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Mind the Gap:
Conflict-Related Sexual Violence and the
Obligations of Armed Non-State Actors
Under International Law

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Summary

War has changed. Since the Second World War, State monopoly on resort to violence has been significantly subverted. Instead, contemporary armed conflict witnesses the pervasiveness of armed non-State actors and the threat they pose to peace, security and human rights. Simultaneously, conflict-related sexual violence is a pervasive practice in contemporary conflicts, of which armed non-State actors are the major perpetrators. These interlinkages are obvious on the battlefield, but not reflected in a coherent approach under international law. The present thesis examines this connection: the definition of conflict-related sexual violence and how it corresponds to obligations of armed non-State actors under international law.

This thesis argues that the approach to conflict-related sexual violence and the approach to armed non-State actors is fragmented under international law, resulting in discrepancies affecting the protection of victims and survivors of conflict-related sexual violence perpetrated by armed non-State actors. After contextualising contemporary armed conflicts and the problems elevated with regards to conflict-related sexual violence and armed non-State actors, this thesis examines the definition of conflict-related sexual violence in relation to norms of international law. Specifically, the definition of conflict-related sexual violence is contrasted to the corresponding proscriptions of rape and sexual violence under international humanitarian law, international criminal law and international human rights law applicable to armed non-State actors.

This thesis concludes that there are discrepancies between the definition of conflict-related sexual violence and the corresponding proscriptions of international humanitarian law and international criminal law. This has particular consequences when the perpetrator of conflict-related sexual violence is an armed non-State actor, as the source, content and scope of armed non-State actors' obligations under international human rights law is an uncertain and still-evolving field of international law. This affects the obligations and accountability of armed non-State actors under international law, and ultimately also the protection afforded to victims and survivors of conflict-related sexual violence under international law.

Sammanfattning

Krig har förändrats. Statens monopol på att tillgripa våld har omkullkastats, och samtida väpnade konflikter vittnar istället om kraftfulla beväpnade icke-statliga aktörer och hotet de utgör mot fred, säkerhet och mänskliga rättigheter. Samtidigt är konflikt-relaterat sexuellt våld en utbredd och kraftfull praxis i samtida konflikter, av vilka beväpnade icke-statliga aktörer är de främsta förövarna. Kopplingarna dem emellan är uppenbara på slagfältet, men reflekteras inte i ett sammanhängande förhållningssätt under folkrätten. Denna uppsats undersöker den kopplingen, och därmed definitionen av konflikt-relaterat sexuellt våld och hur den motsvarar beväpnade icke-statliga aktörers skyldigheter under folkrätten.

I uppsatsen anförs att förhållningssättet till konflikt-relaterat sexuellt våld likväl förhållningssättet till beväpnade icke-statliga aktörer är fragmenterat under folkrätten, vilket resulterar i diskrepanser dem emellan som påverkar skyddet för offer och överlevande av konflikt-relaterat sexuellt våld som begås av beväpnade icke-statliga aktörer. Efter att ha kontextualiserat samtida väpnade konflikter och problemen som uppstår gällande beväpnade icke-statliga aktörer och konflikt-relaterat sexuellt våld undersöker uppsatsen definitionen av det senare i förhållande till folkrätten. Denna definition ställs i kontrast mot motsvarande föreskrifter om våldtäkt och sexuellt våld under internationell humanitär rätt, internationell straffrätt och folkrätten om mänskliga rättigheter tillämplig på beväpnade icke-statliga aktörer.

Baserat på undersökningen dras slutsatsen att det finns diskrepanser mellan definitionen av konflikt-relaterat sexuellt våld och motsvarande föreskrifter under internationell humanitär rätt och internationell straffrätt. Detta har särskilda konsekvenser när beväpnade icke-statliga aktörer begår konflikt-relaterat sexuellt våld, eftersom rättskällan, innehållet och omfattningen av beväpnade icke-statliga aktörers skyldigheter under folkrätten om mänskliga rättigheter är ett fortfarande ovisst folkrättsområde under fortsatt utveckling. Detta påverkar beväpnade icke-statliga aktörers skyldigheter och ansvar under folkrätten, och i slutändan även skyddet för offer och överlevare av konflikt-relaterat sexuellt våld under folkrätten.

Preface and acknowledgments

This master's thesis is dedicated to all victims and survivors of conflict-related sexual violence.

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Abbreviations

ANSA	Armed Non-State Actors
CRSV	Conflict-Related Sexual Violence
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NSA	Non-State Actors
SGBV	Sexual and Gender Based Violence
SRSR-SVC	Special Representative of the Secretary-General on Sexual Violence in Conflict
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNSG	United Nations Secretary-General

1 Introduction

1.1 Background

This thesis is a superstructure and continuance of the scholarly conversation surrounding conflict-related sexual violence and the obligations of armed non-State actors under international law. While both phenomena are extensively researched on their own, not as much examination has been done on the combination and relation between the two. This is noteworthy as contemporary armed conflicts, peace, security and human rights are heavily marked and affected by conflict-related sexual violence and the pervasiveness of armed non-State actors, where the latter often perpetrate the former.¹

The term “conflict-related sexual violence” is extensively used in policymaking and academia as well as referred to in resolutions of the UN Security Council (UNSC) and work of other UN bodies. The authoritative definition is provided by the UN Secretary-General (UNSG), and settles that conflict-related sexual violence is

‘...rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, 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. This 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 or networks; the profile of the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, 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 the provisions of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of

¹ UN Secretary General, ‘Report of the Secretary-General on Conflict-Related Sexual Violence 2020’ (2021) S/2021/312 <<https://reliefweb.int/report/world/conflict-related-sexual-violence-report-secretary-general-s2021312>> accessed 3 April 2021, para 6, p 28-30.

*sexual violence and/or exploitation, when committed in situations of conflict’.*²

As such, the term encompasses the practice of rape and sexual violence as a “tactic” or “method” of warfare as well as sexual violence perpetrated in a wider context of conflict. Conflict-related sexual violence is often stated to be a violation of international humanitarian law (IHL), international criminal law (ICL) and international human rights law (IHRL). Nonetheless, the term is not strictly legal.³ In fact, these international regimes have different definitions and understandings of the elements of conflict, sexual violence as well as the nature of the connection between the two. Not only is the approach to conflict-related sexual violence fragmented across IHL, ICL and IHRL, so is the approach to armed non-State actors.⁴ Accordingly, this thesis concerns these two interlinked discrepancies: on the one hand, the gaps deriving from the divergence between the definition of conflict-related sexual violence and the corresponding proscriptions under international law, and on the other hand, the fragmented approach to armed non-State actors under international law. Specifically, this thesis considers the particular consequences the latter has on the former, namely, the particular consequences stemming from the discrepancies between conflict-related sexual violence and the corresponding proscriptions under international law when conflict-related sexual violence is perpetrated by armed non-State actors.

Simultaneously, in relation to conflict-related sexual violence, accountability is elusive, and impunity remains high.⁵ While this thesis primarily focuses on obligations of armed non-State actors, access to justice, accountability and impunity are directly and inevitably linked to, and affected by, legal obligations. As such, this thesis considers not only the paradox that the level of protection afforded to victims and survivors is dependent on the affiliation of the perpetrator, it also considers the paradox that accountability also is dependent on the affiliation of the perpetrator. This paradox contrasts

² Ibid para 5.

³ Catherine O’Rourke, *Women’s Rights in Armed Conflict under International Law* (Cambridge University Press: 2020) p 56f.

⁴ Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law : Foundations and Frameworks of Obligations, and Rules on Accountability* (Routledge 2017) p 1f; O’Rourke (n 3) p 57.

⁵ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 3-6.

the right to an effective remedy and access to justice as well as the present reality that armed non-State actors are involved in most contemporary conflicts and perpetrate the vast majority of conflict-related sexual violence. Thus, the fragmented approach to obligations of armed non-State actors under international law have implications on the obligations and accountability of such actors in relation to conflict-related sexual violence. Additionally, these implications spill out on victims' and survivors' protection and rights, as the level of protection is dependent on the affiliation of the perpetrator. It is in this paradox the motivation for this thesis lies.

1.2 Purpose and research questions

Against this backdrop, this thesis aims to provide legal analysis to the definition of conflict-related sexual violence and its corresponding obligations under international law applicable to armed non-State actors. In this respect, the purpose of this thesis is to identify obligations as well as discrepancies and limitations of IHL, ICL and IHRL applicable to armed non-State actors with respect to conflict-related sexual violence. Moreover, this thesis aims to shed light on the limits of international law in relation to obligations and accountability of armed non-State actors for acts of conflict-related sexual violence and should therefore be read as underscoring that gap and encouraging efforts to bridge it.

Pursuant to the background and purpose outlined, this thesis aims to answer the following overarching research question:

What obligations under international law does armed non-State actors have in relation to conflict-related sexual violence as defined by the UN?

In answering this main question, the following sub questions are considered:

- How does the established UN definition of conflict-related sexual violence correspond to the prohibitions of rape and sexual violence under international law applicable to armed non-State actors?
- What particular problems can be identified when conflict-related sexual violence is perpetrated by armed non-State actors?

1.3 Delimitations

In researching the topic of armed non-State actors and their obligations under international law in relation to conflict-related sexual violence, numerous interesting points of discussion and legal conundrums have been encountered. However, due to the limited scope, this thesis does not possess the ability nor the aspiration of being all-inclusive of all issues and take-offs encountered. For one, it should be noted that this thesis only addresses the research questions as a matter of principle and from a theoretical point of view. It does not examine the practical application of international law to armed non-State actors and conflict-related sexual violence.

This thesis is limited to focus the analysis and examination on the obligations of armed non-State actors with regards to conflict-related sexual violence, as defined by the UN. The UN definition is relied on as it is extensively relied on in academia and policymaking, and the thesis does not seek to elaborate on the definition more than how it corresponds to international law.

Moreover, while this thesis primarily focuses on obligations of armed non-State actors with respect to conflict-related sexual violence, as alluded to in the purpose of this thesis, accountability and access to justice is inextricably linked to legal obligations. Therefore, this thesis sporadically and briefly examines issues of accountability and impunity in relation to armed non-State actors' obligations, including individual criminal responsibility under ICL. The intention of this thesis is not to extend the examination of accountability further than that. On this note, when referring to accountability and access to justice, this thesis alludes to accountability and access to justice through judicial mechanisms, and thus demarcates other forms of justices, such as political sanctions or administrative mechanisms. Furthermore, this thesis does not consider transnational crimes but focus instead on international crimes stemming from the international legal order.

1.4 Theory and methodology

The methodology of this thesis is to apply a traditional legal method to interpret the relevant components of international law important to answer the

research questions outlined above. This method is applied alongside, and driven by, a combination of gender theory, which for the purposes of this thesis entail a focus on gendered impacts of legal systems,⁶ and a survivors-centred approach and human rights-based approach, meaning that the rights, needs and choices of survivors are at the centre of considerations and efforts. Furthermore, this thesis includes legal historic and critical observations as well as observations and considerations *de lege lata*, what the law is, as well as observations and considerations *de lege ferenda*, what the law ought to be.

The question overarching this thesis is: What obligations under international law does armed non-State actors have in relation to conflict-related sexual violence? The initial step of this thesis research was to contextualise contemporary armed conflicts and the pervasiveness of armed non-State actors, the interlinkages to conflict-related sexual violence and the lack of accountability for such violence. In order to provide an introductory background and holistic understanding of the discrepancies of which this thesis is based on, the elements of conflict-related sexual violence and armed non-state actors was provided with a brief background, patterns and definitions. Then the UN definition of conflict-related sexual violence in relation to obligations and accountability under IHL, ICL and IHRL was analysed and elaborated on. In relation to each of these fields of international law, the most crucial points of discrepancies was identified ensuing the final analysis and conclusion, which was based on the discrepancies discovered with respect to the UN definition of conflict-related sexual violence and the corresponding obligations and accountability of armed non-state actors under IHL, ICL and IHRL.

1.5 Material and previous research

This thesis relies, partly, on primary sources of law, primarily customary international law, but also the four Geneva Conventions (I-IV) (1949), the Rome Statute of the International Criminal Court (1998) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

⁶ Gender refers to the social attributes associated with being male and female, which are learned through socialisation and determine a person's position and value in a given context.

Punishment (1984). On occasion, other international treaties are also consulted. Furthermore, this thesis heavily relies on case-law from international courts and tribunals.

This thesis also relies on secondary sources of law, primarily resolutions and reports from the UN Security Council, UN Secretary-General, Special Rapporteurs and other international bodies. As the fields of law examined are still evolving, this thesis also consults the scholarly work of respected and well published jurists. Primarily three books have been used as an inspiration and material for writing this thesis; *Armed Non-State Actors in International Humanitarian and Human Rights Law : Foundations and Framework of Obligations, and Rules on Accountability* by Konstantin Mastorodimos, *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* by Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *Women's Rights in Armed Conflict under International Law* by Catherine O'Rourke, and one article, 'Sexual Violence in Armed Conflicts: A violation of international humanitarian law and human rights law' by Gloria Gaggioli.

1.6 Relevance

As already depicted, war and armed conflict have changed significantly since the Second World War. Contemporary armed conflicts are highly marked by the pervasiveness of conflict-related sexual violence and armed non-State actors, where the latter often perpetrate the former. Both these phenomena and elements of contemporary armed conflict have gained a lot of attention from the international community. The UN Security Council has dedicated five resolutions to the prevalence of conflict-related sexual violence and has requested the UN Secretary General to submit annual reports on sexual violence in armed conflicts. These reports have continuously, and as late as in March this year, highlighted that armed non-State actors are the major perpetrators of conflict-related sexual violence. Moreover, in late February, a Joint Statement by UN human rights experts was released to highlight the far-reaching negative human rights impacts of armed non-State actors. Additionally, both elements have been extensively researched. Out of the four scholarly works introduced in Chapter 1.5, Mastorodimos as well as Heffes,

Kotlik and Ventura focus primarily on armed non-State actors and their obligations under IHL and IHRL. Contrary, the other two, Gaggioli and O'Rourke focus primarily on conflict-related sexual violence (and women's rights in conflict more broadly). This is, in fact, illustrative for the entire research of this thesis and the cross-cutting topics it considers. A lot has been researched and written on armed non-State actors and conflict-related sexual violence separately, and, as mentioned, both areas of law are extensively researched and still evolving. Yet, research on the two elements in combination is rarer, as is the recognition of the particular interlinkages between conflict-related sexual violence and the corresponding discrepancies and limitations of the obligations and accountability of armed non-State actors under international law, as aimed to demonstrate in this thesis. This is partly surprising due to the pervasiveness of armed non-State actors in armed conflict, and the fact that such actors are the major perpetrators of conflict-related sexual violence in contemporary armed conflicts.

1.7 Outline

The structure of this thesis study is subcategorised into four main parts of research. Broadly speaking, Chapter two seeks to examine the interlinkages between conflict-related sexual violence and armed non-State actors, and the challenges elevated in contemporary armed conflicts in that regard. Similarly, but contrary, Chapters three, four and five seeks to examine the interlinkages and discrepancies between the UN definition of conflict-related sexual violence and the corresponding obligations and accountability for conflict-related sexual violence of armed non-State actors under international law.

Specifically, Chapter two seeks to provide a broad understanding of the pervasiveness of conflict-related sexual violence and armed non-State actors in contemporary armed conflict. It further provides an introductory background to patterns, definitions and characteristics of conflict-related sexual violence and armed non-state actors as well as the particular challenges they pose in relation to obligations and accountability under international law.

Chapters three, four and five comprise the main part of this thesis and seeks to elaborate and draw conclusions on the discrepancies between the UN

definition of conflict-related sexual violence and the corresponding obligations of international law as well as the particular consequences elevated when the perpetrator is an armed non-State actor. Chapter three and four seeks to do so in relation to obligations and accountability under IHL, and ICL respectively, focusing on the discrepancies between the UN definition of conflict-related sexual violence and the corresponding obligations under each field of law. Chapter five builds on the findings of Chapter two, three and four and seeks to examine the obligations and accountability of armed non-State actors under IHRL, and whether such obligations extend to conflict-related sexual violence as defined by the UN.

2 Challenges of contemporary armed conflicts: conflict-related sexual violence and armed non-State actors

This commencing chapter seeks to lay the groundwork for the ensuing chapters and provide an introductory background and context on the two main elements of this thesis: first the patterns and definition of conflict-related sexual violence, and, second the approach to armed non-State actors and their obligations and accountability under international law. Moreover, this chapter intends to contextualise contemporary armed conflicts and the particular challenges elevated in such conflicts with respect to conflict-related sexual violence and armed non-State actors. In doing so, this chapter primarily draws upon resolutions and reports of the UN Security Council and the UN Secretary-General as well as scholarly contributions.

2.1 Patterns of conflict-related sexual violence

‘Only the dead have seen the end of war’ - Plato

The history of humankind supports Plato’s observance, as war and armed conflict seem to be pervasive occurrences. Although a never-ending story, war evolve. The First and Second World War come to mind and appear as “classic” examples of war: armed soldiers in trenches, on battlefields and in U-boats fighting for king and country. Modern conflict is nothing like that. As Rehn and Sirleaf said ‘...bodies become a battleground over which opposing forces struggle’.⁷ Armed non-State actors and conflict-related

⁷ Elisabeth Rehn and Ellen Sirleaf Johnson, *Women, War, Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building* (2002) Progress of the World’s Women 2002, Vol. 1
<https://www.unwomen.org/-/media/headquarters/media/publications/unifem/213_chapter01.pdf?la=en&vs=1005>
accessed 10 April 2021, p 10.

sexual violence has altered and, in a way, dominate modern armed conflict.⁸ To some extent, these elements have also dominated conversations on international peace and security. They will continue to do so in this thesis.

Conflict-related sexual violence has particularly gained increased focus in the aftermaths of the conflicts in Rwanda and former Yugoslavia. Recent focus; timeworn practice. Wartime sexual violence is documented in the Bible, in Anglo-Saxon and Chinese Chronicles, in Viking marauding and in Medieval European warfare. The British-Scottish civil wars in the 18th century, the First and Second World Wars, and the formerly mentioned conflicts in Rwanda and Yugoslavia during the 1990s are more recent examples. Historical and anthropological research support that wartime sexual violence is a practice stubbornly prevailing across eras and societies; across time and space.⁹ Contemporary armed conflicts such as those in Iraq and Syria, Myanmar, the Sudan and South Sudan as well as the very recent developments in the region of Tigray, Ethiopia also bear witness to the pervasiveness of conflict-related sexual violence.¹⁰ This development has, eventually, been accompanied by multipronged efforts to respond to such ongoing violence. In October 2000, the UNSC resolution (UNSCR) 1325 was the first to identify the perpetration of rape and sexual violence in situations of armed conflict and that women and girls are differently and disproportionately affected. While admitting gendered impacts of conflict and wartime sexual violence, UNSCR 1325 (2000) did not detect that men and boys also may be subjected to conflict-related sexual violence.¹¹ Still, significantly, this resolution commenced the Women, Peace and Security agenda,¹² which out of ten resolutions, five are dedicated to sexual and

⁸ Mastorodimos (n 4) p.10f; Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 (894) *International Review of the Red Cross* 503, p 504f.

⁹ Jonathan Gottschall J, 'Explaining Wartime Rape' (2004) 41 (2) *The Journal of Sex Research* 129, p 130.

¹⁰ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) p 13f, 16, 18-21; 'Sexual Violence in Ethiopia's Tigray Region, 30 March 2021 - Ethiopia' (*ReliefWeb*, 30 March 2021) <<https://reliefweb.int/report/ethiopia/sexual-violence-ethiopia-tigray-region-30-march-2021>> accessed 13 May 2021.

¹¹ UN Security Council, 'Resolution 1325' (2000) S/RES/1325

<<http://unscr.com/en/resolutions/doc/1325>> accessed 12 February 2021, p 1.

¹² The WPS agenda is an agenda consisting of ten UNSC resolutions dedicated to strengthening the participation of women in all efforts for peace and security, to improve

gender-based violence in conflict.¹³ Importantly, UNSCR 2106 (2013) recognised that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, but may also affect men and boys.¹⁴ It may also affect lesbian, gay, bi, trans and intersex plus (LGBTI+).¹⁵

The palpable gendered impacts of conflict are partly explained as a result of deeply entrenched gender norms, unequal power relationships and entrenched, and global, gender inequality and discrimination. Thus, sexual and gender-based violence is endemic in all societies and not inherently linked to conflict. However, times of conflict, political instability, or population displacement increase the likelihood of such violence.¹⁶ In turn, human rights violations and abuses and impunity for such crimes have been identified as root causes of conflict. Likewise, improving respect for human rights have been identified as vital to prevent conflict and protect populations.¹⁷ UNSCR 2467 (2019) supports such a holistic understanding of conflict-related sexual violence and further recognises the need of a survivor-centred approach and the importance of effective justice and accountability for sexual violence in conflict.¹⁸ Accordingly, conflict-related sexual violence does not emerge out of a vacuum, but as demonstrated, is affected by multipronged factors. While this thesis focuses on conflict-related sexual violence and obligations under international law, it intends not to separate it from prevention and addressing root causes of such violence nor to separate it from other forms of gender-based violence that takes place in peacetime or in the broader context of conflict. On the contrary, this chapter aims to

the protection of women in conflict and post-conflict situations and recognise the critical role of integrating a gender perspective in operations and organisations. See n 13 p 8f.

¹³ Nordic Centre for Gender in Military Operations, 'A Military Guide to the United Nations Security Council Resolutions on Women, Peace and Security' (2020) Swedish Armed Forces - Nordic Centre for Gender in Military Operations, p 19.

¹⁴ UN Security Council, 'Resolution 2106' (2013) S/RES/2106 <[https://undocs.org/en/S/RES/2106\(2013\)](https://undocs.org/en/S/RES/2106(2013))> accessed 6 February 2021, p 1f.

¹⁵ UN, 'Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence' (2020) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/2020.08-UN-CRSV-Handbook.pdf>> accessed 10 February 2021, p 6.

¹⁶ UN Security Council, 'Resolution 2467' (2019) S/RES/2467, <[https://undocs.org/en/S/RES/2467\(2019\)](https://undocs.org/en/S/RES/2467(2019))> accessed 6 February 2021, p 1f; Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 6.

¹⁷ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 30.

¹⁸ UNSC Resolution 2467 (n 16) p 2f, para 1, 3.

demonstrate that conflict-related sexual violence is inherently linked to endemic gender inequality and peacetime gender-based violence.

Apart from the structural root causes of conflict-related sexual violence such as gender inequality, impunity and human rights violations, different theories have been put forward explaining *why* conflict-related sexual violence is perpetrated. At least a previous, and perhaps somewhat still-standing approach, is the focus on conflict-related sexual violence as strategic rape and a tactic of war that is political, public and part of organised group violence. However, such an explanation does not capture all experiences of conflict-related sexual violence and, contrary, Swaine puts forward that wider and variant forms of violence may occur alongside or separate from more organised forms of violence. Apart from meeting political and organised goals, conflict-related sexual violence may also be individual and opportunistic, or dual-purposed, fulfilling both motives at once.¹⁹ Swaine phrases that ‘in this understanding of war’s violence, connections are evident between centrally organised political violence and heightened levels of decentralised individually-driven violence’.²⁰ It follows that, in a given context of conflict, violence may occur on multiple occasions, on multiple sites by multiple perpetrators. Moreover, the same perpetrator may be involved in politically organised as well as individual forms of conflict-related sexual violence.²¹

Significantly, through the WPS agenda, the UNSC has requested the United Nations Secretary-General (UNSG) to issue annual reports on conflict-related sexual violence, which as of now are twelve in total.²² In the midst of writing this thesis, the most recent report covering the year 2020 was released on 30 March 2021. Primarily, the report identified adverse effects on the prevalence of conflict-related sexual violence globally due to Covid-19. A master thesis of 2021 would not be complete without reference to the adverse impacts Covid-19 has had on the enjoyment of human rights.

¹⁹ Aisling Swaine, ‘Beyond Strategic Rape and between the Public and Private: Violence against Women in Armed Conflict’ (2015) 37 (3) Human Rights Quarterly 755, p 755ff, 759.

²⁰ Ibid p 760.

²¹ Ibid p 759f.

²² Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 6.

Conflict-related sexual violence is no exception. Specifically, the 2020 Report on conflict-related sexual violence identifies that the pandemic amplified gender-based inequality, a root cause and driver of sexual violence in peace and armed conflict, as well as a global spike in gender-based violence, at a time when access to various forms of redress is narrower than ever.²³ As already alluded, conflict-related sexual violence does not exist in a vacuum but is linked with wider security factors such as social tension, impunity and institutional weakness, all of which have exacerbated due to the pandemic. The 2020 report further frames that ‘women and girls in congested refugee and displacement settings were among the hardest hit by the intersecting crises of conflict, forced displacement and Covid-19, facing elevated risks of sexual violence, exploitation and trafficking, a situation that was exacerbated by an overall decline in humanitarian reach and resources’.²⁴

The Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC) noted that the 2020 UNSG report on conflict-related sexual violence details over 2500, by UN verified, incidents of conflict-related sexual violence.²⁵ This should be read in conjunction with another observation of the report, although a chronically underreported crime, lockdowns, curfews, quarantines and limited access to first responders, due to the pandemic, ‘compounded the existing structural, institutional and socio-cultural barriers to reporting sexual violence’.²⁶ The 2020 report further identified that men and boys also are affected by conflict-related sexual violence,²⁷ often targeted in villages and in detention and interrogation settings.²⁸ However, like the WPS agenda, the report highlighted that women and girls are disproportionately affected by conflict-related sexual violence.²⁹

²³ Ibid para 2.

²⁴ Ibid para 3.

²⁵ UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, ‘Statement of SRSG-SVC Pramila Patten at the Security Council Open Debate on Conflict-Related Sexual Violence’ (14 April 2021)

<<https://www.un.org/sexualviolenceinconflict/statement/statement-of-srsg-svc-pramila-patten-security-council-open-debate-on-conflict-related-sexual-violence/>> accessed 22 April 2021.

²⁶ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 2.

²⁷ Ibid para 6, 14.

²⁸ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence’ (n 15) p 9.

²⁹ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 6, 14.

Out of the 2500 incidents of conflict-related sexual violence detailed in the report, the SMSG-SVC noted that 96 percent targeted women and girls.³⁰ While UNSCRs and the statistics of verified situations of conflict-related sexual violence is clear on the gendered impacts of conflict-related sexual violence, this should be read in conjunction with the particular underreporting by men and boys.³¹ Furthermore, the 2020 UNSG Report on conflict-related sexual violence highlighted that while some progress has been made, the current complex global security environment still bears witness to the fact that many countries are affected by the threat, occurrence or legacy of conflict-related sexual violence. Discouragingly, the pandemic revealed the risk of commitments and progress being rolled back and the fragility of progress made thus far.³² Efforts directed towards gender (in)equality and discrimination, human rights violations and impunity in relation to conflict-related sexual violence are more important than ever.

2.2 Conflict-related sexual violence, accountability and access to justice

'I was freed, but I do not enjoy the feeling of freedom because those who have committed these crimes have not been held accountable.'

– Nadia Murad, survivor of conflict-related sexual violence and Nobel peace prize laureate

Apart from its connection to gender equality, the prevalence of conflict-related sexual violence is intrinsically linked to a climate of impunity and low accountability.³³ Impunity and lack of accountability are even identified as root causes of conflict and sexual violence, including conflict-related sexual violence.³⁴ This is evident also in the definition of conflict-related sexual violence, framing that such violence often is linked to the climate of

³⁰ Statement of SMSG-SVC Pramila Patten at the Security Council Open Debate on Conflict-Related Sexual Violence (n 25).

³¹ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 9.

³² Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 2, 6.

³³ Ibid para 3; Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 10.

³⁴ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 10, 18, 114.

impunity.³⁵ The importance of enforcing accountability and combatting impunity with regards to wartime sexual violence is elevated in several UNSC resolutions of the WPS agenda, particularly UNSCR 1960 (2010) and UNSCR 2106 (2013).³⁶

As framed by Nadia Murad in the quote above, enforcing accountability and combating impunity is also part of a survivor-centred approach.³⁷ The right to an effective remedy and access to justice belongs to all victims of violations of IHRL and IHL, including victims and survivors of conflict-related sexual violence.³⁸ Access to justice and effective remedies are basic principles of Rule of Law³⁹ and is asserted in a number of treaties⁴⁰ as well as forming part of customary international law.⁴¹ The right to an effective remedy is further developed in several soft law documents, and particularly the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) adopted by the UN General Assembly (UNGA).⁴² Significantly for this thesis, Principle 11 specifies that access to justice is one of three segments making

³⁵ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 5.

³⁶ UN Security Council, 'Resolution 1960' (2010), S/RES/1960
<<http://unscr.com/en/resolutions/doc/1960>> accessed 2 February 2021, p 1f; UNSCR 2106 (n 14) para 2f.

³⁷ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 16, 35.

³⁸ UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2005) A/RES/60/147
<<https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>> accessed 15 April 2021, Principles 3, 12.

³⁹ Norul Mohamed Rashid, 'Access to Justice' (*United Nations and the Rule of Law*)
<<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>> accessed 4 January 2021.

⁴⁰ See Article 2 International Covenant on Civil and Political Rights, Article 8 of the Universal Declaration of Human Rights, Articles 4, 5, 7 and 12 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13 of the European Convention on Human Rights, Article 12 of the Arab Charter on Human Rights and Article 25 of the American Convention on Human Rights.

⁴¹ Theo Van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2010)
<https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> accessed 1 May 2021, p 2.

⁴² While the title of the document specifies the right to a remedy and reparation for *gross* violations of IHRL and violations of IHL, Principle 26 specify that the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law. See also Van Boven (n 41) p 2f.

up the right to an effective remedy⁴³, which in turn assures equal and effective access to justice ‘irrespective of who may ultimately be the bearer of responsibility for the violation’.⁴⁴ This is an inclusion of liability and responsibility of non-State actors, including *all violations* and not solely those attributable to a State.⁴⁵ From the perspective of a survivor-centred and human rights-based approaches, this is important.⁴⁶

The issues of inadequate remedies, unfulfilled human rights and the issues of impunity and deficient accountability are inevitably linked, particularly so in societies affected by conflict and violence.⁴⁷ Survivors of conflict-related sexual violence face this double-sided problem in the aftermath of abuse, suffering assault upon assault. At first, the violation of conflict-related sexual violence itself. Later on, the lack of equal and effective access to justice is another violation. Failure to provide judicial remedies has short and long-term consequences on survivors and communities affected by conflict-related sexual violence and affects the pursuit of peace and enhancement of the Rule of Law. Also, the chance to deter future conflict-related sexual violence by ensuring accountability is missed.⁴⁸ Specifically, the UN has framed that

‘Ensuring accountability for CRSV crimes is an effective approach to deterring future crimes from being committed and sending a strong message to perpetrators and communities that CRSV will not be tolerated. Accountability is also an essential part of bringing justice and remedies to victims/survivors and supporting them to rebuild their lives. Moreover, as impunity is often a root

⁴³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law’ (n 38) Principle 11; Van Boven (n 41) p 4.

⁴⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law’ (n 38) Principle 3(c).

⁴⁵ Ibid Principles 12, 14; UN ‘Guidance Note of the Secretary General - Reparations for Conflict-Related Sexual Violence’ (2014) <<https://www.unwomen.org/-/media/headquarters/attachments/sections/docs/2014/unsg-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf?la=en&vs=1356>> accessed 10 April 2021, p 6f.

⁴⁶ The scope and substance of access to justice is further defined in Principles 12 until 14. As this thesis focus primarily on obligations, accountability and the subsequent access to justice and judicial mechanisms is not specified further.

⁴⁷ Van Boven (n 41) p 1.

⁴⁸ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 114.

*cause and a catalyst of conflict, promoting justice is a critical condition to re-establishing peace and security.*⁴⁹

Unfortunately, the 2020 UNSG report on conflict-related sexual violence highlights that ‘...the pandemic further complicated the pursuit of justice and redress, as lockdowns affected reporting mechanisms, the work of investigators, judges, prosecutors and lawyers and the overall effective functioning of justice and accountability systems’,⁵⁰ making the efforts towards combating impunity, ensuring accountability and securing access to justice particularly vital post pandemic. It follows that such efforts are twofold: aiming at deterrence of conflict and sexual violence as well as ending impunity and fulfilling human rights in line with a survivor-centred approach.

2.3 Armed non-State actors and conflict-related sexual violence

The understanding that armed non-State actors are the major perpetrators of conflict-related sexual violence has already been elevated. The annual reports on conflict-related sexual violence submitted by the UNSG as requested by the UNSC explicitly illustrates this fact. For more than a decade, the annual reports have highlighted the reoccurring perpetration of conflict-related sexual violence in relation to conflicts worldwide, and armed non-State actors as suspects for the majority of such violence.⁵¹ The reports witness that State monopoly on violence and taking part in armed conflict has been significantly subverted. Nearly all contemporary armed conflicts involve at least one-armed non-State actor, the Islamic State in Iraq and Syria being a succinct example. The evolution of resort to violence is noticeable on the battlefield, but not reflected in a coherent approach to the status, treatment or accountability of armed non-State actors under international law. Noortmann, Ryngaert and Reinisch scripted that ‘non-State actors have added a new dimension of complexity to the study of international law’, a system

⁴⁹ Ibid p 114.

⁵⁰ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 2.

⁵¹ Ibid para 6.

‘developed and understood through the legal personality of the State’.⁵² Even the term is defined in contrast to States, entailing that, a non-State actor is any actor not part of a State, encompassing non-governmental organisations, multinational corporations, international organisations and, of course, armed non-State actors.⁵³

While IHL has long recognised and regulated armed non-State actors participating in conflict, it has primarily done so through customary international law, as treaties of IHL primarily focus on international armed conflicts fought between States.⁵⁴ Contrary to ICL and IHRL, IHL explicitly acknowledges armed non-State actors through Article 3 common to the Geneva Conventions (1949) (common Article 3), which asserts that ‘each party to the conflict is bound to apply’ the provisions therein. Yet, common Article 3, nor any other provision of international law, defines non-State parties to conflict nor armed non-State actors further.⁵⁵ Essentially, armed non-State actors are non-State parties to non-international armed conflicts. Such groups have also been termed insurrectional groups, organised armed groups, non-State armed groups and rebel groups.⁵⁶ All these euphemisms aim to capture the same notion: a group that use force and is beyond State control.⁵⁷ However, defining armed non-State actors is not an entirely straightforward nor a simple endeavour.⁵⁸ Still, what (minimally) characterises and determines an armed non-State actor is:

- i. The existence of a group, sufficient in numbers to initiate and sustain a conflict,

⁵² Math Noortmann, Cedric Ryngaert and August Reinisch, 'Introduction' in Math Noortmann, Cedric Ryngaert and August Reinisch (eds) *Non-State Actors in International Law* (Hart Publishing 2017) p 1f.

⁵³ Mastorodimos (n 4) p 1, 10ff.

⁵⁴ Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura 'Introduction: The Functions and Interactions of Non-State Actors in the Realm of International Humanitarian Law' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020) p 3.

⁵⁵ *Ibid* p 13.

⁵⁶ The term armed non-State actor is for purposes of coherency used throughout this thesis.

⁵⁷ Mastorodimos (n 4) p 9f.

⁵⁸ Annyssa Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds) *International Humanitarian law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020) p 41.

- ii. The group is armed, possessing weapons and war materials. Without it, the group will not be able to be a party to and participate in an armed conflict. Moreover,
- iii. The group is organised, by some form of structure, hierarchy and command. The form of such organisation is secondary, what matters is the joint planned action as an outcome of an organised unit generating an armed conflict.⁵⁹ The collective nature of armed non-state actors is an essential feature of the group's being.⁶⁰

These requirements have primarily been developed through Protocol II additional to the Geneva Conventions (1949) and the ad hoc tribunal International Criminal Tribunal of former Yugoslavia (ICTY), established by the UNSC ensuing the conflict in the Balkans during the 1990s.⁶¹ Consequently, the minimum requirements outlined above primarily relates to IHL and ICL, and the characterisation of armed non-State actors are slightly different when applying IHRL.⁶² Still, for the purposes of applying IHL, and ICL in relation to war crimes, armed non-State actors are non-State parties to non-international armed conflicts. However, armed non-State actors are not defined solely in that context.⁶³

Despite the, at least previous, State-centricity of international law, there is a general understanding that armed non-State actors have obligations under IHL, ICL and IHRL.⁶⁴ This thesis will proceed with detailing the UN definition of conflict-related sexual violence further, before turning to an examination of the source, scope and content of obligations and accountability under IHL, ICL and IHRL in relation to conflict-related sexual violence.

⁵⁹ Mastorodimos (n 4) p 14ff.

⁶⁰ Bellal (n 58) p 42.

⁶¹ Mastorodimos (n 4) p 16.

⁶² See Chapter 5.5 and 5.6 below.

⁶³ Mastorodimos (n 4) p 9f.

⁶⁴ Annysa Bellal and Ezequiel Heffes, "'Yes I Do': Binding Armed Non-State Actors To IHL and Human Rights Norms Through Their Consent' (2018) 12 (1) Human Rights & International Legal Discourse 120, p 121.

2.4 Defining conflict-related sexual violence

As observed in previous subchapters, there are several terms used in the realm of gender-based violence. Sexual and gender-based violence is a form of gender-based violence and includes any type of sexual violence directed against a person or group based on their sex or gender. In turn, conflict-related sexual violence is a form of sexual and gender-based violence.⁶⁵ Conflict-related sexual violence, and all forms of sexual violence, is a fundamental violation of integrity of the person, and has complex, multifaceted and harmful long-term and short-term consequences, affecting survivors and communities alike.⁶⁶ While this thesis is based on the definition of conflict-related sexual violence, it is important to recall that definitions or descriptions can never fully capture nor comprehend victim's and survivor's experiences of such violence and abuse.⁶⁷

The UN definition of conflict-related sexual violence relied on in this thesis is also relied on in academia and policymaking, and recently implemented in the NATO Policy on Preventing and Responding to Conflict-Related Sexual Violence (June 2021).⁶⁸ The definition was provided in Chapter 1.1 of this thesis⁶⁹ and essentially contains three primary elements:

- i. The prohibited forms of sexual violence. The definition explicitly encompasses rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage. The definition is non-exhaustive and includes also 'any other form of sexual violence of comparable gravity'.
- ii. The target (and the perpetrator). Importantly, the definition details that conflict-related sexual violence is perpetrated against women, men, boys and girls. While the definition frames that the perpetrator is

⁶⁵ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 6.

⁶⁶ Ibid p 18, 114.

⁶⁷ Swaine (n 19) p 757.

⁶⁸ O'Rourke (n 3) p 56f. See also the new NATO Policy on Preventing and Responding to Conflict-Related Sexual Violence, endorsed on June 1st, 2021.

⁶⁹ See also Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 5.

‘often affiliated with a State or non-State armed group’ and that the victim is often ‘an actual or perceived member of a political, ethnic or religious minority group’, the definition makes no such requirements, and does not exclude violence based on the characterisation of the perpetrator or the victim/survivor.⁷⁰

- iii. The link to conflict. The perpetrated act must be ‘directly or indirectly linked to a conflict’. Such link could be either temporal, geographical, and/or causal in nature. For sexual violence to be conflict-related, at least two of such links should be established. Inherently, a temporal link requires proximity in time between the conflict and the act of sexual violence. Such proximity exists if the violence occurs *during* conflict, in a context of instability that *may escalate* to conflict, or in the *aftermath* of conflict. A geographical link requires that sexual violence occurs in conflict-affected areas. Conflict-affected areas could be areas of active warfare, areas impacted by a conflict that affect only a part of a territory, border areas or a region. Finally, a causal link requires several contributing considerations. The extent to which pre-conflict sexual violence exacerbates by the conditions of conflict and to what extent sexual violence is linked to the general breakdown of law and order are factors to consider in assessing such causality. Also, the extent to which the conflict played a substantial part in the perpetrator’s ability to commit sexual violence should be considered. Besides, situations that do not meet the threshold of armed conflict set under international law should still be taken into consideration,⁷¹ making no distinction between the type of conflict.

Significantly, the definition of conflict-related sexual violence covers both instances where violence is perpetrated as a tactic or weapon of warfare, and instances when violence is perpetrated in a wider context of conflict.⁷² Likewise, the definition does not directly exclude forms of sexual violence as conflict-related on the basis of the characterisation of the perpetrator nor the

⁷⁰ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 7.

⁷¹ Ibid.

⁷² O’Rourke (n 3) p 57.

victim/survivor, or due to the motive of the perpetrator, and whether it is individual and opportunistic or public, organised and strategic. Still, such contexts and motives may feed into the understanding of the required temporal, geographical and/or causal link to conflict.

As already recalled, the term conflict-related sexual violence is extensively used in policy and academia, and relied on in this thesis to illustrate the variant and multifaceted experiences of sexual violence experienced by individuals affected in situations linked to armed conflict.⁷³ However, as already indicated, from a legal point of view, the term and definition provided is not in alignment with the regimes under scrutiny in this thesis. IHL, ICL and IHRL all regulate sexual violence in conflict, but does so in dissimilar ways, and not in complete alignment with the definition. The proscription of conflict-related sexual violence differs across these regimes in relation to the forms of sexual violence, the presence of a conflict, and the link between the violence and the conflict.⁷⁴ As previously scripted, this has particular consequences when such violence is perpetrated by armed non-State actors, as the approach to such groups is also fragmented across international law. In the ensuing chapters, the interlinkages and discrepancies between conflict-related sexual violence and the corresponding proscriptions applicable to armed non-State actors under IHL, ICL and IHRL is examined in that order, as is the specific challenges that is elevated as these two fragmented areas of international law collide.

⁷³ It has been argued that the term “conflict-related” is too narrow to include all forms of gender-based violence committed in times of armed conflict, see Swaine (19). Still, for the purposes of this thesis, exploring discrepancies of international law, the term is, due to its extensive use in conversations on international peace and security, policymaking and academia, used as a portrayal of the variant forms of sexual violence experienced in armed conflict. As depicted in Chapter 1.3, this and the fact that the UN definition is relied on in academia and policymaking outside the UN are the primary rationales for the central role the definition plays in this thesis. As also depicted in Chapter 1.3, a further elaboration on the UN definition outside the comparison to proscriptions of international law lies outside the scope of this thesis

⁷⁴ O’Rourke (n 3) p 56f.

3 International humanitarian law and conflict-related sexual violence perpetrated by armed non-State actors

This chapter seeks to provide a broad understanding of the IHL applicable in non-international armed conflicts and the obligations and prohibitions it incurs on armed non-State actors in relation to conflict-related sexual violence. On this basis, this chapter seeks to elaborate on how the prohibition of sexual violence under IHL applicable to armed non-State actors corresponds to the definition of conflict-related sexual violence. In this regard, three particular elements that are cause for discrepancies, affecting the protection in terms of conflict-related sexual violence, are specified: the uncertainty surrounding the definition of non-international armed conflict and the ensuing applicability of IHL, the reduced scope of individuals afforded protection under IHL, and, primarily, the limited “conflict nexus” required under IHL contrasting the wider “conflict-related” required under the UN definition. To identify the prohibitions of rape and sexual violence under IHL and contrast it to the definition of conflict-related sexual violence, this chapter draws upon treaty law, customary international law and case-law established by the international criminal tribunals of Rwanda (ICTR) and former Yugoslavia (ICTY).

3.1 International humanitarian law and non-international armed conflicts

IHL applies only in times of armed conflict.⁷⁵ The initial step in any application of IHL is thus an examination of the existence and classification of armed conflict.⁷⁶ An authoritative definition of armed conflict is provided

⁷⁵ O’Rourke (n 3) p 57.

⁷⁶ Vaios Koutroulis, ‘The Fight Against the Islamic State and Jus in Bello’ (2016) 29 (3) *Leiden Journal of International Law* 827, p 827.

by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadić* (1995):

*'...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'*⁷⁷

The definition equally mirrors international armed conflicts fought between States, as well as non-international armed conflicts, fought within a State involving at least one armed non-State actor. This thesis only concerns the latter. IHL is built on the notion that there are different types of armed conflicts that are differently regulated.⁷⁸ As such, the type of conflict determines the normative framework applicable. While common Article 3 provides no definition of non-international armed conflicts, customary law through the work of the ICTY has filled that gap. In *Prosecutor v Limaj et al* (2005), the ICTY developed two criteria that cumulatively need to be fulfilled: intensity and organisation. First, the hostilities must reach a certain level of intensity.⁷⁹ The level of intensity has been further specified by the ICTY, and agreeably summarised in *Prosecutor v Boškoski & Tarčulovski* (2008), and includes considerations on the seriousness of attacks, the spread of clashes over territory and a period of time, the number of casualties, the occupation of territory and the attracted attention by the UN Security Council.⁸⁰ Second, the parties to conflict must sustain a certain level of organisation.⁸¹ In *Prosecutor v Haradinaj et al* (2012) and *Prosecutor v Limaj et al* (2005), the ICTY identified several factors to consider, including the existence of headquarters, a spokesperson and command structure, the distribution of orders, the ability to coordinate attacks, the recruitment and

⁷⁷ ICTY, *Prosecutor v Duško Tadić*, Case No. IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

⁷⁸ O'Rourke (n 3) p 58.

⁷⁹ ICTY, *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Musliu*, Case No. IT-03-66-T, Trial Chamber II, Judgment, 30 November 2005, para 170.

⁸⁰ ICTY, *Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-T, Trial Chamber II, Judgment, 10 July 2008, para 177.

⁸¹ ICTY, *Prosecutor v Limaj et al* (n 79) para 170.

training of new members, communication, weapon supplies, control over territory and recognition by external parties.⁸²

Determining the presence of a non-international armed conflict and its temporal scope and potential cessations, depending on the somewhat ambiguous thresholds of intensity and organisation, is a complex matter.⁸³ Simultaneously, it is a highly important inquiry and matter to decide upon, as the applicability of IHL is premised and dependent on the existence of an armed conflict.⁸⁴ The requirements set for constituting a non-international armed conflict also relate back to the characteristics of the particular armed non-State actor, as only those sufficiently organised and able to uphold a certain level of intensity of conflict are considered bound by IHL. As contemporary non-international armed conflicts are increasingly characterised by the participation of a myriad of splintered, independent and fragile armed non-State actors, new and complex challenges to classification of conflict, and the characteristics of armed non-State actors, are posed.⁸⁵ Situations that fall short of meeting the thresholds of intensity and organisation, thus not constituting a non-international armed conflict, are usually termed “internal disturbance and tension”, to which IHL does not apply. Instead, domestic law and IHRL would regulate conflict-related sexual violence in situations not amounting to an armed conflict, and the applicability of IHRL is important. Due to the uncertainty surrounding the definition of non-international armed conflict and the lack of an authoritative impartial body to characterise the conflict, it is not uncommon State practice to deliberately label violence as “internal disturbance and tension” rather than non-international armed conflict, thus denying the applicability of IHL.⁸⁶ Furthermore, the geographical scope of conflict is also a complex assessment

⁸² Ibid, para 98-132; ICTY, Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84bis-T, Trial Chamber II, Judgment, 29 November 2012, para 60.

⁸³ O’Rourke (n 3) p 58f.

⁸⁴ Sandesh Sivakumaran, ‘International Humanitarian Law’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018) p 508.

⁸⁵ Chiara Redaelli ‘A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts’ (*Humanitarian Law & Policy Blog*, 22 April 2021) <<https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>> accessed 19 May 2021.

⁸⁶ O’Rourke (n 3) p 58f.

and further affects the applicability of IHL, especially in relation to contemporary conflicts that often includes transnational elements.⁸⁷

Innately, the uncertainty surrounding the determination of the existence of a non-international armed conflict affects and obstructs the applicability of IHL, and thus also its afforded protection with respect to conflict-related sexual violence. If the presence of a non-international armed conflict cannot be established, IHL does not apply, and nor does its proscriptions of rape and sexual violence. Contrary, the UN definition of conflict-related sexual violence includes also violence occurring outside non-international armed conflicts. The definition sets out that the link to conflict is established through the existence of two of the three links: temporal, geographic and causal. Thus, the temporal link must not be fulfilled (although it often is through either of the other links). Besides including sexual violence *during* conflict, the temporal link includes sexual violence that occurs ‘in a context of instability that may escalate to armed conflict, during a period of occupation’ or ‘in the aftermath of armed conflict but prior to the full restoration of State authority’.⁸⁸ In this regard, IHL is premised on a narrower application than the definition of conflict-related sexual violence. As women and girls are disproportionately affected by conflict-related sexual violence, the limitations of IHL has gendered impacts. Significantly, the temporal scope of conflict and the temporal link to conflict is intrinsically related and will be returned below.

3.2 Armed non-State actors and obligations under international humanitarian law

Subsequent to the definition of conflict and the parties to it, the material content of applicable IHL is affected. As previously mentioned, the vast majority of treaty IHL regulate international armed conflicts. The primary sources of IHL regulating armed non-State actors and the conflict they participate in is governed by Article 3 common to the Geneva Conventions

⁸⁷ Koutroulis (n 76) p 829.

⁸⁸ Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (n 15) p 7.

(1949), Protocol II additional to the Geneva Conventions and customary international law. However, due to the development of customary law, applicable norms of IHL to international and non-international armed conflicts are to a large extent aligned. The Customary Law Study by the International Committee of the Red Cross (ICRC) (2005)⁸⁹ identifies 161 rules of customary international law, all but 13 applicable also in non-international armed conflicts.⁹⁰

Under contemporary international law, it is settled and generally accepted that armed non-State actors *are* bound to comply with IHL, including treaty law and customary law. This is partly connected to the principle of equality of belligerents, entailing that obligations and rights under IHL apply equally to all parties to an armed conflict. However, different arguments have been put forward as to *why* armed non-State actors are bound by IHL. The most common explanation relies on State's capacity and prerogative to legislate for all its nationals. Contrary, Pictet's Commentary to the 1949 Geneva Convention I, support the argument of effective sovereignty, and that the IHL obligations of previous administrations (States) devolve to the armed non-State actors 'in a similar way to successive governments, owing to their claims to represent the country or a part of it'.⁹¹ Both explanations has been extensively relied on, and are based on the consent of the State to be bound. However convincingly framed, both views have been the subject of debate and criticism. Contrasting theories have emerged, highlighting instead the importance of the willingness of armed non-State actors themselves to be bound by IHL.⁹² No matter the basis, armed non-State actors' obligations

⁸⁹ The customary law study is based on national and international practice visualised in military manuals, domestic legislation, international and domestic case law and UN resolutions. It is relevant to point out that the customary study has received critique for being over-inclusive. However, this is not the case for the four Rules relied on in this thesis and will thus not be elaborated on further.

⁹⁰ Jean-Marie Henckaerts and Cornelius Wiesner, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds) *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (T.M.C Asser Press 2020) p 199.

⁹¹ Bellal and Heffes (n 64) p 121f.

⁹² *Ibid* p 124f.

under customary IHL is undisputed, and it is on this basis this thesis proceeds.⁹³

The primary obligation under IHL is to respect IHL,⁹⁴ and each party to conflict is bound to apply common Article 3. Serious violations of IHL are war crimes. In *Prosecutor v Tadić*, the ICTY clarified that

*‘...the violation of the rule of international humanitarian law must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule’.*⁹⁵

The individual criminal responsibility for war crimes is thus part of customary international law.⁹⁶ However, it is noteworthy that neither customary IHL nor common Article 3 contains provisions on enforcement.⁹⁷

Principally, IHL regulates conduct against adversaries on the battlefield as well as protection of civilians and members of opposing forces *hors de combat*. It follows that IHL does not apply to violence committed within armed groups. Instead, such violations are regulated under domestic law and IHRL.⁹⁸ Contrary, the definition of conflict-related sexual violence relied on in this thesis makes no such distinction. In this regard, there is a discrepancy between IHL and the UN definition of conflict-related sexual violence. The definition of conflict-related sexual violence does not limit nor specify who can be a victim/survivor of conflict-related sexual violence, and thus does not delimit the protection of victims/survivors depending on the affiliation of the perpetrator or the victim/survivor. This is in alignment with the reality in armed conflict, in which sexual violence can be perpetrated within own armed forces as isolated sexual abuse, as well as in a wider context of conflict or as strategic and organised sexual violence.⁹⁹ However, the fact that

⁹³ As it is accepted and settled that armed non-State actors have obligations under IHL (customary and treaty law), a further inquiry on the source of that fact is outside the scope of this thesis. For more information, see Bellal and Heffes (n 64).

⁹⁴ Mastorodimos (n 4) p 90; ICRC, ‘Customary IHL Database’ Rule 139: Respect for International Humanitarian Law <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>> accessed 4 March 2021.

⁹⁵ ICTY, *Prosecutor v Duško Tadić* (n 77) para 106.

⁹⁶ ICRC, ‘Customary IHL Database’ (n 94) Rule 156: Definition of War Crimes.

⁹⁷ O’Rourke (n 3) p 59, 63f.

⁹⁸ Coman Kenny and Yvonne McDermott, ‘The Expanding Protection of Members of a Party’s Own Armed Forces under International Criminal Law’ (2019) 68 (4) *International and Comparative Law Quarterly* 943, p 944.

⁹⁹ *Ibid* p 954; Swaine (n 19) p 764ff.

victims/survivors are civilian may contribute to the assessment and establishment of a sufficient link to conflict.¹⁰⁰ This is a distinct discrepancy between the definition of conflict-related sexual violence and the corresponding prohibition under IHL, and it follows that, in this regard, the UN definition of conflict-related sexual violence encompasses wider experiences of sexual violence in conflict than IHL does, and that the two proscriptions are not aligned.

3.3 Conflict-related sexual violence and international humanitarian law

In common Article 3, neither rape nor sexual violence is explicitly prohibited. Rape and other forms of sexual violence is instead implicitly prohibited when outlawing

‘...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.’¹⁰¹

The International Court of Justice (ICJ) has described common Article 3 as reflecting ‘elementary considerations of humanity’ applicable in all types of armed conflicts.¹⁰² Customary IHL also prohibits rape and other forms of sexual violence. The Customary Law Study by ICRC identifies that this prohibition is applicable to international and non-international armed conflicts alike, and includes sexual violence against women, men, boys and girls.¹⁰³

¹⁰⁰ See Chapter 1.1; Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 5.

¹⁰¹ Common Article 3 to the Four Geneva Conventions (1949).

¹⁰² ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment (1986) ICJ Reports 1986, para 218. See also ICJ, The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment (1949) ICJ Reports 1949, p 22.

¹⁰³ ICRC, ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other forms of Sexual Violence.

3.3.1 Defining rape and sexual violence

In *Prosecutor v Akayesu* (1998), the International Criminal Tribunal of Rwanda (ICTR) settled an authoritative definition of rape as

*‘...a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.*¹⁰⁴

The Trial Chamber further provided an imperious definition of sexual violence, including 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’.*¹⁰⁵

Coercive circumstances do not need be physical, but may also be

*‘...threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances.’*¹⁰⁶

The Trial Chamber provides specific examples to the Rwandan conflict to illustrate circumstances inherently coercive, including armed conflict and military presence.¹⁰⁷ Conclusively, sexual violence is a broader term than, and includes, rape.¹⁰⁸ The ICRC Customary Study identifies that ‘committing sexual violence, in particular rape, sexual slavery, enforced prostitution, enforced sterilization, and enforced pregnancy’ are serious violations of IHL and war crimes.¹⁰⁹ The UN definition of conflict-related sexual violence includes these forms of sexual violence, but goes even further by explicitly including also forced abortion and forced marriage. However, neither customary nor the definition of conflict-related sexual violence aim to be exhaustive and subsequently extends the prohibitions to include “other forms

¹⁰⁴ ICTR, *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para 688.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ O’Rourke (n 3) p 69.

¹⁰⁹ ICRC, ‘Customary IHL Database’ (n 94) Rule 156: Definition of war crimes, Rule 93: Rape and Other forms of Sexual Violence.

of sexual violence”.¹¹⁰ On the basis of case-law, scholars have summarised acts labelled as sexual violence, in which forced abortion and forced marriage are included, as is mutilation of genital organs, sexual abuse and sexual harassment. Moreover, customary international law has not defined sexual violence further, nor determined a minimum threshold of gravity for acts of sexual violence amounting to war crimes.¹¹¹ As such, while some uncertainty may surround the exact acts of conflict-related sexual violence prohibited under IHL, this is to a large extent amended as a result of case-law and the non-exhaustive nature of the proscriptions.

3.3.2 Conflict-related v. conflict nexus

Contrary to the UN definition of conflict-related sexual violence relied on in this thesis, IHL refers to the term “nexus to conflict”. The nexus to conflict is not found in IHL treaties but has been developed in case law to determine jurisdiction or establish whether a war crime has been committed. War crimes are serious violations of IHL, hence, IHL must be applicable. In this sense, the presence of a conflict and the requirement of a nexus to that conflict distinguishes war crimes/other violations of IHL from other crimes that may be committed in armed conflict.¹¹² Gaggioli phrased that ‘it is not because IHL is applicable at a given place and time that all acts occurring in this context are governed by IHL’.¹¹³ The nexus to conflict is a complex area of law and not always easy to determine,¹¹⁴ but it does correspond across IHL and ICL.¹¹⁵ As already alluded, its substance has primarily been developed in case law, and in *Prosecutor v Kunarac et al* (2002) the ICTY Appeals Chamber held that

‘What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in

¹¹⁰ ICRC Customary Law Study (94) Rule 93: Rape and Other Forms of Sexual Violence; Conflict-Related Sexual Violence: Report of the Secretary-General (n 1) para 4.

¹¹¹ O’Rourke (n 3) p 69f.

¹¹² For the purposes of this thesis, the distinction serves as an indicator of whether conflict-related sexual violence is an obligation under IHL or, if there is no nexus to conflict, another sphere of law, be it domestic, regional or international.

¹¹³ Gaggioli (n 8) p 515.

¹¹⁴ O’Rourke (n 3) p 64.

¹¹⁵ Gaggioli (n 8) p 513f.

*which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established (...) that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.*¹¹⁶

As such, conflict-related sexual violence may take place ‘at a time and in a place where no fighting is taking place’. It is sufficient that the perpetrated acts were closely related to the hostilities taking place in other parts of the territories controlled by the parties to conflict in order to correspond to an obligation under IHL.¹¹⁷ The, sometimes critiqued, formulation “under the guise of the armed conflict” was elaborated on by the ICTR in *Prosecutor v Rutaganda* (2003) in which it was asserted that the phrase does not mean ‘at the same time as an armed conflict’ and/or ‘in any circumstances created in part by the armed conflict’,¹¹⁸ seemingly contrasting the notion that IHL only applies in times of armed conflict. In *Prosecutor v Kunarac et al* (2002) the ICTY detailed the following, non-exhaustive and non-cumulative, factors as examples indicating a sufficient nexus to conflict:

*‘...the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and that the crime is committed as part of or in the context of the perpetrator's official duties.*¹¹⁹

Returning to *Prosecutor v Akayesu* (1998), the ICTR clarified that civilians can commit war crimes, also when they have no relation to either side of the party.¹²⁰ In adjudicating on the nexus to conflict, the ad hoc tribunals have

¹¹⁶ ICTY, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para 58.

¹¹⁷ *Ibid*, para 57.

¹¹⁸ ICTR, *Prosecutor v George Rutaganda*, Case No. ICTR-96-3-A, Appeals Chamber, Judgement, 26 May 2003, para. 570.

¹¹⁹ ICTY, *Prosecutor v Kunarac et al* (n 116) para 59.

¹²⁰ ICTR, *Prosecutor v Akayesu* (n 104) para 444.

relied on an “objective test”, and the nexus between act and conflict is assessed on a case by case basis.¹²¹

The UN definition of conflict-related sexual violence also relies on a link to conflict, requiring that it need be temporal, geographical and/or causal. Significantly, the scope and extent of the links to conflict are inherently different. Specifically, the conflict nexus under IHL is narrower than the broader link encompassed in the definition of conflict-related sexual violence. It follows that not all forms of conflict-related sexual violence amounts to war crimes and violations of IHL.¹²² Consequently, there are experiences of conflict-related sexual violence that IHL does not cover due to an insufficient nexus to conflict. It is reiterated here that the nexus to conflict is a complex area of law, and while the nexus and link are distinctively divergent in scope and extent, still, they share similarities: both rely on factors that are temporal, causal or geographical, to determine whether a link is sufficient or not, and both are decided on a case-by case basis. As such, the exact scope of either of the two links are intricate and difficult to assess. To clarify the distinctions, Gaggioli phrased that

‘In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment—as he may have done already in peacetime—without this act having any link to the armed conflict situation, IHL would not apply to the act.’¹²³

By analogy, another example could be; in the context of instability that may escalate to a non-international armed conflict, a military commander of an armed non-State actor perpetrates various forms of sexual violence - that has increased due to the said situation of instability and breakdown of law and order - without having any link to the instability (potential non-international armed conflict), IHL does not apply. Contrary, the temporal (instability that may escalate to conflict) and causal (increased violence due to instability and breakdown of law and order) link to constitute conflict-related sexual violence are fulfilled.

¹²¹ O’Rourke (n 3) p 64; Gaggioli (n 8) p 513f.

¹²² Gaggioli (n 8) p 514.

¹²³ Ibid p 515.

As noted above, sexual violence in conflict is multifaceted, and may be perpetrated as a tactic or weapon of warfare, by combatants against civilians, and thus with a distinct nexus to conflict and as such war crimes. However, as also noted above, sexual violence in conflict may also be perpetrated in wider contexts to conflict, isolated and opportunistic. As the proscriptions of rape and sexual violence requires a stronger link, a nexus, to conflict than the definition of conflict-related sexual violence does, it seems that the UN definition of conflict-related includes more variant and wider forms of sexual violence perpetrated in situations with a link to conflict. A parallel can be drawn to the previous (and perhaps somewhat still-standing) attention to rape as strategic and a tactic of warfare. This approach has been mirrored in UNSC resolutions, yet a shift can be traced in later resolutions of the WPS agenda dedicated to conflict-related sexual violence. Rape and sexual violence as a tactic of war is emphasised in UNSCR 1820 (2008) and UNSCR 2106 (2013),¹²⁴ whereas UNSCR 2467 (2019) does not make such a referral, and instead highlights that ‘sexual violence in conflict occur on a continuum of interrelated and recurring forms of violence’¹²⁵ and prevail in both conflict and post-conflict settings, but is not an inevitable consequence of such context.¹²⁶ On this note, it was elevated above that violence may be committed for political and organized purposes as well as for personal motivations in contemporary armed conflicts. A distinction between motives and forms of sexual violence is not always easy to make, particularly where the same actor might be involved in both strategic and individual forms of violence.¹²⁷ Importantly, it is increasingly acknowledged that strategic rape is not the sole, nor even the predominant, form of violence that disproportionately women and girls experience during conflict.¹²⁸ This relates back to the other discrepancies discovered: the uncertainty surrounding the definition of non-international armed conflict affecting the applicability and thus the protection of IHL, as well as the scope of victims/survivors being

¹²⁴ UN Security Council ‘Resolution 1820’ (2008) S/RES/1820
<<http://unscr.com/en/resolutions/doc/1820>> accessed 6 February 2021, para 1; UNSCR 2106 (n 14) para 1.

¹²⁵ UNSCR 2467 (n 16) p 2.

¹²⁶ *Ibid* p 2f.

¹²⁷ Swaine (n 19) p 760.

¹²⁸ *Ibid* p 759.

limited to civilians and adversaries. Not considering all experiences of conflict-related sexual violence, entails a risk that conflict-related sexual violence is decoupled with gender equality and the endemic gendered and sexualised violence that is prevalent before, during and after conflict.¹²⁹ Moreover, as conflict-related sexual violence disproportionately affects women and girls, the discrepancies discovered between the UN definition of conflict-related sexual violence and the corresponding proscriptions under IHL, the limitations of the latter have gendered impacts. Moreover, given the exclusion of wider forms of conflict-related sexual violence, there is a risk of reinforcing a hierarchy of gendered harms in armed conflict.¹³⁰ Thus, conflict-related sexual violence, to a greater extent, includes opportunistic, isolated and individual forms of sexual violence perpetrated in a situation linked to conflict. Likewise, such forms of sexual violence run a greater risk of ending up in the delta and discrepancy between IHL and the definition of conflict-related sexual violence. A possible consequence may be that, in the context of conflict, a person may experience sexual violence as part of an ordered and strategic attack by an armed actor as well as opportunistic isolated sexual violence by an armed actor. That person may be forced to differentiate between the two experiences of conflict-related sexual violence,¹³¹ where only the former is prohibited under IHL. There is a subsequent risk that such differentiations between violence create a hierarchy of harms¹³², as some experiences of conflict-related sexual violence are excluded from protection under IHL.

3.4 Concluding remarks on international humanitarian law and conflict-related sexual violence perpetrated by armed non-State actors

This subchapter has elaborated on how the definition of conflict-related sexual violence corresponds to the proscription of rape and sexual violence

¹²⁹ Ibid p 759.

¹³⁰ Ibid p 761.

¹³¹ Ibid p 761.

¹³² Ibid p 758.

under IHL applicable to non-international armed conflicts and armed non-State actors. While rape and sexual violence is not explicitly prohibited under IHL, customary law fills this gap through developments under case-law and the work of the ICTY and ICTR. The IHL proscription of rape and sexual violence applies in international and non-international armed conflicts alike, and the acts of sexual violence prohibited under IHL correspond to the acts encompassed in the definition of conflict-related sexual violence. However, as noted above, there are primarily three distinct discrepancies identified that all affect the level of protection in relation to conflict-related sexual violence perpetrated by armed non-State actors. What's more, neither common Article 3 nor Additional Protocol II contains provisions of enforcement, and accountability and enforcement is instead covered by ICL, or domestic law if applicable.

First, IHL is premised on the existence of an armed conflict. The definition of non-international armed conflict is complex, obstructing the application of IHL and the protection afforded in general, and with respect to conflict-related sexual violence in particular. What's more, this is often utilised by parties to deliberately deny the applicability of IHL. This discrepancy is also linked to the conflict nexus required under IHL.

Second, the applicability of IHL does not extend to violence, including sexual violence, within armed forces. As noted above, sexual violence within forces of an armed non-State actor is not uncommon but may instead be regulated under domestic law or IHRL. Nevertheless, by excluding protection and applicability to sexual violence perpetrated by a person affiliated with an armed non-State actor against a person affiliated with the same armed non-State actor, the protection under IHL is limited.

Third, as noted above, acts of rape and sexual violence may constitute serious violations of IHL, and in turn war crimes, if there is a sufficient nexus to conflict. The nexus to conflict as required by IHL is narrower than what is required by the UN definition of conflict-related sexual violence. Ultimately, this entails that there are forms of conflict-related sexual violence that does not correspond to obligations under IHL. As such, armed non-State actors, and State actors alike are bound by IHL, that prohibits some, but not all, experiences of conflict-related sexual violence as encompassed by the

definition relied on in this thesis. This does not entail that IHL allow the violence it does not prohibit; it merely means that IHL only governs sexual violence that has a nexus, and not merely related, to conflict. Despite similarities and that the examination needs to be done on a case- by-case basis, it is clear that there is a discrepancy between conflict-related and conflict-nexus, and that the former is narrower than the latter. Particularly, this may affect forms of violence perpetrated in a wider context of conflict and taking the forms of isolated and individual rather than strategic and a tactic and weapon of warfare. Not considering all experiences of conflict-related sexual violence feed a knowledge gap,¹³³ but also a protection gap under international law. This thesis is not concerned with whether IHL should or should not offer such protection but settles with maintaining that at its current state there are experiences of conflict-related sexual violence that does not correspond to an obligation under IHL. The gap of protection must be minded.

¹³³ Swaine (n 19) p 759.

4 International criminal law and conflict-related sexual violence perpetrated by armed non-State actors

This chapter seeks to provide a broad understanding of the prohibitions of sexual violence under ICL and the corresponding obligations and accountability of (members of) armed non-State actors. In doing so, it briefly considers individual criminal responsibility and universal jurisdiction. Further, this chapter seeks to elaborate and examine the proscriptions of wartime rape and sexual violence under ICL, and how such proscriptions correspond to the definition of conflict-related sexual violence. In this regard, particularly the gravity of international crimes is detailed as a source of discrepancy. In its examinations and elaborations, this chapter draws primarily upon customary international law and case-law as well as the Rome Statute, other treaty law and soft law.

4.1 Crimes and responsibility under international criminal law

*‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.*¹³⁴ – Nuremberg International Military Tribunal

Yet a Second World War vintage,¹³⁵ the roots of ICL date much further back in human history. Still, the notion of universal criminal justice did not materialise in international law until the 20th century. The rationale for such an unhurried development is primarily twofold. First, “classic” international law considered solely States as subjects of international law. Second, States

¹³⁴ Trial of the Major War Criminals Before the International Military Tribunal, Vol. 1, Nuremberg 1947, p 223.

¹³⁵ Robert Cryer, ‘International Criminal Law’ in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018) p 521.

often opposed outside interference in domestic matters, such as criminal behaviour, by persisting the principle of State sovereignty. Eventually, both obstacles were overcome alongside a general tendency in international law to strengthen the position of individuals. Famously framed and previously quoted by the Nuremberg trials, ICL concerns individuals and concerns individual criminal responsibility for international crimes, contrary to the main bulk of international law.¹³⁶

ICL is intrinsically linked to IHL and underpinned by the idea that some crimes are so unacceptable that they are of universal, and not merely domestic, concern. Such crimes may be prosecuted in international courts without interference of domestic law, and by any State in the world on the basis of universal jurisdiction. Only genocide, crimes against humanity, war crimes and the crime of aggression has assumed such status. Terrorism and individual acts of torture have been both considered and contested for such rank, yet, due to remaining uncertainty,¹³⁷ this thesis does not consider them as such.¹³⁸

The advancement of ICL reached its peak, and became customary, during the 1990s through the work of the ad hoc tribunals of ICTR and ICTY. In 1998, these labours led to the adoption of the Rome Statute and the establishment of the appurtenant International Criminal Court (ICC). The Rome Statute calls for ICC jurisdiction, complementary to domestic jurisdiction, over international crimes committed on the territory of a State party or committed by a national of a State party. Also, a non-party State may accept the jurisdiction of the ICC¹³⁹, or, the UNSC may authorise ICC jurisdiction, rendering other requirements of jurisdiction redundant.¹⁴⁰ As such, the applicability of the Rome Statute is dependent on several factors, whereas customary international law binds all States, thus also applicable to individuals of the State. Principally, the Rome Statute reflects customary international law, and, broadly speaking, the crimes under the Rome Statute

¹³⁶ Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020) p 1.

¹³⁷ Cryer (n 135) p 521f.

¹³⁸ Due to the focus of this thesis being obligations under international law, this thesis does not consider transnational crimes of the domestic legal order.

¹³⁹ Rome Statute of the International Criminal Court (last amended 2010) Article 12.

¹⁴⁰ *Ibid* Article 13(b).

are customary.¹⁴¹ However, it has been questioned and debated to what extent the Rome Statute is binding upon individuals or solely upon States, and thus whether the provisions therein are substantive or jurisdictional.¹⁴² It is sufficient for the purpose of this thesis to proceed on the assumption that ICL proscribes rape and sexual violence as international crimes under customary international law, binding individuals and incurring responsibility and indirect obligations thereunder. The Rome Statute also proscribes rape and sexual violence as international crimes, at the very least entailing jurisdiction and incurring responsibility, on individuals. As is detailed below, the proscriptions of rape and sexual violence under customary international law and the Rome Statute are to a large extent aligned. The chief differences lies in slight dissimilarities in material elements, modes of responsibility and the jurisdiction of the ICC, which is dependent on whether the perpetrator is a national of a State party, whether the crime was committed on the territory belonging to a State party, or whether the UNSC refer the case to the ICC and thus allow jurisdiction.¹⁴³ In any case, third party states may exercise universal jurisdiction.¹⁴⁴

4.2 Individual criminal responsibility and armed non-State actors

As already introduced, ICL proscribes individual culpability, under the Rome Statute as well as customary international law. As such, it is not the armed non-State actor per se, but rather the members belonging to the said group that can be held responsible, and thus indirectly having obligations, under ICL. Primarily, ICL considers responsibility, accountability and jurisdiction of international crimes, and indirectly incur negative obligations of individuals.

¹⁴¹ Dapo Akande, 'Customary International Law and the Addition of New War Crimes to the Statute of the ICC' (*EJIL: Talk!*, 2 January 2018) <<https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/>> accessed 29 April 2021.

¹⁴² See Marko Milanović 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2010) 9 (1) *Journal of International Criminal Justice*, for a discussion on whether the provisions of the Rome Statute are substantive or jurisdictional, thus whether it binds solely state parties or also individuals.

¹⁴³ Akande (n 141).

¹⁴⁴ See Chapter 4.4 below.

Individual criminal responsibility is sorted through different modes of responsibility and has been developed through customary international law and firmly established in the Rome Statute. Under customary international law, crimes can be committed through individual commission (including omission), joint commission,¹⁴⁵ and participation through instigation,¹⁴⁶ ordering, assisting the primary perpetrator,¹⁴⁷ and, finally superior/command responsibility, where superiors/commanders are responsible for the crimes of subordinates if they culpably violate the duties of control assigned to them, because they knew or ought to have known about the crime.¹⁴⁸ The Rome Statute cautiously modified the individual responsibility as developed in customary law, and supplemented that participation through ordering, inducing or abetting, perpetration by means, participation in a collective, attempt to international crimes and incitement to commit genocide also are prohibited. Each mode of responsibility is further characterised by particular mental and material elements.¹⁴⁹ Importantly, modes of responsibility can be attributed to members of State and non-State armed forces alike.¹⁵⁰

Contrasting the individual criminal responsibility that characterise ICL, ICL primarily concerns mass atrocity crimes; genocide, crimes against humanity and war crimes, that by nature are collective.¹⁵¹ In *Prosecutor v Tadić* (1999), the ICTY Appeals Chamber stated that

‘Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (...) the participation and contribution of the

¹⁴⁵ Werle and Jeßberger (n 136) p 239f.

¹⁴⁶ Ibid p 255.

¹⁴⁷ Ibid p 257f.

¹⁴⁸ Ibid p 264f.

¹⁴⁹ Ibid p 236.

¹⁵⁰ Ibid p 269.

¹⁵¹ Ilya Nuzov, ‘Post-Conflict Justice: Extending International Criminal Responsibility to Non-State Entities’ in Ezequiel Heffes, Marcos D. Kotlik, Manuel J. Ventura (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020) p 230f.

*other members of the group is often vital in facilitating the commission of the offence in question.*¹⁵²

The focus on individual criminal responsibility, despite the collective nature of mass crimes, has been argued to detach the individual from the community that surrounds them.¹⁵³ Neither customary ICL nor the Rome Statute calls for collective responsibility. Instead, individual acts and appurtenant individual criminal responsibility must be deduced from collective crimes, an often troubled and complex assessment.¹⁵⁴ Moreover, alongside States, collective entities are the most likely participants in violations of IHL and IHRL¹⁵⁵ and in relation to conflict-related sexual violence, the UNSG annual reports supports such a conception, and specifically so with respect to armed non-State actors.¹⁵⁶ On this basis, it has been argued that individual criminal responsibility, on its own, is unable to provide all the answers to all international crimes and violations of international law, and to hold every perpetrator of mass crimes accountable.¹⁵⁷ Furthermore, the dynamic between individual criminal responsibility and collective entities is complex, and the extension of criminal responsibility, or other forms of responsibility, under international law has been extensively debated and both supported and critiqued. Nonetheless, international criminal courts and tribunals (current) inability to exercise jurisdiction over armed non-State actors as collective entities is a significant limitation of ICL. As phrased by Bellal, ‘although holding an individual criminally responsible for the international crimes he or she committed is necessary, there are good reasons for holding an armed non-State actor accountable as such responsible for the violations of international law committed by its members’.¹⁵⁸ In this regard, the influence and importance of a group on individual behaviour must not be undermined. Particularly the example of the Islamic State in Iraq and Syria has shown the

¹⁵² ICTY, Prosecutor v Duško Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para 191.

¹⁵³ Nuzov (n 151) p 256.

¹⁵⁴ Pamela J Stephens, ‘Collective Criminality and Individual Responsibility: The Constraints of Interpretation’ (2014) Fordham International Law Journal, Vol. 37(2) 501, p 502f.

¹⁵⁵ Nuzov (n 151) p 231.

¹⁵⁶ Conflict-related Sexual Violence: 2020 Report of the Secretary-General (n 1) para 6, p 28-30.

¹⁵⁷ Nuzov (n 151) p 256f.

¹⁵⁸ Bellal (n 58) p 40.

powerful abilities of a group to influence the behaviour of its members.¹⁵⁹ The responsibility of armed non-State actors, as collective entities is a field of law still evolving.¹⁶⁰ Still, due to the current inability of adjudicating collective responsibility under ICL, Bellal identifies ‘...a need to devise a more comprehensive and fairer system of responsibility—one which does not rely exclusively on international criminal law’¹⁶¹ and Nuzov even frames that ‘holding non-State entities that are bound by primary rules of IHL, ICL and IHRL responsible for transgressing these rules would seem to be the next logical step’.¹⁶²

4.3 Conflict-related sexual violence as crimes under international criminal law

However progressive in the development of ICL, the International Military Tribunals in Nuremberg and Tokyo failed to prosecute crimes of sexual violence, despite being vastly perpetrated during the war. Decades later, the ICTY and ICTR firmly raised a number of indictments on rape and sexual violence as genocide, crimes against humanity and war crimes, which thereby progressively developed this area of ICL.¹⁶³ Rape and sexual violence are prohibited under ICL as genocide, crimes against humanity and war crimes under customary law and the Rome Statute. The definitions of rape and sexual violence more broadly under ICL was developed in *Prosecutor v Akayesu* (1998), as elaborated on in Chapter 3.2 above. As also alluded above, the crimes prohibited in the Rome Statute reflects customary international law, making the obligations of members of armed non-State actors in relation to conflict-related sexual violence not dependent on whether the Rome Statute is applicable or not. Rape and sexual violence may constitute genocide, crimes against humanity and war crimes under ICL, and are examined as conflict-related sexual violence in that order below.

¹⁵⁹ Ibid p 40f.

¹⁶⁰ Nuzov (n 151) p 230ff.

¹⁶¹ Bellal (n 58) p 42.

¹⁶² Nuzov (n 151) p 258.

¹⁶³ O’Rourke (n 3) p 66.

4.3.1 Conflict-related sexual violence as genocide

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, proclaiming through Article I that genocide is a crime under international law.¹⁶⁴ The ICJ has confirmed that the prohibition against genocide is a peremptory norm of international law, also referred to as *jus cogens*, applying to all States and the individuals within them.¹⁶⁵ Article II states that

‘Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group’.

This definition is consistent with the definitions in the statutes of the ICTY, ICTR and ICC.¹⁶⁶ While the definition of genocide remains silent on sexual violence, the ICTR in *Prosecutor v Akayesu* (1998) recognised that rape and sexual violence may amount to genocide if committed with the intent to destroy, in whole or in part, one of the protected groups.¹⁶⁷ Particularly, the Trial Chamber phrased that

‘With regard, particularly, to (...) rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the

¹⁶⁴ Convention on the Prevention and Punishment of the Crime of Genocide (1948) Article I; Cryer (n 135) p 524.

¹⁶⁵ ICJ, Case Concerning Armed Activities on the Territory of the Congo (DRC v Rwanda) (2006) ICJ Reports 6, para 64.

¹⁶⁶ Cryer (n 135) p 524.

¹⁶⁷ ICTR, *Prosecutor v Akayesu* (n 104) para 731-732; O’Rourke (n 3) p 67.

*Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.*¹⁶⁸

The explicit forms of sexual violence are not detailed under ICL. As long as the sexual violence amounts to one of the prohibited acts in the genocide definition, of which the ICTR in *Prosecutor v Akayesu* (1998) relied on “causing serious bodily or mental harm to members of the group”, it seems that acts of conflict-related sexual violence correspond with the acts of sexual violence that may amount to genocide (if also the other constitutive elements are fulfilled). As such, sexual violence perpetrated with a genocidal intent directed towards one of the protected groups, of which gender is not one, may amount to genocide. This is recognised as customary international law.¹⁶⁹ Contrary to conflict-related sexual violence, genocide does not require a link or nexus to conflict. Contrary to genocide, conflict-related sexual violence does not require a genocidal intent nor the belonging of a victim to a certain group. Evidently, forms of conflict-related sexual violence can amount to genocide. However, genocide is narrower, partly due to the higher set gravity threshold, and partly due to the limitations incurred by listing specific groups that are the only groups that can be subjected to genocide.

4.3.2 Conflict-related sexual violence as crimes against humanity

Contrary to genocide, crimes against humanity is not regulated in a convention of its own. Still, the prohibition against the commission of the crime is well established in customary international law¹⁷⁰, as is its status as a norm *jus cogens*, a peremptory norm, binding all States and the individuals in them.¹⁷¹ Crimes of crimes against humanity were prosecuted at the International Military Tribunal at Nuremberg, and although Control Council Law No. 10, that laid the basis for the Nuremberg prosecutions, included rape as a crimes against humanity, it was never prosecuted as such. The Statutes

¹⁶⁸ ICTR, *Prosecutor v Akayesu* (n 104) para 731.

¹⁶⁹ ICRC ‘Customary IHL Database’ (94) Rule 93: Rape and Other Forms of Sexual Violence.

¹⁷⁰ Werle and Jeßberger (n 136) p 376.

¹⁷¹ Robert Dubler and Matthew Kalyk, *Crimes against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security* (Brill/Nijhoff 2018) p 640f.

of ICTY and ICTR also include rape as a crime against humanity and in *Prosecutor v Kunarac* (2002) the ICTY firmly established that rape and other forms of sexual violence may amount to crimes against humanity.¹⁷² The Rome Statute goes further than its predecessors and includes that acts of ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity’ may amount to crimes against humanity. It has been suggested that the prohibition of crimes against humanity in the Rome Statute reflects customary international law,¹⁷³ but there is disagreement whether the acts of enforced prostitution, forced pregnancy and enforced sterilisation may constitute crimes of crimes against humanity under customary international law.¹⁷⁴ Therefore, for now at least, the better view is that they are not, and that a future conclusion of such status remains to be seen. Inherently, experiences and forms of conflict-related sexual violence may be disregarded as a crime of crimes against humanity dependent on the applicability of the Rome Statute and the appurtenant jurisdiction of the ICC. On this note, it is noteworthy that in the UNSG’s 2020 report on conflict-related sexual violence, the Rome Statute is not directly applicable to the majority of territories and areas of conflicts examined. Given the purposes and research questions of this thesis, it is also noteworthy that the majority of those conflicts are of non-international character and involve armed non-State actors, that are the major perpetrators of conflict-related sexual violence.¹⁷⁵ Moreover, while the Rome Statute requires that acts of crimes against humanity are in furtherance of a State or organisational policy, the existence

¹⁷² Gaggioli (n 8) p 530; O’Rourke (n 3) p 66f.

¹⁷³ ICRC ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other Forms of Sexual Violence; ‘United Nations Office on Genocide Prevention and the Responsibility to Protect’ <<https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>> accessed 10 May 2021.

¹⁷⁴ Dubler and Kalyk (n 171) p 876ff.

¹⁷⁵ See ‘The State Parties to the Rome Statute’ (*The State Parties to the Rome Statute*) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#I> accessed 6 February 2021; Conflict-Related Sexual Violence: 2020 Report of the Secretary-General (n 1) p 13f, 16-19, 21f, 28ff.

of such a requirement also under customary international law is debated,¹⁷⁶ and there is no consensus among scholars.¹⁷⁷

In any case, it follows that rape and other forms of sexual violence may amount to crimes against humanity if also the other constitutive elements are fulfilled, i.e. if rape and sexual violence is committed as part of a widespread or systematic attack against a civilian population. The perpetrator/s act/s must make up “part of” a (widespread and systematic) attack, and the perpetrator must possess knowledge of that fact. Further, there must be a minimum level of scale and seriousness.¹⁷⁸ It follows that isolated, individual and opportunistic forms of sexual violence cannot amount to crimes against humanity.¹⁷⁹ Further the definition preconditions that crimes against humanity can only be committed against a civilian population, and not non-civilians. Thus, similar to IHL, it does not apply to violence and crimes within armed groups. Similar to genocide, the crime of crimes against humanity is not dependent on the existence of an armed conflict.

While certain forms of conflict-related sexual violence may amount to crimes against humanity, if also the other elements are fulfilled, still, there are certain limitations and discrepancies of ICL with regard to conflict-related sexual violence as crimes against humanity. First, crimes against humanity under ICL disregard certain acts of conflict-related sexual violence altogether, primarily those perpetrated within armed forces and those that are isolated, individual and opportunistic rather than part of a “widespread and systematic attack”. Contrary to crimes against humanity, conflict-related sexual violence makes no requirement of the violence to be part of a “widespread and systematic attack”. Thus, the crime of crimes against humanity, similar to the crime of genocide, sets a higher threshold than the definition of conflict-related sexual violence. In this regard, like genocide, the crimes against humanity primarily considers rape that is strategic and political and rape as a weapon and tactic of warfare. Subsequently, other experiences and forms of conflict-related sexual violence that are individual, isolated and opportunistic,

¹⁷⁶ Dubler and Kalyk (n 171) p 638.

¹⁷⁷ Ibid, Chapter 8, see particularly p 625-628, 632f.

¹⁷⁸ Ibid (n 171) p 638.

¹⁷⁹ Gaggioli (n 8) p 530.

rather than political and strategic, are disregarded. Furthermore, crimes against humanity can only be directed against civilian populations. Furthermore, there seems to be a discrepancy under ICL with respect to sexual violence as crimes against humanity under the Rome Statute compared to customary ICL. While the former includes enforced prostitution, forced pregnancy and enforced sterilisation, the latter does not. Moreover, contrary to the definition of conflict-related sexual violence, neither explicitly includes forced marriage nor forced abortion as amounting to crimes against humanity. Furthermore, the Rome Statute requires a policy element, while a corresponding element under customary international law is debated. Inevitably, these discrepancies affect the applicable ICL to a given situation, the possible (indirect) obligations and accountability of members of armed non-State actors and consequently the level of protection afforded to victims and survivors of conflict-related sexual violence. Likewise, the level of protection is dependent upon the applicability of the Rome Statute and the jurisdiction of the ICC, i.e. the nationality of the perpetrator, on what State territory the crime was perpetrated and whether that State is a State party to the ICC, and the referral of the UNSC, which is a highly political query. Conclusively, while forms of conflict-related sexual violence may amount to crimes against humanity, the gravity threshold is set higher, the contextual requirements and prohibited acts are narrower. Moreover, the extent of the protection afforded and the enforceability of the proscriptions of rape and sexual violence under ICL depends on the jurisdiction of the ICC, or a foreign State's goodwill to exercise universal jurisdiction.

4.3.3 Conflict-related sexual violence as war crimes

What was said in relation to war crimes under customary IHL in Chapter 3 is equally applicable to war crimes under ICL. Recalling that rape and sexual violence with a sufficient nexus to conflict are serious violations of Article 3 common to the Geneva Conventions (1949) and war crimes,¹⁸⁰ there are no distinct dissimilarities compared to sexual violence as war crimes under ICL.

¹⁸⁰ See Chapter 3.2 above.

The nexus to conflict corresponds under IHL and ICL,¹⁸¹ as does the forms of sexual violence.¹⁸² Similar to the proscriptions of rape and sexual violence as war crimes under IHL, conflict-related sexual violence is broader than rape and sexual violence as war crimes under ICL. As such, while members of armed non-State actors can be held accountable under ICL, and indirectly have some obligations of conflict-related sexual violence under ICL, the obligations under ICL are limited with respect to the definition of conflict-related sexual violence, primarily so in relation to the narrower “conflict nexus” and the wider, more inclusive, “conflict-related.”

4.4 Universal jurisdiction

The notion of universal jurisdiction has briefly been touched upon in previous subchapters of this thesis and will only briefly be commented on with respect to conflict-related sexual violence and armed non-State actors. Universal jurisdiction builds on the same notion underpinning ICL; that some crimes are so unacceptable that they concern the international community as a whole.¹⁸³ In doing so, it abandons the traditional principle of criminal law, that the factors determining jurisdiction of a court is the connection between it and the site of the crime or the persons involved. Instead, any State may have jurisdiction to prosecute international crimes under universal jurisdiction as a matter of international law, without reference to domestic law. The authority to do so derives from the international character of the crime.¹⁸⁴ The ability to rely on universal jurisdiction for genocide, crimes against humanity and war crimes is generally acknowledged as customary international law.¹⁸⁵

Still, the concept of universal jurisdiction is a somewhat controversial practice. States are not obligated to prosecute genocide, crimes against humanity and war crimes in non-international armed conflicts pursuant to

¹⁸¹ Gaggioli (n 8) p 514.

¹⁸² ICRC ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other Forms of Sexual; Rome Statute of the International Criminal Court (last amended 2010) Article 8(e)(vi).

¹⁸³ Cryer (n 135) p 521f.

¹⁸⁴ Werle and Jeßberger (n 136) p 95f.

¹⁸⁵ Ibid p 97.

universal jurisdiction,¹⁸⁶ meaning that the exercise of universal jurisdiction is merely based upon the will of the State. Nonetheless, since the Second World War, more than 15 states have relied on universal jurisdiction to prosecute individual criminal responsibility for international crimes that took place outside of their territories.¹⁸⁷ The Israeli trial against Adolf Eichmann¹⁸⁸ and the Spanish trial against Augusto Pinochet are well-known examples.¹⁸⁹ Recently, one can trace a revival of domestic courts relying on universal jurisdiction to prosecute international crimes,¹⁹⁰ as in Argentina¹⁹¹, Germany¹⁹², Sweden, Finland, UK and the Netherlands.¹⁹³

Universal jurisdiction facilitates a survivor-centred approach and possess an ability to combat impunity and increase accountability and the opportunities to support survivors' right to access to justice. Still, the potential of universal jurisdiction combating impunity must be considered alongside the challenges of relying on a concept that is dependent on the goodwill of foreign States. In any case, the increased State practice of relying on universal jurisdiction to prosecute international crimes offer a glimpse of hope to survivors and victims and their right to an effective remedy and access to justice. As such, it can be a useful tool to address the residual impunity and lack of accountability for conflict-related sexual violence in general and

¹⁸⁶ Ibid p 106f.

¹⁸⁷ Tun Khin, 'Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide' (*Opinio Juris*, 23 October 2020) <<http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>> accessed 11 April 2021.

¹⁸⁸ Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 (2) *European Journal of International Law* 427, p 434.

¹⁸⁹ Khin (n 187).

¹⁹⁰ Hovell (n 188) p 448.

¹⁹¹ Khin (n 187).

¹⁹² 'Syria Civil War: Germany Holds Unprecedented State Torture Trial' *BBC News* (23 April 2020) <<https://www.bbc.com/news/world-europe-52393402>> accessed 11 April 2021; Human Rights Watch, 'Gambia: Alleged "Death Squad" Member Arrested in Germany' (*Human Rights Watch*, 17 March 2021) <<https://www.hrw.org/news/2021/03/17/gambia-alleged-death-squad-member-arrested-germany>> accessed 11 April 2021.

¹⁹³ Hovell (n 188) p 448; Thierry Cruvellier 'Universal Jurisdiction: The Finnish Revolution' (*JusticeInfo.net*, 1 February 2021) <<https://www.justiceinfo.net/en/69083-universal-jurisdiction-finnish-revolution.html>> accessed 11 April 2021; Aida Samani, 'Swedish Trial Paves the Way for Accountability for Iran's Human Rights Violations' (*Atlantic Council*, 13 January 2021) <<https://www.atlanticcouncil.org/blogs/iransource/swedish-trial-paves-the-way-for-accountability-for-irans-human-rights-violations/>> accessed 11 April 2021.

perhaps particular in relation to conflict-related sexual violence perpetrated by armed non-State actors.

4.5 Concluding remarks on international criminal law and conflict-related sexual violence perpetrated by armed non-State actors

It has been discovered that conflict-related sexual violence may amount to genocide, crimes against humanity and war crimes under ICL, given that all constitutive elements of each crime are fulfilled. However, similar to the prohibition of rape and sexual violence under IHL, the proscriptions and definitions of international crimes under ICL does not correspond to the UN definition of conflict-related sexual violence. As for war crimes, the primary discrepancy relates to the narrower nexus required under IHL and ICL between the non-international armed conflict and the perpetrated act, as compared to the wider and more inclusive conflict-related that follows the UN definition. For genocide and crimes against humanity the conundrum of conflict nexus is forsaken, yet instead, other elements set a higher threshold and explicit limitations with respect to the individuals affected. The crime of genocide requires a genocidal intent to destroy the group in whole or in part. The crime of crimes against humanity requires the perpetrator to, knowingly, commit acts part of a widespread and systematic attack against a civilian population. Further, it has been noted in relation to genocide and crimes against humanity at least, that the higher set thresholds risks excluding several experiences and forms of conflict-related sexual violence, particularly those that are isolated, individual and opportunistic rather than strategic and organised, as well as experiences of sexual violence taking place within armed forces. Subsequently, there is an ensuing risk of reinforcing a hierarchy of gendered harms where only those that are systematic, destructible and widespread or with a stronger nexus to conflict are considered under international law. There is also a risk that such focus and demarcations decouple certain forms of sexual violence from other forms of sexual violence

and from gender inequality, and other root causes, more broadly.¹⁹⁴ In terms of gendered impacts and consequences, there are important points to be made. It has been noted throughout this thesis that women and girls are disproportionately affected by, and constitute the majority of victims and survivors of, conflict-related sexual violence. It has also been detailed that women and girls experience conflict-related sexual violence in strategic and public as well as isolated and private settings.¹⁹⁵ In combination with the high thresholds under ICL just elaborated on, there are large number of experiences of conflict-related sexual violence affecting women and girls that do not qualify as genocide and crimes against humanity, or even war crimes, under international criminal law. As women and girls are disproportionately affected by conflict-related sexual violence, they are also disproportionately affected by the inadequacies and limitations of ICL (and IHL¹⁹⁶) to correspond to the definition of conflict-related sexual violence, the present reality and full range of experiences of conflict-related sexual violence. Similar impacts also affect men and boys that also are victims and survivors of conflict-related sexual violence, although to a lesser extent than women and girls. The 2020 report on conflict-related sexual violence by the UNSG details 2500 (verified) cases of conflict-related sexual violence, of which four percent were directed against men and boys. Such statistics must be read in conjunction with the general underreporting of conflict-related sexual violence, and the particular underreporting and reporting barriers facing men and boys. Generally speaking, and as witnessed by the report, conflict-related sexual violence against men and boys are fewer in numbers, occur primarily in villages and detention facilities, and are often individual and isolated in nature rather than public and strategic.¹⁹⁷ Given the settings and low proportions, it is unlikely that such incidents of conflict-related sexual violence would amount to genocide or crimes against humanity and the constitutive elements and high thresholds set. But, perhaps, it is more likely that such instances amount to war crimes under ICL and IHL alike. It follows

¹⁹⁴ See Chapter 3.3 above.

¹⁹⁵ See Chapter 2.1, 2.2. and 2.4 above.

¹⁹⁶ See Chapter 3 above.

¹⁹⁷ See Chapter 2.1 above.

that, there is a similar risk that also conflict-related sexual violence against men and boys fall outside the scope of genocide and crimes against humanity under ICL. Be they through the requirement of a genocidal intent to destroy a protected group, a widespread and systematic attack against a civilian population or a nexus to conflict, the high thresholds set unites with the idea that international crimes are so unacceptable they concern the international community as a whole. While this is commendable, it effectively results in the marginalisation and demarcation of experiences of conflict-related sexual violence not amounting to international crimes.

The accountability for conflict-related sexual violence under ICL is also cause for concern, as impunity runs high and victims and survivors right to an effective remedy and access to justice is unsatisfied. While the ICC and the notion of universal jurisdiction provides alternatives to enforce provisions and accountability, their applicability are conditioned. Unless the perpetrator is a national of a State party to the Rome Statute or the crime was perpetrated on the territory of a State Party, accountability is allusive and dependent on the UNSC to refer the case to ICC, or on the benevolence of foreign States to exercise universal jurisdiction. Moreover, the being of armed non-State actors as well as the commission of genocide, crimes against humanity, and perhaps also war crimes, are dependent on a collective, a group. Still, ICL concerns accountability and obligations of individuals, ie. members of armed non-State actors rather than the group itself. The inability of ICL to hold collective entities in general, and armed non-State actors in particular, is a significant limitation of international criminal tribunals. There are scholarly contributions that persist the need to develop ICL, or even IL, beyond individual criminal responsibility and include responsibility of collective entities. Consequently, ICL and IHL provide some measures of enforceability and capture some, but not all, experiences of conflict-related sexual violence as encompassed in the definition. Thus, the delta prevails.

5 International human rights law and conflict-related sexual violence perpetrated by armed non-State actors

What has been said in previous subchapters on the contrast and existing delta between the definition of conflict-related sexual violence and the prohibition of rape and forms of sexual violence under IHL and ICL is predominantly relied on customary international law. Customary international law obligates armed State and non-State actors alike, rendering the obligations and accountability, and the identified discrepancies, of the two more or less the same with respect to conflict-related sexual violence. Thus, under IHL and ICL, it is the gap between the definition of conflict-related sexual violence and the corresponding proscriptions under international law that has been identified and elaborated on, rather than the lesser obligations of armed non-State actors. It has been shown that IHL as well as ICL sets a higher threshold and prohibit wartime sexual violence in a narrower sense than what follows the definition of conflict-related sexual violence relied on in this thesis. IHL does so through an uncertain definition of non-international armed conflict, limiting the scope of individuals protected, and primarily by requiring a narrower nexus to conflict. ICL does so by requiring higher set elements of gravity and context. Specifically, in this sense, the definition of conflict-related sexual violence, to a greater extent, mirrors wider and variant forms of wartime sexual violence. However, contrary to IHL regulating international armed conflicts, significantly, IHL regulating non-international armed conflicts does not entail provisions of enforcement, whereas ICL does. Still, ICL does so through individual criminal responsibility, which has been critiqued for not being able to facilitate all crimes and abuses at the hands of armed non-State actors. Neither IHL nor ICL proscribes responsibility of armed non-State actors as a collective.

The fact that neither IHL nor ICL satisfy and correspond to the UN definition of conflict-related sexual violence inherently ensues the

examination of the remaining regime of international law applicable to such violence: IHRL. While “classic international law” did not, it is well established that contemporary international law accepts the applicability of IHRL in non-international armed conflicts. Contrary to IHL and ICL, IHRL is built on a vertical relationship: States as duty-bearers and individuals as rights-holders. Through treaty law and customary law, States have far-reaching human rights obligations pursuant to the prerogative of being a State. Simultaneously, contemporary armed conflicts have shown that the enjoyment of human rights can be severely affected and violated also by armed non-State actors.¹⁹⁸ As such, the examination of human rights obligations of armed non-State actors contrasts the state-centricity of IHRL, the equality of belligerents of IHL as well as the individual criminal responsibility of ICL. Inherently, the obligations and accountability of armed non-State actors under IHRL is a somewhat controversial inquiry, difficult to take on. Nevertheless, the ensuing chapter attempts to do exactly that, in relation to conflict-related sexual violence. The rationale behind the inquiry and elaboration is the prevailing gap left by the shortcomings of international law in relation to conflict-related sexual violence, and the particular consequences it has when such violence is perpetrated by armed non-State actors, as it often is.

This chapter commences with a brief introduction to the development of human rights and the relationship between IHL and IHRL in times of armed conflict. Thereafter, it examines to what extent IHRL proscribes conflict-related sexual violence with respect to the UN definition, and to what extent armed non-State actors have corresponding obligations under IHRL in that regard. On this note, this chapter also make observations on what the extension of human rights obligations to armed non-State actors means for accountability of the same. In doing so, this chapter draws upon international treaties, customary international law and scholarly contributions.

¹⁹⁸ Mastorodimos (n 4) p 140f, 145.

5.1 The development of international human rights law and the State-centricity of human rights treaties

'All human beings are born free and equal in dignity and rights.'

– Article 1, Universal Declaration of Human Rights (1948)

Although not materialising in law until after the Second World War, the notion of human rights traces much further back. Concepts at least related to human rights began at the domestic plane and can be found in several civilisations dating as far back as antiquity.¹⁹⁹ The response under international law took longer. As recalled in a previous subchapter, classic public international law considered solely States as subjects of international law and valued State sovereignty above the interference of foreign States in domestic affairs. Attempts to materialise human rights and strengthen the position of the individual in international law had been done before, but it was the horrors committed during the Second World War that inspired and warranted a new and modern approach to human rights and international law. These efforts crystallised in the establishment of the United Nations (UN) (1945) and a number of regional and international human rights treaties.²⁰⁰

Human rights are rights and freedoms stemming from the idea of human dignity and that all individuals are entitled to rights and freedoms because they are human.²⁰¹ As such, human rights are universal and accrue to every human being.²⁰² IHRL embodies this idea legally through treaties and conventions that create obligations of States to respect, protect and fulfil the

¹⁹⁹ Ed Bates, 'History', in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law International Human Rights Law*, vol 2018 (3rd edn, Oxford University Press 2018) p 3ff.

²⁰⁰ Ibid p 11, 16ff; For example, the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Civil and Political Right (ICCPR) (1976), International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) and European Convention on Human Rights (1950).

²⁰¹ Frédéric Mégret, 'Nature of Obligations', in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018) p 97f.

²⁰² Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 (3) *Journal of Conflict and Security Law* 459, p 465.

human rights of individuals; regulating the vertical relationship between the State and the individual, protecting the latter from the former.²⁰³ Although the universality and justification of human rights has been critiqued²⁰⁴, IHRL still declares human rights as universal and justified due to their legality. The universality of human rights is inherently linked to its applicability through space and time. The extra-territorial application of human rights treaties is outside the scope of this thesis and will not be considered. Contrary, the applicability of IHRL across time, and specifically in times of armed conflict, is inherently key to this thesis.

5.2 *Lex generalis* and *lex specialis*

‘For man, when perfected, is the best of animals; but, when separated from law and justice, he is the worst of all’ – Aristotle

Perhaps Aristotle had war in mind when uttering those renowned words, echoing from antiquity into present day. Indeed, law and justice seem far away in a state of war. Even so, as already noted, the state of war is not a lawless place. As already concluded, IHL is the main, yet not the sole, body of international law that applies in times of armed conflict. Although widely disputed in the past, IHRL, at least to some extent, applies also in non-international armed conflicts.²⁰⁵ Milanović phrased it well when stating that ‘human beings embroiled in armed conflict still retain those rights that are inherent in their human dignity, which are more, not less, important in wartime, and which apply regardless of considerations of reciprocity between the warring parties.’²⁰⁶ A lot has been scripted on the overlapping frameworks and norms of IHL and IHRL and the complex relationship between them.²⁰⁷ There are primarily two court cases of reference explaining this relationship. These cases rely on the Latin maxims *lex specialis* and *lex generalis*, used in domestic and international legal orders, stipulating that if faced with

²⁰³ Mégret (n 201) p 97f.

²⁰⁴ See Samantha Besson, ‘Justifications’ and Marie-Bénédicte Dembour ‘Critiques’ in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018).

²⁰⁵ O’Rourke (n 3) p 71f.

²⁰⁶ Milanović (n 202) p 460.

²⁰⁷ O’Rourke (n 3) p 71f.

conflicting norms, the more specific rule (*lex specialis*) prevail over the more general rule (*lex generalis*).²⁰⁸ A norm conflict exists if one norm constitutes, has led to or may lead to, a breach of another norm. Concerning the relationship between IHL and IHRL, a norm conflict may exist when an application of two norms lead to opposite results.²⁰⁹ In the *Nuclear Weapons* advisory opinion, the International Court of Justice (ICJ) observed the relationship between norms of IHL and IHRL and concluded that

*'In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'*²¹⁰

The *Nuclear Weapons* opinion has been interpreted as saying that IHL defines what IHRL means in wartime, 'guaranteeing no less, but also no more, rights to individuals affected by armed conflict than international humanitarian law'.²¹¹ Nearly a decade later, the ICJ delivered the *Wall* advisory opinion, and decided more broadly that

'More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have

²⁰⁸ ICRC 'Lex Specialis | How Does Law Protect in War? - Online Casebook' <<https://casebook.icrc.org/glossary/lex-specialis>> accessed 13 April 2021.

²⁰⁹ Milanović (n 202) p 465.

²¹⁰ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Reports 226, para 25.

²¹¹ Milanović (n 202) p 463.

*to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.*²¹²

As phrased by the Human Rights Committee in their General Comment No 31, IHL and IHRL ‘are complementary, not mutually exclusive’.²¹³ Crucially, it is the relationship between specific norms of IHL and IHRL, not the regimes, to examine in the event of a norm conflict.²¹⁴

5.3 International human rights law and conflict-related sexual violence

As noted, conflict-related sexual violence is perpetrated in situations directly or indirectly linked to conflict. Nevertheless, as IHRL applies at all times, during peace and armed conflict alike, the conundrum of conflict-nexus is redundant. Still, while IHRL does not require the existence of an armed conflict, the UN definition of conflict-related sexual violence does.²¹⁵ The UN definition of conflict-related sexual violence and the proscriptions of IHRL are examined below.

5.3.1 Conflict-related sexual violence and the infringement of international human rights law

Similar to treaties of IHL, human rights treaties do not encompass explicit prohibitions of sexual violence,²¹⁶ and there is no legally binding norm to that effect under IHRL.²¹⁷ Consequently, IHRL only considers rape and other forms of sexual violence indirectly as a violation of IHRL via other provisions. To this effect, acts of rape and other forms of sexual violence may

²¹² ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ Reports 135, para 106.

²¹³ UN Human Rights Committee, ‘General Comment No. 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (29 March 2004) CCPR/C/21/Rev.1/Add.1326 May 2004

<<https://www.refworld.org/docid/478b26ae2.html>> accessed 6 April 2021, para 11.

²¹⁴ Milanović (n 202) p 464.

²¹⁵ See Chapter 1.1 and 2.4 on the definition of conflict-related sexual violence.

²¹⁶ Gaggioli (n 8) p 519.

²¹⁷ Patricia Viseur Sellers, ‘The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation’ (2008) OHCHR <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 10 April 2021, p 30f.

infringe on a number of human rights, primarily the right to not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,²¹⁸ but also the right to life, to liberty and security of the person, to privacy, to (physical and mental) health, to equality, to be free from all forms of discrimination,²¹⁹ and to not be subjected to slavery.²²⁰

As IHRL prohibits forms of sexual violence at all times, also conflict-related sexual violence may amount to a violation of IHRL.²²¹ As for the prohibited acts and forms of conflict-related sexual violence, similar to IHL and ICL, IHRL does not provide a definition nor a description of elements of sexual violence,²²² and the exact acts of sexual violence, and conflict-related sexual violence, prohibited under IHRL is not easy to determine, nor entirely settled. In adjudicating on the matter, human rights tribunals have on occasion relied on the work of ICTR and ICTY.²²³ As such, although it does not reveal anything about the specific rights infringed upon, IHRL seem to offer no less protection of conflict-related sexual violence than IHL and ICL.²²⁴ Gaggioli frames that, as far as the prohibition of sexual violence goes, ‘the different international law branches (IHL, IHRL, ICL) echo and reinforce each other’.²²⁵

The primary prohibition of rape and sexual violence under IHRL is the prohibition against torture and other cruel, inhuman or degrading treatment.²²⁶ This is supported by the fact that regional courts of human rights has predominantly focused on rape as amounting to torture.²²⁷ Bearing in

²¹⁸ Bojan Gavrilovic and Stephanie Schweininger, ‘A Criminal Tribunal and a Wide-Ranging Reparation Programme Is Necessary for the Victims of Sexual Violence and Torture in Iraq.’ (2019) 29 (1) *Torture Journal: Journal on rehabilitation of torture victims and prevention of torture* 110, p 113; Gaggioli (n 8) p 521; ICRC ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other Forms of Sexual Violence.

²¹⁹ *Viseur Sellers* (n 217) p 32f, Gaggioli (n 8) p 525; United Kingdom: Foreign and Commonwealth Office ‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict’ <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf> accessed 24 April 2021.

²²⁰ ICRC ‘Customary IHL Database’ (n 94) Rule 94: Slavery and Slave Trade.

²²¹ Gaggioli (n 8) p 537.

²²² O’Rourke (n 3) p 76f.

²²³ Gaggioli (n 8) p 523; *Viseur Sellers* (n 217) p 33.

²²⁴ Gaggioli (n 8) p 537; *Viseur Sellers* (n 217) p 33, 38.

²²⁵ Gaggioli (n 8) p 537.

²²⁶ *Viseur Sellers* (n 217) p 33; ICRC ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other Forms of Sexual Violence; Gavrilovic and Schweininger (n 218) p 113.

²²⁷ Gaggioli (n 8) p 523; *Viseur Sellers* (n 217) p 33.

mind the above-provided recital of rights infringed on by various forms of sexual violence, it follows that forms of conflict-related sexual violence, depending on the circumstances, may violate non-derogable, *jus cogens* rights (the prohibition against torture, the prohibition against slavery and the right to life)²²⁸, while other forms of conflict-related sexual violence may violate derogable human rights, of both civil and political (right to liberty and security of the person, right to privacy, right to be free from all forms of discrimination) and economic, cultural and social character (right to (physical and mental) health).²²⁹ While lacking a definition of sexual violence, an important contribution by IHRL is its articulation of the relationship between sexual violence and broader gender inequality.²³⁰

5.3.2 Conflict-related sexual violence as torture

The prohibition against torture and cruel, inhuman or degrading treatment or punishment is the primary prohibition of sexual violence under IHRL and the main approach of which sexual violence has been addressed under IHRL.²³¹ The ICTY, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR)²³² and the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee Against Torture) have all established instances of rape and some forms of sexual violence to constitute torture.²³³ Torture is defined in Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (Torture Convention) 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

²²⁸ Mastorodimos (n 4) p 187, 189; Nigel S Rodley, ‘Integrity of the Person’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018) p 176.

²²⁹ Mégret (n 201) p 104.

²³⁰ O’Rourke (n 3) p 77.

²³¹ ICRC ‘Customary IHL Database’ (n 94) Rule 93: Rape and Other Forms of Sexual Violence.

²³² Ibid; Gaggioli (n 8) p 522f.

²³³ Committee Against Torture, ‘General Comment No. 2 - Implementation of Article 2 by States Parties’ (24 January 2008) CAT/C/GC/2 <<https://www.refworld.org/docid/47ac78ce2.html>> accessed 8 January 2021, para 18, 22.

committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.²³⁴

The definition is considered to reflect customary international law.²³⁵ Moreover, the prohibition against torture is a norm *jus cogens*, and as such non-derogable.²³⁶ Contrary, different opinions exist as to whether cruel, inhuman or degrading treatment or punishment also is a norm *jus cogens*.²³⁷

As evident by the definition, the key elements of torture are severity, intent and purpose, and state involvement through a public official. Significantly, it has been established that any pain or suffering, physical and/or psychological, caused by rape, and most forms of sexual violence, meet the requisite of severity.²³⁸ Although the ICTY has adjudicated that sexual violence also cause severe pain or suffering, whether physical or mental, and thus justified as an act of torture, as discovered above, a lower threshold of sexual violence is not settled, and it is subsequently unclear what forms of sexual violence, and conflict-related sexual violence, could amount to torture.²³⁹ Moreover, IHRL does not detail nor define the elements of sexual violence.²⁴⁰ Fittingly, the Office of the UN High Commissioner of Human Rights stated that

'...rape and other forms of sexual violence can amount to torture and ill-treatment. In addition to the severe physical trauma, the mental pain and suffering inflicted on victims are often exacerbated by the social stigma they face'.²⁴¹

²³⁴ Convention against Torture and Other Cruel Inhuman or Degrading Treatment (1984) Article 1.

²³⁵ ICTY, Prosecutor v Kunarac et al (n 116) para 146.

²³⁶ Mastorodimos (n 4) p 187; O'Rourke (n 3) p 74.

²³⁷ See Rodley (n 228) p 168; Mastorodimos (n 4) p 187; O'Rourke (n 3) p 74.

²³⁸ ICTY, Prosecutor v Kunarac et al (n 116) para 150; Gavrilovic and Schweininger (n 218) p 113.

²³⁹ ICTY, Prosecutor v Kunarac et al (n 116) para 150.

²⁴⁰ O'Rourke (n 3) p 77.

²⁴¹ UN Office of the High Commissioner of Human Rights, 'OHCHR | Gender-Based Crimes through the Lens of Torture International Women's Day – Tuesday 8 March 2016' (OHCHR 8 March 2016)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17152>> accessed 9 May 2021. *Emphasis added.*

The Torture Convention specifies that purposes of punishing, intimidating or coercing the victim is prohibited. On this note, the ICTY has phrased that

*‘...it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict’.*²⁴²

Still, it is not detailed as to whether a purpose of punishing, intimidating or coercing the victim is inherent also in the perpetration of other forms of sexual violence. Nor is it elaborated on what ‘situations of armed conflict’ specifically entails, and if it is meant in a narrow sense as the conflict nexus under IHL, or in a wider sense as under the UN definition of conflict-related sexual violence. Subsequently, while it seems clear that systematic rape, and maybe other forms of sexual violence, perpetrated as a “weapon or tactic of warfare” is included in such an approach to the intent and purpose of torture, it is far less clear whether sexual violence perpetrated in a wider context of conflict is.

Finally, there is the requirement of the perpetrator being a public official or other person acting in an official capacity. To constitute torture or other ill-treatment, some form of public sanction is required. Much legal debate has surrounded this issue and the Committee Against Torture has dallied back and forth on the level of required State authority and involvement.²⁴³ It finally settled that violations committed by armed non-State actors fall outside the torture definition if State authority, however nominally, perseveres. Consequently, only armed non-State actors that have control over territory and exercise government-like functions in the absence of State authority, could be considered to commit torture through public officials or other persons in an official capacity.²⁴⁴ As noted above, the definition of torture provided by the Torture Convention is still-standing under customary

²⁴² ICTY, Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998, para 495.

²⁴³ Gavrilovic and Schweininger (n 218) p 114.

²⁴⁴ Committee Against Torture, ‘H.M.H.I. v. Australia’ (1 May 2002) CAT/C/28/D/177/2001 <<https://www.refworld.org/cases,CAT,3f588ec13.html>> accessed 3 May 2021, para 6.4.

international law. Still, it has been suggested by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that a potential universal prohibition of torture directly binding also armed non-State actors could be based on general principles of law, pursuant to Article 38 of the ICJ Statute.²⁴⁵ Still, there is yet not sufficient practice in support of such a norm. Simultaneously, the Special Rapporteur recognised the need to clarify the “contours and meaning” of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment in light of the contemporary international environment²⁴⁶ and the need for ‘systematic attention from the international community’ towards torture and other cruel, inhuman or degrading treatment or punishment at the hands of armed non-State actors.²⁴⁷

It follows that conflict-related sexual violence, under certain circumstances, may amount to a violation of the prohibition of torture, and may also amount to a violation of other human rights. The exact forms of sexual violence prohibited under IHRL and under which rights of IHRL is not entirely settled and is too big an endeavour to take on in this master’s thesis. However, it does not seem that IHRL offers any lower protection than IHL and ICL in relation to the specific acts of sexual violence prohibited. Thus, in this regard, there is no notable nor apparent discrepancy between the prohibited acts of sexual violence under the proscriptions under IHRL and the UN definition of conflict-related sexual violence. Instead, as alluded above, it is the source, extent and scope of human rights obligations of armed non-State actors, and the implications this has for conflict-related sexual violence, that are under scrutiny from now on.

²⁴⁵ Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (14 February 2017) A/HRC/34/54 <https://www.ohchr.org/Documents/Issues/Torture/A_HRC_34_54.pdf> accessed 3 May 2021, para 45.

²⁴⁶ *Ibid* para 53.

²⁴⁷ *Ibid* para 54.

5.4 State-centricity of human rights treaties and the extension of human rights obligations to armed non-State actors

Before turning to the obligations of armed non-State actors under IHRL, it is important to briefly comment on States obligations under IHRL. As already noted, treaties of IHRL explicitly bind States alone. Under IHRL, States have an obligation to respect (negative obligations to not take any measures in violation of a right), protect and fulfil (positive obligations to proactively ensure the (greater) enjoyment of rights) the human rights of persons within their jurisdiction.²⁴⁸ However, it is increasingly accepted that States have a duty to respect human rights everywhere and all the time, while the duty to respect and fulfil human rights is less far-reaching.²⁴⁹

The extent of State obligations under IHRL may be affected by surrounding circumstances. Contrary to IHL where the entire applicability of the regime is dependent on the existence and definition of armed conflict, the term does not exist under IHRL. This complicates the relationship between the regimes further. Instead, under IHRL, the presence and notion of conflict is embedded in the system of derogations, in which States are permitted to derogate from human rights obligations in times of “public emergency”. The presence of an armed conflict may, but not necessarily, constitute a public emergency.²⁵⁰ Some rights are non-derogable, rendering the prevalence of public emergency and armed conflict irrelevant. Amongst others, the prohibitions of torture, slavery, genocide and crimes against humanity²⁵¹ and the right to life are norms *jus cogens*, peremptory norms, of customary international law and non-derogable.²⁵² These norms cannot be derogated from even in times of public emergency and armed conflict.²⁵³

²⁴⁸ Mégret (n 201) p 97f.

²⁴⁹ Henckaerts and Wiesner (n 90) p 214.

²⁵⁰ O’Rourke (n 3) p 71f.

²⁵¹ Ibid p 74.

²⁵² Mégret (n 201) p 104

²⁵³ O’Rourke (n 3) p 71f.

While a State in times of armed conflict is bound by IHL *and* IHRL, the same is less settled for armed non-State actors.²⁵⁴ Moreover, while the definition of armed non-State actors for the purposes of applying IHL and ICL was provided above,²⁵⁵ for the purposes of applying IHRL, the definition is slightly dissimilar.²⁵⁶ Anyhow, several arguments have been put forward, in this thesis and elsewhere, as to why armed non-State actors should have obligations under IHRL. On this note, independent UN human rights experts articulated in a Joint Statement earlier this year that

*‘In view of the pervasiveness of armed non-State actors’ involvement worldwide – during both armed conflict and other situations of violence – we consider it imperative that existing international legal protections be effectively implemented to safeguard the human rights of individuals and groups, irrespective of the status or character of the perpetrator(s).’*²⁵⁷ – Joint Statement by independent UN human rights experts on human rights responsibilities of armed non-State Actors (Joint Statement), 25 February 2021

For one, as illustrated by the quote above, armed non-State actor’s participation in conflict and violence has had grave implications and poses a very real threat to human rights. Moreover, aspects of human rights may not be covered by IHL or ICL, either due to differences in material content,²⁵⁸ the cessation of violence or violence falling short of armed conflict. This is particularly true for non-international armed conflicts, due to the uncertainty surrounding the definition.²⁵⁹ What’s more, during armed conflict, the conduct of armed non-State actors is not necessarily regulated under IHL or ICL. As detailed above, this could be true for certain forms of conflict-related sexual violence,²⁶⁰ but also with respect to other civil and political rights as well as economic, cultural and social rights. While the laws of occupation

²⁵⁴ Mastorodimos (n 4) p 140f.

²⁵⁵ See Chapter 2.3 above.

²⁵⁶ See Chapter 5.5 and 5.6 below.

²⁵⁷ UN Office of the High Commissioner of Human Rights, ‘OHCHR | Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors’ (OHCHR 25 February 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E>> accessed 28 February 2021, p 1.

²⁵⁸ Mastorodimos (n 4) p 140f; Henckaerts and Wiesner (n 90) p 203.

²⁵⁹ See Chapter 3.1 above.

²⁶⁰ See Chapter 5.3 above.

would govern situations where a party to conflict control territory of another party to conflict, the laws of occupation are limited to international armed conflicts and States.²⁶¹ An additional challenge relates to the duration of confrontations, and the fact that contemporary non-international armed conflicts often last for a significant amount of time, as seen in Iraq and Syria, the Democratic Republic of the Congo, South Sudan and Sri Lanka. IHL did not foresee such a development and was not meant to regulate “occupation” by armed non-State actors and the everyday life of the population living under their control.²⁶² Likewise, ICL may not capture all aspects of human rights nor be able to extract and isolate individual conduct from the collective efforts of a group. Concomitantly, individual criminal responsibility may not be able to capture the collective aspects of criminal conduct committed by a group.²⁶³

Another argument often put forward in favour of considering armed non-State actors as bound by IHRL relates to the principle of equality of belligerents. In a non-international armed conflict, a State party would be regulated under IHL and IHRL while, the adversary non-State party would be regulated solely under IHL, creating an imbalance in obligations. However, this principle formally applies only to IHL, and its applicability does not extend to IHRL.²⁶⁴ While all arguments mentioned are directed towards the general application of IHRL to non-international armed conflicts and armed non-State actors, they equally fit the particular inquiry of this thesis: the obligations of armed non-State actors under international law with respect to conflict-related sexual violence, and the extension of IHRL obligations to such actors in that regard.

Evidently, many arguments have been put forward in relation to the human rights obligations of armed non-State actors. One of the arguments put forward *against* an extension of human rights obligations to such actors relates to the risk of granting legitimacy to such actors, thereby undermining the sovereignty of the State. The same concern could be identified with respect to IHL and its applicability to non-international armed conflicts and

²⁶¹ Henckaerts and Wiesner (n 90) p 202f.

²⁶² Ibid p 203f; Mastorodimos (n 4) p 144.

²⁶³ Mastorodimos (n 4) p 204.

²⁶⁴ Henckaerts and Wiesner (n 90) p 202.

armed non-State actors. In common Article 3, the concern is resolved by explicitly recognising that ‘the application of IHL does not affect the status of the parties to the conflict’.²⁶⁵ Similarly, it has been put forward that extending human rights obligations to actors beyond States may dilute the responsibility of the State. However, the extension of IHRL regulating both State and non-State actors need not be diluting, but complementary and reinforcing.²⁶⁶

Perhaps the most powerful argument in denying the extension of IHRL obligations to armed non-State actors relates to the state-centricity of human rights treaties. As only States are bound by such treaties, only States can commit human rights violations. The UNSC has alluded in its resolutions that armed non-State actors may commit “abuses” of human rights, rather than “violations”. Scholars have interpreted this distinction in different ways; some read it as a testimony that armed non-State actors are *not* bound by IHRL, while others interpret it as a verification of such actors’ obligations under IHRL, yet *different* than those of States. The view of the UNSC has shifted through time, and a current legal position cannot be sufficiently established. The conventional view of IHRL, however, is that the perpetration, as well as prevention and remediation of human rights violations, are State prerogatives.²⁶⁷ On this note, Moir has phrased that

*‘human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone those of opposing insurgents.’*²⁶⁸

However, as elaborated above, the paradigm of State-responsibility does not provide solutions for all instances of human rights violations. The threat of armed non-State actors, and the lack of accountability for such entities, led to the development of the concept of due diligence as State responsibility, aiming at State protection of individuals from third parties. Apart from the principal duty of States to secure human rights by ensuring effective systems

²⁶⁵ Article 3 common to the Four Geneva Conventions (1949).

²⁶⁶ Henckaerts and Wiesner (n 90) p 206ff.

²⁶⁷ *Ibid* p 205f.

²⁶⁸ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) p 194.

of criminal law and justice, the State holds positive obligations to take measures to protect an individual from another individual. However, due diligence is a relative concept, and it is doubtful to what extent States can prevent all third-party conduct violating human rights, particularly in relation to armed conflict and in relation to areas under the control of an armed non-State actor.²⁶⁹ Further, this thesis considers the direct obligations and accountability of armed non-State actors under international law.

5.5 Human rights obligations of armed non-State actors that control territory and fulfil government-like functions

As noted, there is momentous support for the position that armed non-State actors should have obligations under IHRL, and that, at least, some groups under some circumstances have some obligations under IHRL. Still, a lack of clarity surrounds the basis, content and source of such obligations. The most authoritative and prominent proposition in contemporary international law in this regard relates to control over territory. Since the 1990's, it has been asserted that armed non-State actors have obligations under IHRL in areas under their control. While the UNSC emphasised the control of territory some decades ago, as elaborated above, recent practice is less clear on their position as to whether and under what circumstances armed non-State actors hold obligations under IHRL. Contrary, various international experts, commissions and special rapporteurs supports such an application.²⁷⁰ The Joint Statement, quoted above, also detailed that

*'At a minimum, armed non-State actors exercising either government-like functions or de facto control over territory and population, must respect and protect the human rights of individuals and groups.'*²⁷¹

In contemporary international law, there seems to be a general agreement among scholars that obligations under IHRL extend to armed non-State actors

²⁶⁹ Mastorodimos (n 4) p 142.

²⁷⁰ Henckaerts and Wiesner (n 90) p 208-212.

²⁷¹ OHCHR 'Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors' (n 257) p 1.

when they are in control over territory and/or fulfil State-like functions.²⁷² The ICRC 2016 Commentary on the First Geneva Convention (1949) identifies that

‘...the question of whether and to what extent human rights law applies to non-State armed groups is not settled. At a minimum, it seems accepted that armed groups that exercise territorial control and fulfil government-like functions thereby incur responsibilities under human rights law.’²⁷³

Furthermore, Henckaerts and Wiesner put forward that only those armed non-State actors that ‘control territory to the exclusion of the regular State government *and* are in a position to govern that area effectively would be obliged to observe human rights law’.²⁷⁴ This is also supported by the Committee Against Torture in relation to torture.²⁷⁵ As illustrated by the, in this thesis, added emphasis, it seems not entirely settled whether the requirements are cumulative or are interchangeable. In any case, according to this well-supported submission, there are only some types of armed non-State actors, under some circumstances, that have some obligations under IHRL. The exact scope and extent of control of territory and State-like functions remains to be uncovered.

At least, the area of control must be populated. It need not be geographically large nor under the groups control for an extended time. Mastorodimos terms that armed non-State actors that ‘are organised and effective enough to mount an armed conflict’, yet does not control territory, are excluded from incurring obligations of IHRL. However, such armed non-State actors are able to commit human rights violations, and simultaneously, recent practice demonstrates a tendency to the implication that actors not in control over territory could have certain human rights obligations.²⁷⁶ Still,

²⁷² Henckaerts and Wiesner (n 90) p 212; Mastorodimos (n 4) p 182ff, 204f.

²⁷³ ICRC, ‘Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949 Common Article 3 : Conflicts Not of an International Character - Commentary of 2016’ (Treaties, States Parties, and Commentaries 2016) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#253>> accessed 3 May 2021, para 517. *Emphasis added.*

²⁷⁴ Henckaerts and Wiesner (n 90), p 212f. *Emphasis added.*

²⁷⁵ See Chapter 5.3.2 above.

²⁷⁶ Mastorodimos (n 4) p 184f.

such an interpretation is far too fleeting and uncertain to form the basis of obligations under IHRL of armed non-State actors. Additionally, and significantly, the vast majority of international practice and doctrine does not support the claim that armed non-State actors have binding obligations of IHRL when they do not control territory.²⁷⁷ Armed non-State actors that are able to ‘exercise effective and probably exclusive control over a territory and have acquired the characteristics of a State, through the passage of time and outside the strict confines of armed violence’²⁷⁸ and less organised armed non-State actors that ‘are effective in mounting an armed conflict of considerable proportions, while they also exercise control over a territory and people’ are ‘in a position to incur human rights responsibilities’.²⁷⁹ On this note, Mastorodimos has proposed that all armed non-State actors have, at least, some human rights obligations, contrasting the majority view that only certain armed non-State actors, i.e. those that control territory and exercise government-like functions, have obligations under IHRL. Again, as of now, there is not sufficient practice nor doctrine that support a deviation from this norm and extend human rights obligations even further.²⁸⁰

Henckaerts and Wiesner, with support from Murray and Rodenhäuser, has suggested a gradual approach in which armed non-State actors have a duty to respect human rights when operating outside their area of control, and a duty to protect and fulfil human rights in areas under their control.²⁸¹ On this note, reiterating the above cited testimony of the Joint Statement, the independent UN human rights experts who signed it phrased that ‘armed non-State actors exercising government-like functions or de facto control over territory and population must *respect* and *protect* the human rights of individuals and groups’.²⁸² The Statement seems to flirt with the gradual approach described above. While not providing any clarity to the exact content, scope and source of such obligations, it is indeed an interesting submission, and it remains to be seen to what extent UN bodies, or other agencies, will adopt or develop

²⁷⁷ Henckaerts and Wiesner (n 90) p 222.

²⁷⁸ Mastorodimos (n 4) p 183f.

²⁷⁹ Ibid p 184.

²⁸⁰ Ibid p 204; Henckaerts and Wiesner (n 90) p 222.

²⁸¹ Henckarts and Wiesner (n 90) p 214.

²⁸² OHCHR, ‘Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors’ (n 257) p 1. *Emphasis added.*

this approach further. However, as of now, such a practice is not established and does not constitute a sufficient basis for extending IHRL obligations to armed non-State actors. It follows that the legal position remains unclear as to the extent and scope of armed non-State actors' obligations of IHRL, and whether they include negative obligations (to respect) as well as positive obligations (to protect and fulfil). Concomitantly, it is unclear in what way the obligations of armed non-State actors under IHRL fit into the system of derogations under IHRL,²⁸³ as well as the due diligence responsibility of States.²⁸⁴

5.6 The source and content of armed non-State actors obligations under international human rights law

The debate surrounding the human rights obligations of armed non-State actors seem to have agreed that certain armed non-State actors under certain circumstances have certain obligations under IHRL. As noted above, the exact requirements and circumstances during of which such obligations emerge is still somewhat unclear, as is the source and scope of such obligations.

A well-supported proposal identifies IHRL obligations of armed non-State actors as deriving from the controlled territory, in which the human rights obligations of the territorial State devolve to the armed non-State actor.²⁸⁵ When territory falls outside the scope of the territorial State, the latter ceases to have responsibility for violations of international law. In this sense, obligations of human rights follow the territory and the individuals in it, in line with a survivor-centred approach, focusing on the rights of the individual rather than the duty-bearers of the obligations. Such "take-over" of obligations due to control over territory could, dependent on the outcome of the conflict, be temporary and provisional. It does not absolve State responsibility, although the nature of such responsibility may be delimited to that of due diligence. Again, the control over territory is the decisive factor,

²⁸³ Bellal and Heffes (n 64) p 129f.

²⁸⁴ Mastorodimos (n 4) p 142.

²⁸⁵ Ibid p 161; Henckaerts and Wiesner (n 90) p 217; Bellal and Heffes (n 64) p 129.

rather than the characteristics of the armed non-State actor as such.²⁸⁶ It is unclear where this leaves the armed non-State actors' displacement and/or exercise of governmental functions. Further, as pointed out by Bellal and Heffes, as many contemporary armed conflicts are characterised by transnational elements, the question is raised whether one and the same group can be bound by different provisions according to the territorial States they operate in.²⁸⁷ While it has been suggested that the devolution of human rights obligations from the territorial State to the armed non-State actor controlling the territory has crystallised as a rule of customary international law,²⁸⁸ there are still practical considerations, lack of practice and uncertainty regarding the extent of coverage.²⁸⁹ Hence, territorial devolution does not provide all the answers with respect to the source and content of armed non-State actors IHRL obligations.

Another submission focuses on the wording of human rights treaties, suggesting an evolutionary interpretation and downplaying the fact that they explicitly obligate States alone. According to this view, the State-centricity of human rights treaties should be examined in light of subsequent practice in the application of the treaty, in line with Article 31(3)(b) Vienna Convention of the Law of Treaties (1969).²⁹⁰ On this note, Murray argues that human rights treaties were created with the object and purpose of restricting vertical power over human beings. While previously, such power was a State prerogative, contemporary realities demonstrate that armed non-State actors pose a significant threat to the enjoyment of rights and may exercise vertical authority over the population of the area of which they control.²⁹¹ Significantly, this thesis has illustrated this to be particularly true in relation to conflict-related sexual violence. The obligations of armed non-State actors under human rights treaties could thus be established through an evolutionary interpretation in line with the developments on the international plane as well as the object and purpose of human rights treaties. Murray argues further that

²⁸⁶ Mastorodimos (n 4) p 161–165.

²⁸⁷ Bellal and Heffes (n 64) p 130.

²⁸⁸ Mastorodimos (n 4) p 163.

²⁸⁹ *Ibid* p 165.

²⁹⁰ Vienna Convention of the Law of Treaties (1969); Henckaerts and Wiesner (n 90) p 219.

²⁹¹ Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) p 164f.

such an interpretation is supported by the practice of various actors of the international community.²⁹² However, the human rights bodies that monitor the compliance of human rights treaties has not, yet at least, confirmed such an approach. In its early stages as a scholarly proposition of interpretation, it cannot make up the legal basis for incurring obligations of entire human rights treaties upon armed non-State actors. Nonetheless, it makes an interesting inquiry for the future, and the proposition and its concomitant extent and scope of obligations demands further research.²⁹³

Other propositions as to the source and content of human rights obligations of armed non-State actors have also been put forward. Murray has further proposed that armed non-State actors that are non-State parties to conflict possess international legal personality, and as such are subjects under international law, and thus bound by customary international law.²⁹⁴ On the other hand, the legal personality of armed non-State actors is based on, and exists for, the purpose of applying IHL. Therefore, its applicability before and after armed conflict is uncertain. Instead, outside of armed conflict and for the purposes of applying IHRL, armed non-State actor's legal personality depends on control over territory. In relation to IHRL, 'it is the ability to exercise vertical authority over a population in a State-like manner that makes certain non-State armed groups (usually acting as de-facto regimes) bound by the relevant set of customary rules'.²⁹⁵ Moreover, not all areas of customary international law are automatically applicable to all armed non-State actors and the applicability of customary law may differ for different subjects of international law. Accordingly, customary IHRL applies solely to armed non-State actors that are able to, like States, exercise vertical authority over a population. Therefore, only certain armed non-State actors have obligations of IHRL stemming from customary law. Related arguments put forward that armed non-State actors are bound by general principles of IHRL or the principles and rules of international law guaranteeing fundamental human rights, rather than customary human rights law. Moreover, what amounts to

²⁹² Ibid p 167ff.

²⁹³ Henckaerts and Wiesner (n 90) p 222.

²⁹⁴ Murray (n 291) p 83ff, 89.

²⁹⁵ Henckaerts and Wiesner (n 90) p 215.

customary IHRL remains unclear.²⁹⁶ Neither this submission provides a satisfactory answer to the scope and content of human rights obligations of armed non-State actors, nor is international practice sufficiently clear on the value and steadiness of such an approach.²⁹⁷

As indicated above, Mastorodimos proposes that *all* armed non-State actors have some obligations, but that the extent of those obligations are dependent on the qualities of such actors, their control over territory and their ability to exercise government-like functions. On this note, Mastorodimos argues, the minimum *jus cogens* human rights are owed by all armed non-State actors, while obligations to fulfil civil and political rights are owed solely by armed non-State actors in control over territory. Likewise, armed non-State actors that not only control territory, but also have acquired the characteristics of a State outside the confines of armed conflict, under certain circumstances may have obligations to fulfil social and economic rights.²⁹⁸ However, as also noted above, it is not supported in doctrine nor international practice that obligations of IHRL extend to armed non-State actors that do not control territory.²⁹⁹ Further, it seems unclear as to whether control over territory *and* fulfilment of government-like functions is required to incur human rights obligations on armed non-State actors, or whether it is sufficient that they exercise control over territory *or* fulfil government-like functions.³⁰⁰

The source of human rights obligations has also been suggested to derive out of Article 30 of Universal Declaration of Human Rights (1948) (UDHR) and the prohibition of destruction of rights,³⁰¹ the Preamble of UDHR,³⁰² the language of duties in human rights instruments,³⁰³ third parties' obligations³⁰⁴ and applying IHRL through IHL.³⁰⁵ However, all propositions have particular

²⁹⁶ Ibid p 215f.

²⁹⁷ Mastorodimos (n 4) p 186.

²⁹⁸ Ibid p 204.

²⁹⁹ Henckaerts and Wiesner (n 90) p 222.

³⁰⁰ See OHCHR 'Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors' (n 257) p 1; ICRC Commentary – Common Article 3 (n 273) para 517; Henckaerts and Wiesner (n 90) p 222; Mastorodimos (n 4) p 204.

³⁰¹ Mastorodimos (n 4) p 148–151.

³⁰² Ibid p 151–154.

³⁰³ Ibid p 154–159.

³⁰⁴ Ibid p 159–161.

³⁰⁵ Ibid p 165–167.

advantages and drawbacks, and neither provides a comprehensive, sufficient or adequate legal basis for armed non-State actors overall obligations under IHRL. The uncertainty of the source likewise spills over to the extent of scope and content of such obligations.³⁰⁶ Therefore, these propositions are not considered further.

In summary, this thesis has submitted several arguments as to why armed non-State actors should have obligations under IHRL. It is generally accepted that armed non-State actors that control territory and/or exercise government-like functions have obligations under IHRL. Some even claim this is a norm of customary international law.³⁰⁷ This is also true for the prohibition of torture under IHRL, of which at least some forms of conflict-related sexual violence are covered. However, the source and, effectively, the content and scope of such obligations remains unclear under the current state of international law. Moreover, the required level of control and precise exercise of government-like functions is also a query that demands further clarification. Effectively, this affects also the protection under IHRL with respect to proscriptions of conflict-related sexual violence. In the current state of IHRL, it remains unclear as to whether its proscriptions of rape and sexual violence correspond to the UN definition of conflict-related sexual violence. Consequently, as of now, forms of conflict-related sexual violence by armed non-State actors are not regulated under IHRL, particularly those that do not amount to torture, but instead violate other human rights, and those that are perpetrated by armed non-State actors that do not control territory nor exercise government-like functions.

More broadly, the uncertainty of the exact scope and content of certain actors' obligations spills over to the obligations of armed non-State actors under IHRL particularly with respect to conflict-related sexual violence, which inherently risks excluding certain experiences of conflict-related sexual violence from protection. Due to the uncertainty under the current state of IHRL, there is a discrepancy between experiences of conflict-related sexual violence and the corresponding proscriptions under IHRL. Similar to what was concluded in relation to IHL and ICL, there is a risk that exclusion

³⁰⁶ Ibid n 302 until n 305. See particularly Mastorodimos (n 4) p 151, 158f, 161, 165, 167.

³⁰⁷ Henckaerts and Wiesner (n 90) p 222.

of certain forms of conflict-related sexual violence reinforces a hierarchy of gendered harms and/or decouples it from gender inequality and other root causes. Moreover, as conflict-related sexual violence disproportionately affects women and girls, so does the corresponding limits of international law. As for the source and content of IHRL obligations of armed non-State actors more broadly, extensive research and debate is ongoing. As shown in this thesis, many suggestions as to the source and content of armed non-State actors IHRL obligations have been proposed, and the prospects of gaining clarity on this inquiry in the future seem bright. In this regard, with respect to conflict-related sexual violence, the questions of derogations in relation to armed non-State actors, the scope of negative and positive obligations inside and outside the territory under control as well as the forms of conflict-related sexual violence falling under more human rights than just the prohibition of torture requires particular attention in the development of this field of law.

5.7 The accountability of armed non-State actors under international law

On a final note, the accountability and impunity of armed non-State actors has occasionally been addressed throughout this thesis. Due to the motivation and purpose as well as the survivors-centred and human rights-based approach employed in this thesis, some concluding observations are addressed. The IHL applicable to non-international armed conflict contains no provisions of enforcement. Instead, ICL provides provisions as well as means of enforcement through ad hoc tribunals and their Statutes, the ICC and its Statute and through domestic courts and the concept of universal jurisdiction. Even though ICL is unable to hold armed non-State actors accountable as a collective entity, it still forms an improvement towards enforcing violations of IHL and ICL and establishing accountability for members of armed non-State actors under international law. As duly noted in Chapter four, the ability of adjudicating on matters of international crimes is conditioned. The Rome Statute is only applicable to individuals that are nationals of a State-party, or that have perpetrated crimes of the Rome Statute on a territory of a State-party. This need not be the case, as witnessed in

several contemporary armed conflicts such as Iraq, Libya, Myanmar, Somalia, South Sudan, The Sudan, Syria and Yemen. Noteworthy, in the vast majority of these areas and conflicts, armed non-State actors are, or have been, involved and are suspects of conflict-related sexual violence.³⁰⁸ Moreover, while it is possible that the UNSC refers a situation to the ICC, or a State refers itself to the ICC, or a third State decides to exercise universal jurisdiction, such paths to justice and accountability are conditioned. Moreover, as also noted in Chapters three and four, there is an existing delta between the UN definition of conflict-related sexual violence and the corresponding prohibitions of sexual violence in conflict under IHL and ICL and the concomitant obligations of armed non-State actors, affecting also the prospects of accountability. As elaborated on above, this is the chief reason for which IHRL needs to be consulted.

As for IHRL, as noted in Chapter five, the extension of obligations under IHRL, to not only States, but armed non-State actors as well, is an uncertain area of international law, undergoing extensive development. While it seems settled that armed non-State actors in control of territory and/or exercise government-like functions have obligations under IHRL, the source and content of such obligations remains unclear, and demands further clarification and research. While the development that some armed non-State actors do have some obligations under IHRL, from a survivor-centred approach, this does not change much. Like the scope and content of obligations, inherently, the accountability of armed non-State actors under IHRL is allusive. So far, treaty-based judicial bodies and quasi-judicial bodies have been reluctant to find human rights violations by armed non-State actors. Concomitantly, and paradoxically, the work of such establishments is necessary to develop and frame the responsibility and obligations of armed non-State actors under IHRL. Neither is there a World Court of Human Rights, as there is for ICL, and the suggestion of establishing such a court has been celebrated, opposed and everything in between. Thus, human rights claims against armed non-State actors as collective entities are currently not judiciable.³⁰⁹ However, the

³⁰⁸ See 'The State Parties to the Rome Statute' (n 175); Conflict-Related Sexual Violence: 2020 Report of the Secretary-General (n 1) p 13f, 16ff, 19, 21f, 28ff.

³⁰⁹ Henckaerts and Wiesner (n 90) p 219f; Gavrilovic and Schweininger (n 218) p 115.

obligations and accountability of armed non-State actors is a still-evolving field of IHRL, and requires further research. Simultaneously, individual criminal responsibility under ICL and State responsibility under international law more broadly does not provide all the answers, to which accountability under IHRL could be a welcomed complement. Citing Nuzov yet again, ‘holding (armed non-State actors) that are bound by primary rules of IHL, ICL and IHRL responsible for transgressing these rules would seem to be the next logical step’.³¹⁰

5.8 Concluding remarks on international human rights law and conflict-related sexual violence perpetrated by armed non-State actors

As noted, while it seems established that armed non-State actors in control of territory and/or exercise government-like functions have obligations under IHRL, it is equally unclear as to the source and content of such obligations. Inherently, this affects the exercise of determining to what extent armed non-State actors have obligations under IHRL with respect to conflict-related sexual violence. IHRL does not proscribe rape and sexual violence explicitly but does so indirectly through a number of rights. Primarily, under IHRL, rape and sexual violence has been addressed under the prohibition of torture and other cruel, inhuman or degrading in treatment. Noteworthy, the prohibition of torture explicitly requires the involvement of a public official, a requirement subsequently interpreted as applying to armed non-State actors that control territory and exercise government-like functions. The requirement of State or public official involvement has received, for this thesis highly relevant, critique as the definition excludes otherwise torturous acts based on them being perpetrated by a non-State actor. With respect to conflict-related sexual violence, this has particular consequences as the majority of suspects according to the UNSG reports are armed non-State actors. More broadly, the uncertainty as to the exact scope and content of armed non-State actors’ obligations under IHRL remains. Effectively, this

³¹⁰ Nuzov (n 151) p 258.

affects also the protection under IHRL with respect to proscriptions of conflict-related sexual violence. In its current state, IHRL cannot provide an answer as to whether its proscriptions of rape and sexual violence applicable to armed non-State actors correspond to the UN definition of conflict-related sexual violence. As such, while it is a field of law still-evolving and while there are relevant proscriptions in place, there is a discrepancy between experiences of conflict-related sexual violence and the current state of corresponding proscriptions under IHRL applicable to armed non-State actors. The current state of IHRL is even more dire as for accountability and enforcement of the proscriptions in place.

6 Conclusions: the limits of international law and the way forward

As demonstrated in this thesis, it is settled that armed non-State actors have, at least some, obligations with respect to conflict-related sexual violence under contemporary international law. However, as also demonstrated, there are discrepancies between the UN definition of conflict-related sexual violence relied on in this thesis, and its corresponding prohibitions under international law. This has particular consequences when such violence is perpetrated by armed non-State actors.

Through the work of the ad hoc tribunals of ICTR and ICTY, rape and sexual violence has been firmly prohibited as war crimes, genocide and crimes against humanity under customary international law. However, the proscriptions of wartime rape and sexual violence under IHL and ICL alike do not correspond to the UN definition of conflict-related sexual violence, creating discrepancies and gaps in protection. In this regard, as the proscriptions rely primarily on customary international law under which armed State and non-State actors have the same obligations, the discrepancies under IHL and ICL relate not to limits in obligations of armed non-State actors in relation to conflict-related sexual violence, but rather to limits of international law in relation to the definition of conflict-related sexual violence.

Under IHL, the primary discrepancies are threefold. First, while the UN definition of conflict-related sexual violence does not limit the protection to certain individuals, IHL does not offer protection to violations within armed forces or armed non-State actors. Inherently this has implications on the extent of protection under IHL, however, IHRL may extend protection to such violence. Second, the uncertainty of the definition of non-international armed conflict and the corresponding applicability of IHL, in which IHRL applies before and after armed conflict but IHL does not, inherently affects the protection of conflict-related sexual violence. This further links to the third, and main discrepancy, which relates to the narrower requirement “conflict-

nexus” under IHL as compared to the broader “conflict-related” in the definition relied on. While the exact discrepancy between the two formulations and elements are difficult to determine, especially as the link to conflict is determined on a case-by-case basis, it is clear that the proscriptions of IHL and ICL on rape and sexual violence as war crimes, does not include all experiences of conflict-related sexual violence as encompassed by the UN definition. Particularly, this discrepancy may affect and overlook the forms of conflict-related sexual violence that are perpetrated in a wider context of conflict, with individual and opportunistic motives and settings rather than public and organised ones.

Under ICL, the primary discrepancy relates to the required thresholds of gravity, through various elements, for acts of rape and sexual violence to amount to genocide and crimes against humanity. Conflict-related sexual violence may amount to genocide, if it is committed with a genocidal intent to destroy a specific protected group, of which gender is not included. Likewise, conflict-related sexual violence may amount to crimes against humanity, if it is committed as part of a widespread and systematic attack against a civilian population. Neither of these requirements are found in the definition of conflict-related sexual violence under scrutiny. Genocide and crimes against humanity are the gravest crimes in the international legal order, which is evident in the high set gravity thresholds. Ultimately and consequently, experiences of conflict-related sexual violence that are isolated and individual in nature rather than systematic and organised, are delimited. The demarcations and discrepancies identified has gendered impacts, affecting the protection of women and girls, but also, men and boys. Under ICL, rape and sexual violence may also amount to war crimes, yet, contrary to genocide and crimes against humanity, war crimes are dependent on the existence of an armed conflict, and the discrepancy between “conflict nexus” and “conflict-related” reappears.

As for accountability, IHL contains no provision of enforcement, whereas ICL is premised on the individual criminal responsibility for international crimes. On this note, such responsibility may only be incurred to a situation under the jurisdiction of the ICC or on the basis of universal jurisdiction, both of which are conditioned in a way that affects accountability and survivors’

access to justice. What's more, it has been submitted that individual criminal responsibility is not able to enforce accountability for all international crimes and violations, and thus not able to provide all the answers in combating impunity and enforcing accountability for international crimes, including conflict-related sexual violence. This is partly due to the collective nature of such crimes and violations, and the influence by a group on individual behaviour. As of now, however, international law does not entail accountability of armed non-State actors as a collective entity. However, and significantly, the UN definition of conflict-related sexual violence does not exclude such a development, and it remains to be seen in which direction this field of law will evolve more broadly.

Conclusively, while armed non-State actors have some obligations of conflict-related sexual violence under IHL and ICL alike, this thesis has detailed several discrepancies between the proscriptions of rape and sexual violence under the mentioned regimes and the UN definition of conflict-related sexual violence. In this sense, IHL and ICL has limitations, ultimately excluding experiences of conflict-related sexual violence and affecting the level of protection afforded. However, it is accepted that IHRL also apply to non-international armed conflicts, and due to the limits of IHL and ICL to provide all the answers, the applicability of IHRL is significant.

Under IHRL however, different challenges and discrepancies are identified. IHRL prohibits rape and sexual violence, including conflict-related sexual violence, but does not entail a description nor definition of sexual violence, and it is not yet settled which acts of conflict-related sexual violence violate which rights under IHRL. However, rape and sexual violence is primarily approached through the prohibition on torture and cruel, inhuman or degrading treatment or punishment, which requires the involvement of a public official. This entails an inherent risk that otherwise torturous forms of conflict-related sexual violence do not amount to torture or other cruel, inhuman or degrading treatment or punishment. Still, as other forms of human rights may also be consulted, IHRL does not offer less protection than IHL and ICL with regard to prohibited acts of conflict-related sexual violence, thus, there is no apparent discrepancy between the prohibited acts under IHRL and the UN definition. Instead, under IHRL, the primary discrepancy relates

to the source, scope and content of armed non-State actor's human rights obligation, not whether IHRL is limited as to the substantial proscription of conflict-related sexual violence. An extension of human rights obligations to armed non-State actors contrasts the state-centricity of IHRL and is a field of law still evolving. Moreover, this thesis has put forward several arguments as to why armed non-State actors should have obligations under IHRL, including obligations encompassing the definition of conflict-related sexual violence. While it is generally accepted that some armed non-State actors, that have control over territory and/or exercise State-like functions, the source and extent of obligations remains unclear. Effectively, only some armed non-State actors have some obligations under IHRL under certain circumstances. As the extent of such obligations is debated, the content nor scope of armed non-State actors' human rights obligations in relation to conflict-related sexual violence can be determined as per the current state of IHRL. Still, several propositions in that regard have been elevated, although neither, as of now, is supported with sufficient practice nor doctrine to constitute the base for incurring legally enforceable human rights obligations on armed non-State actors.

Effectively, it follows that the limits of IHL and ICL in regard to the UN definition of conflict-related sexual violence, in this thesis representing a wider set of experiences of conflict-related sexual violence, may at least to some extent be amended by IHRL, yet solely in relation to certain armed non-State actors, namely those that control territory and exercise government-like functions. However, international law is not yet at a stage where the source, scope and content are sufficiently clear to establish and determine human rights obligations of armed non-State actors in general, nor in relation to conflict-related sexual violence. It follows that there is a discrepancy also between the definition of conflict-related sexual violence and the corresponding obligations of armed non-State actors under IHRL. Ultimately, this affects the protection of victims and survivors of conflict-related sexual violence. Again, as conflict-related sexual violence has gendered impacts and disproportionately affects women and girls, so does the limits of international law.

While the extension of some human rights obligations to some armed non-State actors is a pivotal step forward in bridging the gap between the crimes committed of armed non-State actors and the obligations of the same, as well as the limitations of international law in relation to conflict-related sexual violence, the matter of allusive accountability prevails. Similar to the material substance of IHRL, accountability through human rights bodies and various mechanisms remains, as of now anyways, heavily State-based. Also this field of law is evolving, and the collective responsibility of armed non-State actors under IHRL could constitute a welcome complement to individual criminal responsibility under ICL. Speaking of the development of international law, the ICJ has phrased that

‘Throughout its history, the development of international law has been influenced by the requirements of international life.’³¹¹ – International Court of Justice

Conclusively, the obligations and accountability of armed non-State actors under international law is a field of law evolving, yet, for now, armed non-state actors’ obligations of conflict-related sexual violence under international is limited and does not encompass all experiences of conflict-related sexual violence. From a gender perspective and survivors-centred approach, it is vital that the forthcoming development and evolvement of international law adapt to the contemporary requirements of international life (and conflict), and that the extension of human rights obligations to armed non-State actors bridge the identified discrepancies and encompass a broader spectrum of conflict-related sexual violence. The gap must be minded.

³¹¹ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) ICJ Reports 1949, p 178.

Bibliography

Treaties

American Convention on Human Rights, 1969 (Organisation of American States)

Arab Charter on Human Rights, 1994 (League of Arab States)

Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 (United Nations Treaty Series vol 1465, p 85)

Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (78 United Nations Treaty Series 277)

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 15, 1950 (Council of Europe ETS 5)

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (75 United Nations Treaty Series 31)

Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949 (75 United Nations Treaty Series 85)

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949 (75 United Nations Treaty Series 135)

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (75 United Nations Treaty Series 287)

International Covenant on Civil and Political Rights, 1966 (UN Treaty Series vol 999, p 171)

International Covenant on Economic, Social and Cultural Rights, 1966 (UN Treaty Series vol 993, p 3)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977 (1125 UN Treaty Series 609)

Rome Statute of the International Criminal Court (last amended 2010), 1998

Statute of the International Court of Justice, 1946 (United Nations)

Vienna Convention on the Law of Treaties, 1969 (United Nations Treaty Series vol. 1155, p 331)

Declarations

UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 2005 (A/RES/60/147)

UN General Assembly, Universal Declaration of Human Rights, 1948 (217 A (III))

Literature and Scholarly Articles

Monographs

Bates E, 'History' in Moeckli D, Shah S and Sivakumaran S (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Bellal A, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' in Heffes E, Kotlik MD and Ventura MJ (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020)

Cryer R, 'International Criminal Law' in Moeckli D, Shah S and Sivakumaran S (eds) in *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Dubler R and Kalyk M, *Crimes against Humanity in the 21st Century : Law, Practice, and Threats to International Peace and Security* (Brill/Nijhoff 2018)

Heffes E, Kotlik MD and Ventura MJ, 'Introduction: The Functions and Interactions of Non-State Actors in the Realm of International Humanitarian Law' in Heffes E, Kotlik MD and Ventura MJ (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020)

Henckaerts J-M and Wiesner C, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Heffes E, Kotlik MD and Ventura MJ (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020)

Mastorodimos K, *Armed Non-State Actors in International Humanitarian and Human Rights Law : Foundations and Frameworks of Obligations, and Rules on Accountability* (Routledge 2017)

Mégret F, 'Nature of Obligations' in Moeckli D, Shah S and Sivakumaran S (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Moir L, *The Law of Internal Armed Conflict* (Cambridge University Press 2002)

Murray D, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016)

Noortmann M, Ryngaert C and Reinisch A, 'Introduction' in Noortmann M, Ryngaert C and Reinisch A (eds) *Non-State Actors in International Law* (Hart Publishing 2017)

Nuzov I, 'Post-Conflict Justice: Extending International Criminal Responsibility to Non-State Entities' in Heffes E, Kotlik MD and Ventura MJ (eds) *International Humanitarian Law and Non-State Actors : Debates, Law and Practice* (T.M.C Asser Press 2020)

O'Rourke C, *Women's Rights in Armed Conflict under International Law* (Cambridge University Press 2020)

Rodley NS, 'Integrity of the Person' in Moeckli D, Shah S and Sivakumaran S (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Sivakumaran S, 'International Humanitarian Law' in Moeckli D, Shah S and Sivakumaran S (eds) *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Werle G and Jeßberger F, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020)

Articles

Bellal A and Heffes E, "'Yes I Do": Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent' (2018) 12 (1) *Human Rights & International Legal Discourse* 120

Gaggioli G, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 (894) *International Review of the Red Cross* 503

Gavrilovic B and Schweininger S, 'A Criminal Tribunal and a Wide-Ranging Reparation Programme Is Necessary for the Victims of Sexual Violence and Torture in Iraq' (2019) 29 (1) *Torture Journal: Journal on Rehabilitation of Torture Victims and Prevention of Torture* 110

Gottschall J, 'Explaining Wartime Rape' (2004) 41 (2) *The Journal of Sex Research* 129

Hovell D, 'The Authority of Universal Jurisdiction' (2018) 29 (2) *European Journal of International Law* 427

Kenny C and McDermott Y, 'The Expanding Protection of Members of a Party's Own Armed Forces under International Criminal Law' (2019) 68 (4) *International and Comparative Law Quarterly* 943

Koutroulis V, 'The Fight Against the Islamic State and Jus in Bello' (2016) 29 (3) *Leiden Journal of International Law* 827

Milanović M, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 (3) *Journal of Conflict and Security Law* 459

Milanović M, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2010) 9 (1) *Journal of International Criminal Justice*

Rehn E and Sirleaf Johnson E, 'Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building (2002) *Progress of the World's Women 2002*, Vol. 1 <https://www.unwomen.org/-/media/headquarters/media/publications/unifem/213_chapter01.pdf?la=en&vs=1005> accessed 20 April 2021

Stephens PJ, 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation' (2014) 37 (2) *Fordham International Law Journal* 501

Swaine A, 'Beyond Strategic Rape and between the Public and Private: Violence against Women in Armed Conflict' (2015) 37 (3) *Human Rights Quarterly* 755

Viseur Sellers P, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (2008) Office of the High Commissioner of Human Rights <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 10 April 2021

Official Documents of International Bodies

Committee Against Torture, 'General Comment No. 2 - Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2 <<https://www.refworld.org/docid/47ac78ce2.html>> accessed 8 January 2021

Human Rights Committee, 'General Comment No. 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add. 13 26 May 2004 <<https://www.refworld.org/docid/478b26ae2.html>> accessed 6 April 2021

Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) <https://www.ohchr.org/Documents/Issues/Torture/A_HRC_34_54.pdf> accessed 3 May 2021

ICRC ‘Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949 Common Article 3 : Conflicts Not of an International Character - Commentary of 2016’ (Treaties, States Parties, and Commentaries 2016) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#253>> accessed 3 May 2021

ICRC, ‘Customary IHL Database’ <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>> (2005) accessed 4 March 2021

UN Office of the High Commissioner of Human Rights and UN Women ‘Guidance Note of the Secretary General - Reparations for Conflict-Related Sexual Violence’(2014) <<https://www.unwomen.org/-/media/headquarters/attachments/sections/docs/2014/unsg-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf?la=en&vs=1356>> accessed 22 December 2020

UN Secretary General, ‘Report of the Secretary-General on Conflict-Related Sexual Violence 2020’ (2021) S/2021/312 <<https://reliefweb.int/report/world/conflict-related-sexual-violence-report-secretary-general-s2021312>> accessed 3 April 2021

UN Security Council, ‘Resolution 1325’ (2000) S/RES/1325 <<http://unscr.com/en/resolutions/doc/1325>> accessed 12 February 2021

UN Security Council ‘Resolution 1820’ (2008) S/RES/1820 <<http://unscr.com/en/resolutions/doc/1820>> accessed 6 February 2021

UN Security Council, ‘Resolution 1960’ (2010) S/RES/1960 <<http://unscr.com/en/resolutions/doc/1960>> accessed 2 February 2021

UN Security Council, ‘Resolution 2106’ (2013) S/RES/2106 <[https://undocs.org/en/S/RES/2106\(2013\)](https://undocs.org/en/S/RES/2106(2013))> accessed 6 February 2021

United Nations Security Council, ‘Resolution 2467’ (2019) S/RES/2467 <[https://undocs.org/en/S/RES/2467\(2019\)](https://undocs.org/en/S/RES/2467(2019))> accessed 6 February 2021

Trial of the Major War Criminals Before the International Military Tribunal, Vol. 1, Nuremberg 1947, p 223.

Other Secondary Sources

‘Sexual Violence in Ethiopia’s Tigray Region, 30 March 2021 - Ethiopia’ (*ReliefWeb*, 30 March 2021) <<https://reliefweb.int/report/ethiopia/sexual-violence-ethiopia-s-tigray-region-30-march-2021>> accessed 13 May 2021

‘Syria Civil War: Germany Holds Unprecedented State Torture Trial’ *BBC News* (23 April 2020) <<https://www.bbc.com/news/world-europe-52393402>> accessed 11 April 2021

‘The State Parties to the Rome Statute’ (*The State Parties to the Rome Statute*) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#I> accessed 6 February 2021

‘United Nations Office on Genocide Prevention and the Responsibility to Protect’ <<https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>> accessed 10 May 2021

Akande D, ‘Customary International Law and the Addition of New War Crimes to the Statute of the ICC’ (*EJIL: Talk!*, 2 January 2018) <<https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/>> accessed 29 April 2021

Cruvellier, T ‘Universal Jurisdiction: The Finnish Revolution’ (*JusticeInfo.net*, 1 February 2021) <<https://www.justiceinfo.net/en/69083-universal-jurisdiction-finnish-revolution.html>> accessed 11 April 2021

Human Rights Watch ‘Gambia: Alleged “Death Squad” Member Arrested in Germany’ (*Human Rights Watch*, 17 March 2021) <<https://www.hrw.org/news/2021/03/17/gambia-alleged-death-squad-member-arrested-germany>> accessed 11 April 2021

International Committee of the Red Cross, ‘Lex Specialis | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/glossary/lex-specialis>> accessed 13 April 2021

Khin, T ‘Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide’ (*Opinio Juris*, 23 October 2020) <<http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>> accessed 11 April 2021

Nordic Centre for Gender in Military Operations, ‘A Military Guide to the United Nations Security Council Resolutions on Women, Peace and Security’ (Swedish Armed Forces - Nordic Centre for Gender in Military Operations 2020)

Rashid NM, ‘Access to Justice’ (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>> accessed 4 January 2021

Redaelli C, ‘A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts’ (*Humanitarian Law & Policy Blog*, 22 April 2021) <<https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>> accessed 19 April 2021

Samani, A ‘Swedish Trial Paves the Way for Accountability for Iran’s Human Rights Violations’ (*Atlantic Council*, 13 January 2021) <<https://www.atlanticcouncil.org/blogs/iransource/swedish-trial-paves-the-way-for-accountability-for-irans-human-rights-violations/>> accessed 11 April 2021

UN, 'Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence' (2020) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/2020.08-UN-CRSV-Handbook.pdf>> accessed 10 February 2021

UN Office of the High Commissioner of Human Rights 'OHCHR | Gender-Based Crimes through the Lens of Torture International Women's Day – Tuesday 8 March 2016' (*OHCHR* 8 March 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17152&>> accessed 9 May 2021

UN Office of the High Commissioner of Human Rights 'OHCHR | Joint Statement by Independent United Nations Human Rights Experts on Human Rights Responsibilities of Armed Non-State Actors' (*OHCHR* 25 February 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E>> accessed 29 February 2021

UN Special Representative of the Secretary General on Sexual Violence in Conflict 'Statement of SRSG-SVC Pramila Patten at the Security Council Open Debate on Conflict-Related Sexual Violence' <<https://www.un.org/sexualviolenceinconflict/statement/statement-of-srsg-svc-pramila-patten-security-council-open-debate-on-conflict-related-sexual-violence/>> accessed 22 May 2021

Van Boven T, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (2010) <https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> accessed 1 May 2021

United Kingdom: Foreign and Commonwealth Office 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict' <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf> accessed 24 April 2021

Table of Cases

Committee Against Torture, *H.M.H.I. v. Australia* (2002)
CAT/C/28/D/177/2001

<<https://www.refworld.org/cases,CAT,3f588ec13.html>> accessed 3 May 2021.

ICJ, *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports 1949 p 4.

ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11th April 1949, ICJ Reports 1949 p 178.

ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports 1986 p 14.

ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 p 226.

ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004 p 135.

ICJ, *Case Concerning Armed Activities on the territory of the Congo (DRC v Uganda)* 19 December 2005, ICJ Reports 2005 p 116.

ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v Rwanda) (New Application: 2002)*, 3 February 2006, ICJ Reports 2006 p 6.

ICTR, *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998.

ICTR, *Prosecutor v George Rutaganda*, Case No. ICTR-96-3-A, Appeals Chamber, Judgment, 26 May 2003.

ICTY, *Prosecutor v Duško Tadić*, Case No. IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

ICTY, *Prosecutor v Zejnir Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998.

ICTY, Prosecutor v Duško Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999.

ICTY, Prosecutor v Dragoljub Kunarac et al, Case No. IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002.

ICTY, Prosecutor v Fatmir Limaj et al, Judgment, Case No. IT-03-66-T, Trial Chamber II, 30 November 2005.

ICTY, Prosecutor v Ljube Boškoski & Johan Tarčulovski, Case No. IT-04-82-T, Trial Chamber II, Judgment, 10 July 2008.

ICTY, Prosecutor v Ramush Haradinaj et al, Case No. IT-04-84*bis*-T, Trial Chamber II, 29 November 2012.