprudence, discussed in chapter two of this thesis. Such criminal acts are prohibited from being used by combatants against anyone, irrespective of status. Additionally, international humanitarian law prohibits violence against civilians and persons not directly participating (or no longer directly participating)[65] in armed hostilities.

[65] See ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, (2008) 90 IRRC 991, at 1031 and 1034-1035.

3.3.2 Acts that are criminalised in international law cannot be subjected to a test as to their legality as a method in armed conflict

Sexual violence is unlawful and criminal behaviour (in both international law and in most domestic jurisdictions) and so it cannot and should not be subjected to a legal test of military necessity, proportionality and distinction[66] by those directly participating in hostilities. Irrespective of the tactical or operational advantage to be gained by the use of sexual violence a combatant cannot lawfully employ such an act as a method of warfare. Military commanders and armed groups should have absolute clarity concerning the law of armed conflict in this regard. There is no test as to the effectiveness of conflict-related sexual violence to target an enemy, irrespective of how effective such acts might be to target the will of an enemy to fight, that can provide any semblance of legality to such brutal acts.

If the lawfulness or unlawfulness of a tactic of warfare depends ultimately on its nature, its military necessity in pursuit of a legitimate military objective, proportionality, and whether it causes superfluous injury or unnecessary suffering or a combination thereof,[67] there can be no argument to support conflict-related sexual violence being permitted.

[66] For discussion on the issues of military necessity, proportionality and distinction see Jan Klabbers, *International Law*, 2nd Edition (Cambridge University Press: 2017), pp 226-227 and Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, 2018), pp 195-199.

[67] See the *1907 Hague Regulations*, Article 23(e) and Protocol I additional to the Four Geneva Conventions, 1977 Articles 35(2), 51(4)(b) and (c). For the customary nature of these rules, see Rules 70 and 71 of the ICRC *Customary International Humanitarian Law Study*.

3.3.3 The characterisation of conflict-related sexual violence as a tactic of warfare creates confusion between the conduct of hostilities and the lawfulness (or unlawfulness) of the methods of warfare

Characterising conflict-related sexual violence as a *tactic* of warfare undermines the steps taken to criminalise such acts under international law. This is because tactics or methods of warfare are generally assessed in terms of military necessity, proportionality and distinction to determine the legality or illegality of their use in a given set of circumstances. Acts of sexual violence are characterised in law as unlawful criminal behaviour at all times, and thus there can never be an assessment as to the utility of their use in an armed conflict.

The characterisation as a tactic of warfare creates some uncertainty on this issue from a legal perspective, and either undermines the criminalisation of sexual violence or undermines the framework for testing methods against well-accepted principles of international law. Uncertainty between the conduct of hostilities and the lawfulness (or unlawfulness) of criminal acts is not the desired result of the characterisation of conflict-related sexual violence as a tactic of warfare, but it is an unfortunate by-product.

Such a characterisation in law might even lead one to a discussion on whether prosecutors have the additional burden to establish how conflict-related sexual violence has been employed by combatants in furtherance of military objectives as an element of crimes in order to make a *prima facie* case. This is less than ideal. Whilst a widespread and systematic attack against a civilian population is a necessary element of crimes against humanity, and the intent to destroy in whole or in part is an element of genocide, these proofs focus more on the strategic context and not necessarily on the operational or tactical context of the conduct of hostilities. Adding an operational or tactical element only adds to the task of ensuring accountability.

3.3.4 Characterising conflict-related sexual violence as a tactic of warfare does nothing add to the prohibition of such acts under international law

Referring to conflict-related sexual violence as a tactic of warfare is a moot point that has no impact on improving accountability for international crimes. It does nothing add to the prohibition of such acts under international law or to further criminalise such crimes under international criminal law. Nor does it alter the obligations and roles of international or domestic courts in the prosecution of such crimes, and arguably it does nothing to further deter its use in non-international armed conflict.

It is, therefore, more accurate to characterise conflict-related sexual violence as unlawful criminal acts used to deliberately target civilians, either as a part of a widespread or systematic attack against civilian populations or as a consequence of a breakdown in civil society that cultivates a climate and culture of impunity. In this respect, as will be demonstrated in chapter 4, the UN missed an opportunity to instead characterise conflict-related sexual violence as torture, within a UN Security Council Resolution, as a means of invoking the special status of the prohibition against torture to improve accountability for these crimes.

3.3.5 Defining conflict-related sexual violence as a tactic of warfare does nothing to alter how such crimes are considered post-conflict

The legacy of acts of conflict-related sexual violence lingers long after the cessation of hostilities, leaving behind shattered lives and livelihoods, shredding social fabrics and impacting sustainable peace. The characterisation of conflict-related sexual violence as a tactic of warfare in any discourse on peace and conflict has much more to do with achieving

political purchase than it does with correlating with international law norms or having any legal implications for the criminal responsibility of individuals under international law.

That said, defining conflict-related sexual violence as a tactic of warfare does nothing to alter how such crimes are considered in post-conflict peace processes, including amnesty provisions, and the establishment of truth commissions. In this respect, references to conflict-related sexual violence are generally absent from ceasefire agreements, such acts are difficult to include in disarmament programmes, and they are (regrettably) rarely mentioned at the peace table. But if one accepts that this characterisation was made for the purpose of shaping the discourse on peace and conflict, one must wonder how this aligns to the essential aspect of peace being not just the absence of conflict but the presence of justice?

3.3.6 Sexual violence in conflict that does not fit the narrative of a tactic

The prevailing characterisation of conflict-related sexual violence as a tactic of warfare refers to such acts being carried out for the purpose of destabilising populations, destroying family and community bonds, supplying combatants with sexual services (sometimes in lieu of monetary payments), as a way to target an enemy and their will to fight or perhaps their centre of gravity, and as a means of advancing ethnic cleansing. This line of argumentation contends that conflict-related sexual violence seeks to advance a political or military objective. Accepting the line of argumentation that conflict-related sexual violence is a tactic of warfare, how does one attribute the widespread occurrence of conflict-related sexual violence that does not fit the narrative of being a systemic tactic for a defined politicial or military purpose?

In many contemporary armed conflicts, such as the conflicts currently ongoing in the South Sudan and Syria, sexual violence in war seems to be

best understood as a conscious strategy to fulfil political and military goals (especially when such acts are attributable to the state). This can be deduced on the basis of a culture of militarism, the issuing of orders down the chain of command, or through the willingness of commanders to look the other way as a means of troop mollification. A strategy of troop mollification is particularly common in situations where civilians are forced into sexual slavery, as has been the case in the harrowing situations of Yezidi women in Iraq and Syria, the abduction of hundreds of school-aged girls for forced marriages in Nigeria in recent years or the taking of 'bush wives' in South Sudan.

However, conflict-related sexual violence can also reflect the opposite of an effectively implemented political or military tactic to target a civilian population. In can be reflective of the breakdown of societal structures and weak legal and security institutions that leads to opportunistic or random criminal acts and a culture of impunity. Conflict-related sexual violence can also reflect a breakdown in command structures, in both command and control and the chain of command, and is thus can be reflective of a commander's lack of control rather than a tactic of warfare. It can be reflective of poor discipline or it can the micro-dynamics of violent score-settling, rather than decisions of military and political leaders focused on defeating the enemy.

The contemporary characterisation of conflict-related sexual violence as a tactic of warfare tends to seek to portray military institutions as rational war machines, but fails to account for a principal factor in military sociology known as the 'fog of war'.[68] Military sociology and the fog of war suggests that the use of violence in armed conflict is shaped and influenced by the situational and fluid nature of warfare. Furthermore, many non-state actors

[68] For the purposes of this master's thesis the fog of war is defined as the uncertainty in situational awareness experienced by those directly participating in armed conflict. The term seeks to capture the uncertainty regarding one's own capabilities, an adversaries capabilities, the adversaries intent and the actions of other actors in the operating environment.

and armed groups engaged in asymmetric warfare rarely function as a disciplined hierarchy of command and control, preferring instead to operate as decentralised, cellular and compartmentalised command and control structures that provide great flexibility and autonomy to individuals. Yet these non-state actors are still responsible for acts of conflict-related sexual violence, at either group on an individual level. The effect of classifying conflict-related sexual violence as a tactic of warfare is that such a definition gives little consideration opportunistic or random criminal acts of sexual violence during times of armed conflict. Furthermore, it presupposes that conflict-related sexual violence is a group action, and may dilute the normative understanding of an individual being responsible for their own actions as part of the expression of their individual agency. In this regard, whilst the term tactic of warfare in connection to conflict-related sexual violence may be descriptive for political purposes, it also risks being too prescriptive and perhaps an exclusionary definition.

In non-international armed conflict, non-state actors and armed groups also play an important role in the commission of conflict-related sexual violence. In these groups the flexibility and autonomy sometimes given to persons directly participating in hostilities on behalf of a non-state actor provides such persons with individual agency and may result in opportunistic or random criminal acts that do not form part of a broader tactic of warfare, but are nonetheless devastating to those whom are targeted by acts of conflict-related sexual violence. Attributing too much rationality to conflict-related sexual violence, assuming it occurs as a tactic of warfare, lacks nuance and fails to deal with the complex nature of armed conflict and of sexual violence. The important take away on this line of argumentation is that irrespective of whether conflict-related sexual violence results from random criminal acts or as a tactic of warfare, such acts are categorically prohibited under international law and thus characterising them as a tactic does nothing to further criminalise them under contemporary international law.

4.0 Framing conflict-related sexual violence in non-international armed conflict as *torture*

This chapter frames conflict-related sexual violence in non-international armed conflict as *torture*, examining the legal implications of torture in terms of additional deterrence measures and the holding to account of perpetrators of conflict-related sexual violence through courts and tribunals. It elevates conflict-related sexual violence crimes to the well-established international legal position that such crimes constitute torture. It does so in order to provoke a strong and visceral reaction and to harness the special legal status of the crime of torture within international law to improve accountability for such crimes.

This chapter also identifies that the UN Security Council missed a significant opportunity to reaffirm this well-established international legal position in Resolution 1820 (2008). It argues that characterising conflict-related sexual violence as torture, vice a tactic, would have served to improve the accountability for criminal acts of sexual violence in armed conflict.

The following issues will be addressed in this chapter:

1. The prohibition against torture.
2. Conflict-related sexual violence in non-international armed conflict constitutes torture.
3. The implications of defining conflict-related sexual violence as torture.

4.1 The prohibition against torture

The broad consensus in contemporary international law is that the prohibition against torture constitutes a fundamental rule of customary international law.[69] The prohibition against torture is a *jus cogens* norm,[70] defined as a peremptory norm of international law from which there can be no derogation.[71] The result of the prohibition against torture existing in international law as a *jus cogens* norm is that all states, even those not party to the international treaties prohibiting the use of torture (such as the Convention Against Torture[72]), are subject to the prohibition and it is one that they cannot derogate from noting its peremptory norm status in international law.[73] Put another way, the prohibition on torture is an absolute prohibition without exception[74] and constitutes a negative obligation to refrain from acts constituting torture.[75] The prohibition against torture will be framed in this section as follows:

1. Torture under international human rights law.
2. Torture under international humanitarian law.
3. Torture under international criminal law

[69] ICTY, case IT-95-17/1-T *Prosecutor v. Anto Furundzija ('Furundzija Judgment'),* Trial Chamber Judgement of 10 December 1998, at 160.
[70] Human Rights Committee, General Comment No. 24 (52)(1994), UN Doc. CCPR/C.21.Rev.1/Add.6 (1994) at 10.
[71] See General Comment No. 2, 'Implementation of Article 2 by States Parties', UN Doc. CAT/C/GC/2/CRP/1/Rev.4 (2007), Advance Unedited.
[72] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
[73] Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014) 75, p 84.
[74] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, pp 176-177.
[75] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 182.

4.1.1 Torture under international human rights law

The prohibition against torture or other cruel, inhuman or degrading treatment or punishment is a fundamental principle enshrined in international human law.[76] The Human Rights Council does not distinguish between treatment amounting to torture, inhumane or degrading treatment.[77] International human rights law is relevant to any discussion on the use of torture in armed conflict. Whilst armed conflict may impose limits on the enjoyment of rights, human rights cannot be completely set aside merely because parties engage in armed conflict.[78] It is for these reasons that the overwhelming consensus amongst legal scholars and international bodies is that international human rights law applies at all times, in peace and armed conflict, and international humanitarian law applies in armed conflict.[79] In this respect, international humanitarian law applies *lex specialis* to the *lex generalis* nature of international human rights law during times of armed conflict.[80]

Furthermore, international human rights law is binding *de jure* on states with obligations to individuals within its jurisdiction or effective control, whereas international humanitarian law is binding on parties to an armed conflict, including state and non-state actors, with varying obligations to persons directly participating in armed conflict versus those designated as protected persons.

---

[76] See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
[77] OSCE Office for Democratic Institutions and Human Rights (ODIHR), Manual: *Countering Terrorism, Protecting Human Rights* (2007), p 121.
[78] Marko Milanovic´: 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) *Journal of Conflict and Security Law*, Vol. 14 No. 3, 459, pp 464-465.
[79] Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014) 479, p 487.
[80] ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Rep 136, at 106 and ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Rep 226, at 25.

The Convention Against Torture enshrines the prohibition against torture in international human rights treaty law. It defines torture as:

> *"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind..."*[81]

Article 1 of the Convention Against Torture also contains an explicit requirement that the act of torture be:

> *"... inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

This particular restriction has been heavily criticised by feminist legal scholars on the basis that acts of violence that might otherwise be torturous in nature may be excluded based on them being committed by non-state actors,[82] a point which is particularly relevant in the context of non-international armed conflict. In this regard the feminist movement has done much to highlight that the restrictive nature of torture when framed under the Convention Against Torture definition, of which the three core elements are:

1. Pain and suffering must be severe, and it can be either physical or mental, or both.
2. It must be inflicted for a defined purpose.

---

[81] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Article 1.
[82] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', 1991 *American Journal of International Law* 85, 613, p 627.

3. It must be inflicted by or under the agency of a public official.[83]

The feminist criticism of the wording in the Convention Against Torture is well justified. Women and girls are disproportionately the target of acts of sexual violence inflicting severe pain and suffering for the purpose of discrimination against women (this being the defined purpose of the act), and most often these acts are perpetrated by non-state actors (in both conflict and in time of peace). Applying a gender perspective to the wording of the Convention thus leads to the conclusion that gender has a considerable impact level of protection offered to either men or women if the crime of torture is restricted to violence and humiliation directly at the hands of state actors. Such a limitation on the characterisation of torture, one could argue, is a male construct based upon a traditional understanding of torture by state agents in interrogation or custodial sentences. After much legal discourse over the requirement that an act of torture be at the instigation of or with the consent or acquiescence of a public official, the Committee Against Torture has clarified that:

> *"... where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors... the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts*

[83] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 179.

> *impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking."*[84]

This is a significant clarification of how the crime of torture is constructed under international human rights law and, as will be demonstrated in the case study on South Sudan in chapter 5, this has significant implications in addressing conflict-related sexual violence at the hands of non-state actors.

In *Rosendo Cantú and other v Mexico*[85] the issue of due diligence of a state to investigate, prosecute and make reparations for a crime of sexual violence was assessed by the IACtHR. In their jurisprudence the Court found unequivocally that rape and sexual violence constituted torture when committed systemically and for a defined purpose, applying the jurisprudence of the ICTR and ICTY. This is significant, in that it demonstrates that not only is international human rights law *lex generalis* to international humanitarian law, but that that other areas of international law can influence and assist in clarifying international and regional human rights law.

Violations of the absolute prohibition against torture under the Convention Against Torture create to the obligation on a state to investigate, and if sufficient evidence is gathered to warrant the commencement of a case then the obligation to prosecute or the option to extradite.[86] This obligation exists irrespective of the jurisdiction in which the act of torture was carried out or the nationality of the perpetrator, which has been described by jurists as a

---

[84] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, at 18.
[85] IACtHR, case 12.579, *Rosendo Cantú and other v Mexico*, Judgement of 31 August 2010.
[86] Articles 7, 8, and 9 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

'form of universal jurisdiction.'[87] The only requirement is that the perpetrator either be in the custody or jurisdiction of a state party to the Convention Against Torture to thus establish the obligation on the state.[88]

The seminal case in international law for establishing the jurisprudence on the obligation to prosecute or the option to extradite for the crime of torture under the Convention Against Torture is the ICJ case of *Belgium v Senegal*.[89] In this case the ICJ found that Senegal had breached its obligations under Articles 6 and 7 of the Convention Against Torture to investigate and either prosecute or extradite Mr. Hissène Habré, the former President of Chad, for crimes of torture and crimes against humanity. This case established in international law, in the context of the Convention Against Torture, that prosecution of a suspected perpetrator of torture is an obligation even if there is no specific connection between the state and the alleged crime of torture other than the presence of the suspect. It further established that extradition is an option offered to a state by the Convention Against Torture, should it not have the resources to prosecute or should another state party request extradition of the accused on the basis of a *prima facie* case being made.[90]

The legal effect of the judgement in *Belgium v Senegal* is that it provides for the possible decentralisation of prosecution for the crime of torture by third-party state parties, in a contemporary international legal framework whereby direct enforcement of such crimes by international courts remains the exception. This has the potential to create a more robust network of judicial avenues for the prosecution of the crime of torture, it may act as a deterrence

[87] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 183.
[88] Article 7 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
[89] ICJ case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 2012, 422.
[90] ICJ case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 2012, 422, at 94.

measure, and it is likely to improve the chances of holding to account perpetrators of conflict-related sexual violence through courts and tribunals.[91]

4.1.2 Torture under international humanitarian law

Whilst this definition of torture under international human rights law is useful when interpreting torture under international human rights law frameworks, it must be noted that such a definition does not restrict other areas of contemporary international law to only acts committed under the agency of a public official.[92] In this respect, institutional dimensions in other areas of international law can be seen as substitutes for the public official requirement under the Convention Against Torture.[93]

International humanitarian law prohibits torture, cruel and degrading treatment in non-international armed conflict via Article 3 common to the Geneva Conventions, 1949 and customary international law,[94] although it does not explicitly define the term torture per se.

4.1.3 Torture under international criminal law

International criminal law is clear that acts of torture may amount to war crimes or crimes against humanity when committed as part of a widespread

[91] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Edition, (Oxford University Press, 2018), p 223 and the authorities cited therein.
[92] Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law.* International Review of the Red Cross, (96/894), 2014, pp 521-524.
[93] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 180.
[94] Rule 90 of the ICRC *Customary International Humanitarian Law Study.*

or systematic attack.[95] The 'Elements of Crimes' to the Rome Statute of the ICC adopt two different definitions of torture, as either a crime against humanity or a war crime. Concerning defining torture as a crime against humanity, the Elements of Crimes list the following:

1. *The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.*
2. *Such person or persons were in the custody or under the control of the perpetrator.*
3. *Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.*[96]

Concerning defining torture as a war crime, the Elements of Crimes list the following:

1. *The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.*
2. *The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.*[97]

The absence of a public official requirement to the crime of torture in international criminal law has a direct linkage to the understanding that in armed conflict violent acts of torture are not always committed by state actions, but can be committed by non-state actors. In this respect the institutional dimensions for the crime of torture in international criminal law are elements of organisation to classify a non-state actor as a party to a conflict within the meaning of international humanitarian law (for war

[95] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 176.
[96] ICC Elements of Crimes for Article 7(1)(f) of the *Rome Statute of the International Criminal Court*.
[97] ICC Elements of Crimes for Articles 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 of the *Rome Statute of the International Criminal Court*.

crimes), and in the context of an attack on a civilian population (for crimes against humanity).[98]

4.2 Conflict-related sexual violence in non-international armed conflict constitutes *torture*

Acts of conflict-related sexual violence in non-international armed conflict constitute torture and are prohibited in the strongest of international legal terms. Sexual violence is a means of torturing men, women, boys and girls (and indeed communities), as it inflicts severe physical and mental pain and is often aggravated by additional factors, such as social and cultural implications, the risk of sexually transmitted diseases, the risk of pregnancy, and damage to an individual's reproductive system.[99] The following jurisprudence establishing sexual violence as torture in international law and points of argumentation will be discussed in this section:

1. *Prosecutor v Akayesu* – sexual violence in armed conflict meets the definition of torture in international human rights law.
2. *Prosecutor v Kunarac* - sexual violence in armed conflict defined as torture under international humanitarian law.
3. *Čelebići judgment* – rape can produce the level of suffering and specific purpose to constitute torture, and constitutes discrimination against women.
4. UN Security Council missed a significant opportunity to reaffirm and solidify this well-established international legal position that sexual violence constitutes torture.

[98] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p180.
[99] Michelle Jarvis, 'An Emerging Gender Perspective on International Crimes' in eds Gideon Boas and William Schabas, *International criminal law developments in the case law of the ICTY* (Nijhoff, 2003), 157, p 163.

4.2.1 Prosecutor v Akayesu

In *Akayesu* it was determined by the ICTR Trial Chamber that rape (an act of conflict-related sexual violence) can constitute *torture*, and that there is a linkage between the crime of *torture*, rape and the crime of genocide.[100] The Trial Chamber stated that:

> *"[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*[101]

The Trial Chamber in *Akayesu* further stated that:

> *"Indeed, rape and sexual violence certainly constitutes ... one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm ... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities…"*[102]

In this regard the Trial Chamber in *Akayesu* reflected the definition of *torture* as per international human rights law, by referencing the core elements of Convention Against Torture, being:

---

[100] Alexandra Miller: 'From the International Criminal Tribunal for Rwanda to the International Criminal Court: expanding the definition of genocide to include rape' in *Penn State Law Review*, Volume 108, Issue 1 (2003), 349, p 364.
[101] ICTR, case ICTR-96-4 *Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998, para 597
[102] ICTR, case *ICTR-96-4 Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998, at 731-734.

1. Pain and suffering must be severe, and it can be either physical or mental, or both.
2. It must be inflicted for a defined purpose.
3. It must be inflicted by or under the agency of a public official.[103]

The fact that the ICTY relied upon the international human rights law definition of torture, as per the Convention Against Torture, is significant in that it shows that international courts and tribunals dealing with issues of international criminal law are willing and able to draw upon definitions from other components of international law in which to establish the elements of the crime. Thus, where international humanitarian or criminal law is vague the *lex generalis* nature of international human rights law can be applied to clarify or assist the jurisprudence of courts.

4.2.2 Prosecutor v Kunarac

The ICTY Trial Chamber, in *Kunarac*, took a different approach to the ICTR in *Akayesu* in how it defined the elements of the crime of torture. In this respect, the ICTY in *Kunarac* clarified that the crime of torture in international humanitarian law does not necessarily require the presence of a state official or other person of authority in the same manner as it does under an international human rights law definition of *torture*. The Chamber stated that:

> *"... the definition of torture under international humanitarian law does not comprise the same elements ... under human rights law... [T]he presence of a state official or of any other authority-wielding person in the torture process is not*

[103] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 179.

necessary for the offence to be regarded as torture under international humanitarian law... [I]n the field of international humanitarian law, the elements of the offence of torture [...] are as follows:

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) The act or omission must be intentional.
(iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[104]

What is crucial for the establishment of torture in international humanitarian law is the intent to inflict severe pain and suffering for a specific purpose. The absence of a public official requirement to the crime of torture under international humanitarian law has a direct linkage to the operational reality that in armed conflict violent acts of torture are not always committed by state actions, but are also committed by non-state actors. This is a critical development in the jurisprudence of the crime of torture in the context of non-international armed conflict.

Furthermore, the ICTR Appeal Chamber in *Kunarac*, whilst reinforcing the international human rights law position with respect to establishing severe pain and suffering, stated that acts of sexual violence, including rape, constituted prima facie acts that inflict sever pain and suffering:

"[g]enerally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act ... Sexual violence necessarily gives rise to severe pain

[104] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Trial Chamber Judgment of 22 February 2001, at 496-497

> *or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture ... Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering."*[105]

The ICTY reinforced the position of *Kunarac* in several other cases, establishing a body of jurisprudence that defines rape and sexual violence as torture.[106] The issue of conflict-related sexual violence as torture was examined further by the ICTY in the *Čelebići judgment*,[107] which is examined in further detail in the section below. What is relevant to highlight about this case at this juncture is that the Trial Chamber examined rape in relation to the crime of torture by analysing in detail the jurisprudence of other international courts and tribunals dealing with the crime of rape as torture, such as the Inter-American Court of Human Rights and the European Court of Human Rights. In this respect international criminal law can again be seen to be drawing upon the *lex generalis* nature of international human rights law to inform other areas of international law.

4.2.3 Čelebići judgment

The *Čelebići judgment* established undoubtedly that rape can produce the level of suffering necessary for torture. Moreover, this judgement considered in detail that only a rape with a specific purpose will constitute the crime of torture, instead of the crime of rape. The *Čelebići judgment* the ICTY Trial

[105] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Appeal Chamber Judgment of 12 June 2002, at 151.
[106] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps),* Trial Chamber Judgment of 02 November 2001, at 139 and 144-145.
[107] ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Judgement),* Trial Chamber Judgment of 16 November 1998.

Chamber stated that rape is a form of discrimination against women,[108] a position that drew great support from feminist legal scholars and drawing upon the *lex generalis* jurisprudence of the Inter-American Court of Human Rights in *Fernando and Raquel Mejia v. Peru* that stated that the objective of rape:

> *"in many cases, is not just to humiliate the victim but also her family or community."*[109]

To support the position that rape constitutes discrimination against women, and that discrimination fulfils the purpose requirement to establish the crime of torture, the ICTY Trial Chamber referred to the UN Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict statement that:

> *"[I]n many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture."*[110]

The jurisprudence of the ICTY, that rape constitutes discrimination against women, and that discrimination fulfils the purpose requirement to establish the crime of torture, was confirmed by the ICTR in *Semanza*.[111] The ICTR Trial Chamber stated that:

> *"[t]he Chamber has found... that the Accused, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them... The Chamber finds that*

---

[108] See Michelle Jarvis, 'An Emerging Gender Perspective on International Crimes' in eds Gideon Boas and William Schabas, *International criminal law developments in the case law of the ICTY* (Nijhoff, 2003), 157, p 166 and ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Judgement),* Trial Chamber Judgment of 16 November 1998, at 494.
[109] IACtHR, case 10.970 *Fernando and Raquel Mejia v. Peru,* Judgement of 1 March 1996, Report No. 5/96, at 3(a).
[110] Final report submitted by Ms Gay J. McDougall, UN Special Rapporteur on Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (1998), at 495.
[111] ICTR, case ICTR-97-20 *Prosecutor v Semanza,* Trial Chamber Judgment of 15 May 2003.

> *the rape was committed on the basis of discrimination, targeting Victim A because she was a Tutsi woman. The Chamber recalls that severe suffering inflicted for the purposes of discrimination constitutes torture and, therefore, finds that the principal perpetrator tortured Victim A by raping her for a discriminatory purpose... The Chamber finds that by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture... Therefore, the Chamber finds that the Accused is criminally responsible for instigating torture as a crime against humanity."*[112]

In this respect, international courts and tribunals that have classified conflict-related sexual violence as torture have consistently drawn upon norms of international human rights law in their jurisprudence. This is both because of the *lex generalis* nature of international human rights law, but arguably also because acts of conflict-related sexual violence characterised as torture directly conflict with the fundamental aim of human rights to guarantee the fundamental freedoms and integrity of the person.

4.2.4 UN Security Council missed a significant opportunity to reaffirm and solidify this well-established international legal position

The jurisprudence of international tribunals is clear; sexual violence constitutes torture when the intent of the crime is to inflict severe pain and suffering for a specific purpose. It is for these reasons that it is submitted that

[112] ICTR, case ICTR-97-20 *Prosecutor v Semanza,* Trial Chamber Judgment of 15 May 2003, at 481-485.

the UN Security Council missed a significant opportunity to reaffirm and solidify this well-established international legal position in its characterisation of conflict-related sexual violence in the drafting and adoption of UN Security Council adopted Resolution 1820 (2008). Instead it opted for a characterisation of conflict-related sexual violence as a tactic of warfare, which is problematic for the reasons outlined in chapter 3.

It is submitted that an alternative wording for a UN Resolution that would clarify and solidify the characterisation of conflict-related sexual violence as torture and improve accountability for such crimes would read as follows:

> *'conflict-related sexual violence inflicts severe pain and suffering on victims, whether physical or mental, disproportionately affecting women and children. Conflict-related sexual violence has the purpose of humiliation, domination, discrimination, to instil fear in, to drive displacement of civilians and specific ethnic groups, and is perpetrated in a manner that may in some instances persist after the cessation of hostilities. Conflict-related sexual violence by its very nature justifies its characterisation as an act of torture, and are thus crimes directed against the interests of the international community as a whole.'*

4.3 The implications of defining conflict-related sexual violence as torture

Categorically characterising conflict-related sexual violence as torture via a UN Security Council Resolution would act to further improve accountability sexual violence crimes in armed conflict, based upon the absolute prohibition against torture as discussed in this chapter in the section on 'the prohibition against torture'. Such a characterisation would have served to reaffirm and

solidify well-established international norms on the special status of the crime of torture, specifically:

> *"The aim is to ensure that the torture protection framework is applied in a gender-inclusive manner with a view to strengthening the protection of women from torture. While a variety of international instruments explicitly or implicitly provide for an extensive set of obligations with respect to violence against women or rape, classifying an act as "torture" carries a considerable additional stigma for the State and reinforces legal implications, which include the strong obligation to criminalise acts of torture, to bring perpetrators to justice and to provide reparation to victims."*[113]

The implications of characterising conflict-related sexual violence as torture will be discussed as follows:

1. Implications under international human rights law.
2. Implications under international humanitarian law.
3. Implications for post-conflict peace.

4.3.1 Implications under international human rights law

Acts of conflict-related sexual violence satisfying the definition of torture contained within the Convention Against Torture, that of a criminal act causing severe pain and suffering, inflicted for a defined purpose and under the agency of a public official (or with the the *de facto* acquiescence of the state through its failure to exercise due diligence), creates the obligation to

[113]Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak* of 15 January 2008, A/HRC/73, at 26.

prosecute or the option to extradite when a *prima facie* case is made out and the alleged perpetrator is either in the custody or jurisdiction of a state party. This has significant implications in international law for alleged perpetrators of conflict-related sexual violence constituting torture during non-international armed conflict, as a 'form of universal jurisdiction'.[114]

This also enables the possible decentralisation of prosecution for the crime of torture by third-party states under the international human rights law framework. This is perhaps the most significant component of the existing international legal framework for addressing conflict-related sexual violence, albeit limited to specific circumstances in which public officials are involved in acts of torture. It would also serve as a means by which to hold state parties accountable for their failure to prosecute perpetrators responsible for acts of torture constituting conflict-related sexual violence,[115] which is a significant issue in situations of non-international armed conflict noting the realpolitik of how states and individuals in positions of power seek to protect their own interests.

4.3.2 Implications under international humanitarian law

Elevating acts of conflict-related sexual violence to the status of torture would result in such crimes amounting to breaches of international humanitarian law, implying mandatory universal jurisdiction for acts committed in international armed conflict.[116] This would place a duty on states to prosecute or extradite those who have allegedly committed war crimes amounting to

[114] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 183.
[115] ICJ case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgment, ICJ Reports 2012, 422.
[116] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Edition, (Oxford University Press, 2018), pp 73-83 and the authorities cited therein.

grave breaches when a *prima facie* case could be made out in situations of international armed conflict.

This duty on states to prosecute or extradite those who have allegedly committed war crimes corresponds with the principle of customary international humanitarian law that serious violations of international humanitarian law, whether committed in international or non-international armed conflict, constitute war crimes.[117] That said, there is much controversy in international law as to whether war crimes constituting serious violations of international humanitarian law provide for universal jurisdiction in situations of non-international armed conflict.[118] In any case, a characterisation of conflict-related sexual violence as torture via a UN Security Council Resolution, such as the one suggested in the preceding section would do much to intensify the discourse amongst international jurists and scholars. It would have also served the purpose of provoking a stronger and more visceral response on the part of policy and lawmakers to take further measures to address sexual violence noting the special legal status of the crime of torture.

What is not debated in international law is the applicability of common Article 3 to the Geneva Conventions, 1949. Under common Article 3, all parties to armed conflict of a non-international character are obliged to respect the minimum standards of humane treatment. In particular civilians and persons not taking an active part in hostilities are protected from violence. Common Article 3 specifically prohibits torture,[119] and so the characterisation of conflict-related sexual violence as torture enables the direct invocation of this Article as a negative obligation on all parties to a conflict. This elevates acts of conflict-related sexual violence to direct violations of common Article 3 under the specific provision for torture.

[117] Rule 156 of the ICRC *Customary International Humanitarian Law Study.*
[118] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Edition, (Oxford University Press, 2018), pp 75-76 and the authorities cited therein.
[119] Common Article 3 to the Four Geneva Conventions, 1949.

4.3.3 Implications for post-conflict peace

Characterising conflict-related sexual violence as torture may alter how such crimes are considered in post-conflict peace processes, including amnesty provisions, and the establishment of truth commissions. This is because of the increasingly accepted concept in international law, and international realpolitik, is that it is unacceptable to grant amnesty to persons responsible for the serious crime of torture during post-conflict peace processes.[120] The crime of torture is so egregious and acts constituting such a crime are directed against the interests of the international community as a whole. In essence this creates the impetus for states and the international community to prosecute alleged perpetrators when a prima facie case for torture is made out, rather than to grant amnesty for the 'lesser'[121] crime of conflict-related sexual violence. Characterising conflict-related sexual violence as torture, and torture constitutes a *jus cogens* norm of international law, creates an *erga omnes* obligation on states to prosecute or extradite and invokes the non-applicability of any immunities and the non- applicability of the defence of obedience to superior orders.[122]

Additionally, the characterising of conflict-related sexual violence as torture provides for the specific right to reparation for victims through both customary international law and treaty law.[123] Whilst reparations for such acts do not negate the impact of the act, they can seek to repair broken lives and may provide formal compensation and recognition to survivors.

---

[120] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174, p 183 and the authorities cited therein.

[121] This thesis is not arguing that a crime constituting conflict sexual violence is lessened in impact on the victim by if it is not constituted as torture, but rather arguing how it is characterised and construed in international law.

[122] See ICJ, case, *Barcelona Traction Case (Belgium v Spain) (Second Phase)* (1970), ICJ Rep 3, at 33.

[123] Article 14 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Deterrence is generally presumed to be one of the primary objectives of criminal law. Characterising conflict-related sexual violence as torture may serve to deter future acts given the egregious nature of torture in international law. Crimes of torture are directed against the interests of the international community as a whole, garnering widespread condemnation and generating political pressure to remedy the violation. Accordingly, by classifying sexual violence as torture, state and non-state actors may take active measures to ensure such acts are not committed based upon the strategic reputational risk such crimes represent to the moral authority for their cause or to the public image they wish to cultivate to establish or maintain support for their cause. In this respect the UN Security Council noted:

> "… consistent and rigorous prosecution of sexual violence crimes is central to deterrence and prevention…"[124]

The ICTY Appeal Chamber in *Erdemović* discussed the role of law as a deterrent to crime in great detail,[125] with a joint separate opinion determining that legal sanctions not only form part of a potential future perpetrators' rational decision-making processes, but they might also have the effect of dissuading at least some potential future perpetrators' from committing their crimes. Whether in reality any deterrent effect of the law can be observed, and to what extent and in what circumstances, is a matter of some debate, and beyond the scope of this thesis (as it would form a thesis in and of itself). Suffice to say, this would present an interesting topic of research for scholars, and discussion for international jurists, should conflict-related sexual violence be characterised as torture via a UN Security Council Resolution.

[124] *UN Security Council Resolution 2467* of 23 April 2019), S/RES/2467 (2019), preamble.
[125] See the Joint Separate Opinion of Judge McDonald and Judge Vohrah in ICTY, case IT-96-22-A *Prosecutor v Erdemović*, Appeals Chamber Judgement of 7 October 1997, at 75-80.

5.0 Case study. Conflict-related sexual violence in the non-international armed conflict in South Sudan

This chapter studies the situation in South Sudan, as well as the more general themes of conflict-related sexual violence explored in earlier chapters, in order to explore broad questions about the framing of sexual violence as an act of torture. It harnesses the special legal status of the crime of torture within international law to examine the legal implications for those responsible for the brutal, widespread and systematic use of sexual violence in the non-international armed conflict in South Sudan.

5.1 The situation in the South Sudan

The Republic of South Sudan gained independence from the Republic of Sudan in 2011, after almost forty years of conflict. In a devastating blow for this new nation, South Sudan spiralled into a further conflict in late 2013, on the back of a political dispute that overlapped with pre-existing ethnic and political tensions between the two largest tribal groups, Dinka and Nuer.[126] In September 2018 a peace deal was reached in this conflict, with an agreement to establish a transitional government of national unity in May 2019 (the timeframe for which has now been extended).[127]

A significant feature of the conflict since December 2013, as with many other of its kind in Rwanda, the Former Yugoslavia, and the Democratic Republic

[126] Lauren Ploch Blanchard, *Conflict in South Sudan and the Challenges Ahead* (Congressional Research Service: 2016), p 1.
[127] Hiba Morgan, 'South Sudan war crimes: UN calling for forming hybrid court', *Al Jazeera*, 17 September 2018.

of the Congo to name but a few, has been the scale, intensity and severity of violations of international law and the human rights abuses.

5.1.1 International legal framework applicable to South Sudan

The international legal framework applying to the conflict situation in South Sudan includes international human rights law, international humanitarian law and international criminal law. The conflict in South Sudan is characterised in international law as a non-international armed conflict, in which all parties are bound by international humanitarian law.[128] South Sudan is a party to the four Geneva Conventions, 1949 and the two Additional Protocols, 1977.[129] Accordingly, all parties to the conflict are obliged to observe Common Article 3 and Protocol II additional to the Four Geneva Conventions, 1977.

With respect to human rights, the South Sudanese state is obligated at all times to respect, protect and fulfil the human rights of all persons within its territory and subject to its jurisdiction.[130] Of particular relevance to this case study, and in addition to its obligations under customary international human rights law, South Sudan has obligations with respect to the crime of torture as a state party to the Convention Against Torture and its Additional Protocol.[131] The importance of the obligations South Sudan has in terms of this international treaty will be discussed in the coming sections.

---

[128] UNMISS Report, *A report on violations and abuses of international human rights law and violations of international humanitarian law in the context of fighting in Juba, South Sudan, in July 2016,* January 2017, p 8.
[129] ICRC database, 'Treaties, States Parties and Commentaries: South Sudan', accessed 21 May 2019. South Sudan acceded to the four Geneva Conventions, 1949 and their two Additional Protocols on 16 July 2012.
[130] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford university Press, 2014), 96, pp101-104.
[131] OHCHR database, 'Status of Ratification Interactive Dashboard', accessed 21 May 2019. South Sudan acceded to the Convention Against Torture and its Additional Protocol on 30 April 2015.

There exists a staggering level of impunity[132] and a lack of justice in South Sudan, towards both the investigation and the prosecution of crimes, and particularly crimes of sexual violence. This is both due to the crisis state the country finds itself in, the lack of development in the country, the lack of capacity within the justice system, and the cultural norms surrounding the recognition and accountability for sexual violence. Additionally, the South Sudanese Security Forces (SPLA and SSPS) and other non-state actors are routinely able to take advantage of the instability resulting from the armed conflict to target and exploit civilians with relative impunity in a nation where there is little semblance of effective accountability mechanisms and where those with power and status are able to protect themselves through their influence and networks.[133]

5.1.2 Culture of impunity

Impunity is a significant challenge in cases involving the South Sudanese Security Forces (including SPLA soldiers or SSPS personnel). My personal observation is that the South Sudanese justice system is dysfunctional and has little impact outside of the major population centres. Investigations and prosecutions of sexual violence ordinarily move slowly because of a lack of capacity or because those responsible for investigating are, in some capacity, involved with the commission of the alleged crimes. A consequence of this climate of impunity is that survivors of crime often consider it futile to report the crimes to domestic security forces.

[132] UNMISS Report, *Human rights violations and abuses in Yei, July 2016 – January 2017,* May 2017, p 7.
[133] UNMISS Report, *A report on violations and abuses of international human rights law and violations of international humanitarian law in the context of fighting in Juba, South Sudan, in July 2016,* January 2017, pp 7 and 28.

5.2 Conflict-related sexual violence in South Sudan

Credible reporting from the UN and other respected human rights organisations paints a picture of widespread conflict-related sexual violence in the context of fighting within the non-international armed conflict in South Sudan. This reporting supports my personal observations as to the prolific use of sexual violence by all sides to this conflict and the broader issues of gender-based violence in South Sudan. Sexual violence crimes are systemic to both the culture and modus operandi of both the South Sudanese Security Forces and non-state armed groups in this conflict, who operate with effective impunity. Both state and non-state actors consistently and blatantly ignore norms of international law, deliberately targeting civilians, in particular women and children, with violence, brutality and with disregard for humanity.[134]

5.2.1 Documenting conflict-related sexual violence in South Sudan

The widespread nature of sexual violence in this conflict is associated with the intimidation and coercion of the civilian population, as both a driver of displacement and as a result of a breakdown in the rule of law that has cultivated a climate and culture of impunity. The UN has sought to document the testimony of (non)survivors and witnesses of this widespread sexual violence since the outbreak of hostilities. This reporting is both confronting and harrowing. A selection of these reports is presented below as an illustration of the widespread and systematic nature of sexual violence in this non-international armed conflict. The decision to reprint these accounts in

[134] UNMISS Report, *A report on violations and abuses of international human rights law and violations of international humanitarian law in the context of fighting in Juba, South Sudan, in July 2016,* January 2017, within executive summary.

detail is a conscious one, with the view to giving voice to (non)survivors of conflict-related sexual violence in this master's thesis .

> *"… women and girls suffered physical assaults and sexual violence including rape, gang-rape and sexual assaults… In most of these cases, victims and witnesses reported that the alleged perpetrators were SPLA soldiers, police officers and NSS members…*
>
> *… SPLA soldiers would reportedly separate the women and girls they judged more attractive to them, to be raped or gang-raped, while the remaining women were forced to wait, sometimes held at gunpoint. On another occasion, women and girls were ordered to cook for the soldiers at checkpoints when their friends or family members were raped…*
>
> *Other survivors narrated that women leaving the PoC sites moved in groups of five, 10, 15 or more as a protective measure. However, this did not prevent them from being raped by SPLA soldiers and other uniformed personnel at various places, including at SPLA checkpoints…*
>
> *… victims were given "the choice" of either being raped or killed, while being held at gunpoint. Some of the victims interviewed reported that they were gang-raped by more than four armed men. One survivor reported that she was raped by 15 men. Testimonies gathered suggest that some of the attackers were as young as 15 years old…*
>
> *They ordered one of the women to go into a separate room, where she was assaulted, hit on her genitalia, bitten on her face and neck, and repeatedly raped. The witness reported that one of the soldiers who raped her was very young… The last soldier*

who raped her sprayed insect repellent on her face while singing. The victim also observed the physical abuse and rape of other women by SPLA soldiers…

Another female victim testified that she was also seriously physically assaulted by different SPLA soldiers before being repeatedly raped in different locations of the house. While trying to make her way out of the building, the woman also witnessed the rape of other female residents, who were forcibly pulled into different rooms. Another victim testified that she was also raped by a very young soldier who was under pressure from other soldiers to do so…

A male resident at the Hotel recounted that he witnessed the rape of some women while he was hiding under a bed. Many other witnesses stated they could hear women in the building screaming while being raped. All interviewed by UNMISS confirmed the high degree of violence and brutality…

… a 24-year-old woman who had gone to the funeral of a relative who had been killed during the fighting was raped by an SPLA soldier. According to witnesses, 10 SPLA soldiers reportedly entered the compound in Jebel, where the mourners were sleeping, dragged the victim out of the compound and handed her over to an SPLA soldier who subsequently raped her…

… a pregnant woman was gang-raped and severely beaten by SPLA soldiers in a Juba neighbourhood…"[135]

[135] UNMISS Report, *A report on violations and abuses of international human rights law and violations of international humanitarian law in the context of fighting in Juba, South Sudan, in July 2016,* January 2017, pp 18-20.

"… about 50 armed men believed to be SPLA soldiers entered a compound in Yei County, where internally displaced persons had sought protection. Four soldiers raped a young displaced woman in front of her family while other soldiers cheered." [136]

"Testimonies reflect an insight into the scale and severity of acts of conflict-related sexual violence committed against civilians… four Nuer women, three of whom were lactating mothers, had been abducted by a group of armed Dinka SPLA soldiers… they were kept in captivity and subjected to sexual slavery in very harsh living conditions with limited access to food and water…

… villages had been attacked by a mixture of SPLA soldiers and armed militia who, among other violations, abducted and raped girls and women on a large scale… it had become a practice for parties to the conflict and civilians during attacks 'to abduct women and do what they want'. Pregnant women, lactating mothers and minors have not been spared…

One woman reported having been gang-raped by four SPLA soldiers and witnessed how other women and girls suffered the same ordeal when SPLM/A-IO reconquered her village… A young girl narrated how she and another girl had been raped by soldiers allegedly belonging to the SPLA and armed militia on their way to Bentiu from Koch County. She reported that 'after raping us, they took all our clothes; we walked naked…"[137]

[136] UNMISS Report, *Human rights violations and abuses in Yei, July 2016 – January 2017,* May 2017, p 17.
[137] UNMISS Report, *The State of Human Rights in the Protracted Conflict in South Sudan,* December 2015, pp 19-21.

"My village was attacked early in the morning. I managed to run and hide in the bush with my three-day-old baby. I returned in the evening before sunset thinking that the attackers were gone, but a group of SPLA soldiers and youth found me and my baby in our tukul. I was still bleeding from labour, but one of the soldiers raped me. I kept quiet and did not resist as I saw other women being shot dead for refusing to have sex with the soldiers and youth…

The brutality and ruthlessness of the attack, as described by survivors and witnesses, seems to have been carried out to punish and terrorize civilians… at least 120 women and girls, including pregnant and lactating mothers, and girls as young as four-year-old, were raped and gang-raped by one or multiple armed elements…

Accounts by survivors and witnesses indicate that rape was used by the attackers to demonstrate power over their victims, impose extreme humiliation, destroy their dignity and to fracture families and the community through the stigma and shame attached to survivors…

Young girls were not spared either as illustrated in the gang-rape of a six-year-old girl by eight soldiers who pulled her out of hiding... According to witnesses, the soldiers continued to rape the girl even after she became unconscious and left her bleeding on the ground…

This is consistent with other incidents and with overall trends of sexual violence in South Sudan, where women and girls

abducted in these circumstances are most likely also raped and sexually enslaved by their abductors."[138]

What is clear from the selection of reports presented above is that sexual violence in the non-international armed conflict in South Sudan is a brutal, widespread and systemic feature associated with the fighting. These acts of sexual violence satisfy both the international human rights law and international humanitarian law definitions of torture, and align to international jurisprudence on the characterisation of conflict-related sexual violence as torture.

A major theme observed in the reporting is the involvement of the South Sudanese Security Forces (SPLA and SSPS) in the commission of these crimes. UN statistics for 2017 indicates that 60% of reported cases of conflict-related sexual violence were committed by the South Sudanese Security Forces (state actors) and that 97% of those violations were committed against women and girls.[139] This presents a major challenge to any steps to address such this criminality, as survivors of sexual violence at the hands of the Security Forces often no longer feel confidence in the state that has the obligation to respect and protect their rights. Additionally, survivors must continue to live in the same communities as those accused of perpetrating crimes against them.

Against the context of the widespread nature of sexual violence in the conflict in South Sudan, UN reporting indicates that the South Sudanese Security Forces have been responsible for the majority of acts of sexual violence. If true, noting this is consistent with my observations from the field, this demonstrates a callous disregard for their roles within society to protect rights (not violate them). It is also representative of a chain of command, and more

[138] UNMISS Report, *Indiscriminate attacks against civilians in Southern Unity, April – May 2018,* July 2018, pp 7-8.
[139] See *Post Operational Report -OP ASLAN – UN Mission in South Sudan (UNMISS) Military Gender and Protection Advisor,* dated 31 August 2018 (enclosure 2), at 4 and *Report of the Military Gender and Protection Advisor for the UN Mission in South Sudan – OP ASLAN – Observations, Insight, Lessons,* dated 9 February 2019 (Enclosure 1), at 1.

broadly the South Sudanese state, that gives little weighting to addressing such crimes without significant pressure from the international community. The effect is that those most vulnerable to exploitation who require the state to fulfil their obligations to protect and respect their rights are in fact those most easily targeted by acts of sexual violence in this armed conflict. As will be discussed in the section below, by characterising conflict-related sexual violence as torture and harnessing its special legal status enables the achievement of justice and thus the opportunity for real and lasting peace in this conflict.

5.3 The implications of defining conflict-related sexual violence as *torture* in the situation in South Sudan

The implications for defining conflict-related sexual violence as torture will be addressed in this section as follows:

1. Implications under international human rights law.
2. Implications under international humanitarian law.
3. Implications for post-conflict peace.

5.3.1 Implications under international human rights law

South Sudan is a state party to the Convention Against Torture and its Additional Protocol.[140] Characterising conflict-related sexual violence as torture through a UN Security Council Resolution would serve to add further weight to the argument that, in accordance with its obligations under the

[140] OHCHR database, 'Status of Ratification Interactive Dashboard', accessed 21 May 2019. South Sudan acceded to the Convention Against Torture and its Additional Protocol on 30 April 2015.

Convention Against Torture, the state of South Sudan has an obligation to investigate and prosecute acts of conflict-related sexual violence that satisfy the definition of torture (as per the Convention). General Comment No. 2 from the Committee Against Torture clarifies that *de facto* acquiescence of the state through a failure to exercise due diligence also satisfies the *actus reus* for the crime of torture.

The obligations owed by South Sudan under the Convention Against Torture enable other state parties to the Convention to hold it 'accountable' for investigating and prosecuting the crime of torture in instances where a *prima facie* case for torture is made out. Alternatively, the obligations owed by South Sudan provide the legal grounds on which another state party to the Convention Against Torture can seek extradition of an alleged perpetrator for prosecution.[141]

In effect, characterising conflict-related sexual violence as torture, and invoking the relevant provisions of the Convention Against Torture,[142] may have the potential to force the prosecution of persons responsible for the widespread and systemic use of sexual violence in this conflict, used to inflict severe pain and suffering for the purpose of intimidating and coercing the civilian population. It is clear from the testimony of (non)survivors in the previous section that conflict-related sexual violence in South Sudan satisfies the *actus reus* for the crime of torture. Such a prosecution would be thematic,[143] focusing on the framing of conflict-related sexual violence under the core international crime of torture, and with the express intent to make it clear that perpetrators will be held accountable for their crimes. This signals at an international level that such crimes will be punished, and may act to

[141] ICJ, case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 2012, 422, at 94.
[142] Articles 7, 8, and 9 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
[143] For further reading on thematic prosecutions see: Morten Bergsmo, 'Tematisk etterforskning og straffeforfølgning av seksualisert vold i konflikt: er det en uproblematisk praksis?' ('Thematic investigation and prosecution of sexualised violence in conflict: is that an unproblematic practice?'), in H. Skjeie, I. Skjelsbæk and T.L. Tryggestad (eds.): *Kjønn, Krig, Konflikt (Gender, War, Conflict),* 2008, pp 79-91.

deter individuals from committing such crimes in future armed conflicts. Further, it creates the impetus for states to take all reasonable actions to comply with their obligations under the Convention and to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture. It would also provide a mechanism, under the Convention Against Torture, for survivors to seek reparations.[144]

5.3.2 Implications under international humanitarian law

Crimes of conflict-related sexual violence amounting to torture in the non-international armed conflict in South Sudan are direct violations of Common Article 3 to the Geneva Conventions, 1949. Common Article 3 specifically prohibits torture, the prohibition of which is a negative obligation on all parties to the conflict. All parties to the conflict in South Sudan are bound by the norm of international humanitarian law to not target civilians and those not directly participating in the conflict under both customary international law and as a result of the obligations under Common Article 3 to the Geneva Conventions, 1949 and Additional Protocol II.

5.3.3 Implications for post-conflict peace

As South Sudan moves towards a peace process, and international pressure mounts for the creation of a hybrid court in which to address violations of international humanitarian law during the armed conflict, elevating conflict-related sexual violence to the special status of the crime of torture (and a direct violation of Common Article 3) adds significant weight towards ensuring accountability for such crimes through international or hybrid judicial means.

[144] Article 14 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Characterising conflict-related sexual violence as torture will assist in accountability measures, in that perpetrators of such crimes are unlikely to be considered under any potential amnesty provisions given the widely held position that it is unacceptable to grant amnesty to torturers noting the special legal status of the crime of torture as an egregious act directed against the interests of the international community as a whole. In essence this creates the impetus for the prosecution of conflict-related sexual violence as torture, a violation of common Article 3 to the Geneva Conventions, 1949, rather than a 'lesser' crime that may be overlooked or excused under immunity provisions.

6.0 Concluding remarks

Conflict-related sexual violence is criminalised under contemporary international law, with individual acts either being charged as a war crime, a crime against humanity and, in some cases, as a component of genocide. Sexual violence-based crimes bring overwhelming social, psychological and economic consequences to survivors, families, communities and nation states. Conflict-related sexual violence can be operationalised as a means of overwhelming and weakening an adversary and their will to fight, either directly or indirectly, by targeting the civilian population perceived as supporting the enemy and as a driver to forced displacement.

In classifying conflict-related sexual violence as a *tactic* of warfare in UN Security Council Resolution 1820 (2008), the Security Council created legal uncertainty and missed an opportunity given such a characterisation does nothing to add to the prohibition of such acts under international law. Furthermore, the UN Security Council missed a significant opportunity to reaffirm the well-established international legal position that conflict-related sexual violence constitutes *torture*, a conscious crime of concern to the international community given its special nature under international law. Characterising conflict-related sexual violence as torture, vice a tactic, would have served to improve the accountability for criminal acts of sexual violence in armed conflict.

The jurisprudence of international tribunals is clear; sexual violence constitutes torture when the intent of the crime is to inflict severe pain and suffering for a specific purpose. This is precisely the case in the widespread and systemic use of sexual violence in the non-international armed conflict in South Sudan. In this situation, a characterisation of conflict-related sexual violence as torture would invoke obligations owed by South Sudan under the Convention Against Torture, and enable other state parties to the Convention to hold it ‘accountable’. Such a characterisation would also result in acts of

conflict-related sexual constitute constituting direct violations of Common Article 3 to the Geneva Conventions, 1949 under the specific provision for torture. Furthermore, perpetrators of the crime of torture would be unlikely to be considered under any potential amnesty provisions in the South Sudanese peace process and the creation of a potential hybrid court. Characterising conflict-related sexual violence crimes as torture is the most conducive way in which address accountability for these crimes, through the prosecution of perpetrators, deterrence measures and the invocation of state accountability to investigate, prosecute or extradite.

Table of International Treaties and Conventions

Convention on the Elimination of All Forms of Discrimination against Women.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Convention on the Prevention and Punishment of the Crime of Genocide.

International Covenant on Civil and Political Rights.

Protocol I additional to the Four Geneva Conventions, 1977.

Protocol II additional to the Four Geneva Conventions, 1977.

Rome Statute of the International Criminal Court.

Statute of the International Criminal Tribunal for the Former Yugoslavia

Statute of the International Criminal Tribunal for Rwanda.

Universal Declaration of Human Rights.

First Geneva Convention, 1949.

Second Geneva Convention, 1949.

Third Geneva Convention, 1949.

Fourth Geneva Convention, 1949.

1907 Hague Regulations.

Table of Cases

IACtHR, case 10.970 *Fernando and Raquel Mejia v. Peru,* Judgement of 1 March 1996, Report No. 5/96.

IACtHR, case 12.579, *Rosendo Cantú and other v Mexico*, Judgement of 31 August 2010.

ICJ, case, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* Judgment, ICJ Reports 1986.

ICJ, case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 2012.

ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Rep 226.

ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Rep 136.

ICJ, case, *Barcelona Traction Case (Belgium v Spain) (Second Phase)* (1970), ICJ Rep 3.

ICTR, case ICTR-96-4 *Prosecutor v Akayesu,* Trial Chamber Judgment of 02 September 1998.

ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi,* Trial Chamber Judgment of 17 June 2004.

ICTR, case ICTR-95-1B *Prosecutor v Muhimana,* Trial Chamber Judgment of 28 April 2005.

ICTR, case ICTR-96-13 *Prosecutor v Musema,* Trial Chamber Judgment of 27 January 2000.

ICTR, case ICTR-97-20 *Prosecutor v Semanza,* Trial Chamber Judgment of 15 May 2003.

ICTY, case IT-95-17/1-T *Prosecutor v. Anto Furundzija ('Furundzija Judgment'),* Trial Chamber Judgement of 10 December 1998.

ICTY, case IT- 96-22-A *Prosecutor v Erdemović*, Appeals Chamber Judgement of 7 October 1997.

ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje*
Camps), Trial Chamber Judgment of 2 November 2001.

ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Trial Chamber Judgment of 22 February 2001.

ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Appeal Chamber Judgment of 12 June 2002.

ICTY, case IT-96-21 *Prosecutor v Mucić et al (Čelebići Jusgement),* Trial Chamber Judgment of 16 November 1998.

ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor),* Trial Chamber Judgment of 7 May 1997.

ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor),* Appeal Chamber Judgment of 15 July 1999.

Resolutions, Reports and Documents of International Bodies

Final report submitted by Ms Gay J. McDougall, UN Special Rapporteur on Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (1998).

General Comment No. 2, 'Implementation of Article 2 by States Parties', UN Doc. CAT/C/GC/2/CRP/1/Rev.4 (2007), Advance Unedited.

Human Rights Committee, General Comment No. 24 (52)(1994), UN Doc. CCPR/C.21.Rev.1/Add.6 (1994).

Human Rights Council, *Report of the Commission on Human Rights in South Sudan* of 12 March 2019, A/HRC/40/69.

Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak* of 15 January 2008, A/HRC/73

ICRC *Customary International Humanitarian Law Study.*

ICRC database, 'Treaties, States Parties and Commentaries: South Sudan'.

ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law,* (2008) 90 IRRC 991, at 1031.

OHCHR database, 'Status of Ratification Interactive Dashboard'.

OSCE Office for Democratic Institutions and Human Rights (ODIHR), Manual: *Countering Terrorism, Protecting Human Rights* (2007).

Post Operational Report -OP ASLAN – UN Mission in South Sudan (UNMISS) Military Gender and Protection Advisor, dated 31 August 2018 (enclosure 2).

Report of the *Military Gender and Protection Advisor for the UN Mission in South Sudan – OP ASLAN – Observations, Insight, Lessons,* dated 9 February 2019 (Enclosure 1).

UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties* of 24 January 2008, CAT/C/GC/2.

UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 29 March 2019, S/2019/280.

UN Secretary General, *Conflict-related Sexual Violence: Report of the UN Secretary General* of 13 January 2012, S/2019/280.

UN Security Council Resolution 1325 of 31 October 2000, S/RES/1325 (2000).

UN Security Council Resolution 1820 of 19 June 2008, S/RES/1820 (2008).

UN Security Council Resolution 2467 of 23 April 2019), S/RES/2467 (2019).

UNMISS Report, *The State of Human Rights in the Protracted Conflict in South Sudan, of* December 2015.

UNMISS Report, *A report on violations and abuses of international human rights law and violations of international humanitarian law in the context of fighting in Juba, South Sudan, in July 2016,* of January 2017.

UNMISS Report, *Human rights violations and abuses in Yei, July 2016 – January 2017,* of May 2017.

UNMISS Report, *Indiscriminate attacks against civilians in Southern Unity, April – May 2018,* of July 2018.

Bibliography

Kelly Dawn Askin: 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003', *Human Rights Brief*, Volume 11, Issue 3 (2004).

Aryn Baker, War and Rape: The most shameful consequence of conflict comes out into the open', *Time Magazine,* 18 April 2016, 36

Morten Bergsmo, 'Tematisk etterforskning og straffeforfølgning av seksualisert vold i konflikt: er det en uproblematisk praksis?' ('Thematic investigation and prosecution of sexualised violence in conflict: is that an unproblematic practice?'), in H. Skjeie, I. Skjelsbæk and T.L. Tryggestad (eds.): *Kjønn, Krig, Konflikt (Gender, War, Conflict),* 2008.

Susan Brownmiller, *Against our Will: Men, Women and Rape* (Simon and Schuster, 1975).

Jocelyn Campanaro: 'Women, war and international law: the historical treatment of gender-based war crimes', *Georgetown Law Journal,* Volume 89, Issue 8 (2001), 2557.

Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', 1991 *American Journal of International Law* 85, 613.

Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 75.

Rhonda Copleon: 'Gender crimes as war crimes: integrating crimes against women into international criminal law', *McGill Law Journal*, Volume 46, Issue 1 (2000), 217.

Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, 2018).

Friman Cryer and Wilmshurst Robinson, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010).

Anne Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia: 2005).

Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary* (Cambridge University Press: 2004).

Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law.* International Review of the Red Cross, (96/894), 2014.

Kiran Grewal: 'The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape' in *Journal of International Criminal Justice*, Volume 10, Issue 2 (2012), 373.

Jan Klabbers, *International Law*, 2nd Edition (Cambridge University Press: 2017).

Michelle Jarvis, 'An Emerging Gender Perspective on International Crimes' in eds Gideon Boas and William Schabas, *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff: 2003), 157.

Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford university Press, 2014), 96.

Marko Milanovic´: 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) *Journal of Conflict and Security Law*, Vol. 14 No. 3, 459.

Alexandra Miller: 'From the International Criminal Tribunal for Rwanda to the International Criminal Court: expanding the definition of genocide to include rape' in *Penn State Law Review*, Volume 108, Issue 1 (2003), 349.

Amy Palmer: 'An evolutionary Analysis of gender-based war crimes and the continued tolerance of 'forced marriage', *Northwestern University Journal of International Human Rights*, Volume 7 (2009), 128.

Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Nijhoff, 2006).

Andrea Phelps: 'Gender-based war crimes: Incidence and effectiveness of international criminal prosecution', *William and Mary Journal of Women and the Law*, Volume 12, Issue 2 (2006), 499.

Lauren Ploch Blanchard, *Conflict in South Sudan and the Challenges Ahead* (Congressional Research Service: 2016).

Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 174.

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, (ICRC: 1987).

Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contempoary Practice in International Humanitarian Law*, 3rd Edition (ICRC: 2011).

William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press: 2010).

Wolfgang Schomburg and Ines Peterson: "Genuine Consent to Sexual Violence under International Criminal Law" in *American Journal of International Law*, Volume 101, Issue 1 (2007), 121.

Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014), 479.

Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press: 2010).

Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Edition, (Oxford University Press, 2018).