



**TRAVERSING
INTERNATIONAL
HUMANITARIAN LAW ON
PROTECTION OF WOMEN
FROM SEXUAL VIOLENCE
DURING ARMED CONFLICTS**

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**BRIEF HISTORY OF THE
PARTICIPATION OF WOMEN IN
ARMED CONFLICTS**

Up to the twentieth century, women seldom took part in wars or other military engagements. There were just a select few cases that caught the attention of the media and stood out. For instance, Florence Nightingale's historic case, in which she assisted the troops in the Crimean War, is still an important point to note.

ABSTRACT

This research paper aims to study the peculiar aspects of the international humanitarian law regarding women who experience sexual assault during armed wars. Despite the existence of comprehensive laws that expressly forbid sexual violence in armed conflicts we have not yet been successful in our battle against it, as shown by the recent approval of the framework of cooperation on the prevention and response to conflict-related sexual violence. The International Committee of Red Cross has often emphasised that the situation of women in armed situations presents unique problems and opportunities for humanitarian law. Highlighting the intricacies of the international humanitarian law on the issue of protection from sexual violence during armed conflicts and providing some suggestions for improvements is the core of this research endeavour.

World War I provided a better example of organised and consistent female engagement in armed warfare. Two nations that come to mind are Germany and England. The Women's Army Auxiliary Corps (WAAC), Women's Royal Naval Service (WRNS), and Women's Royal Air Force (WRAF) employed some 80,000 women in England, demonstrating the engagement of British women outside of nursing for the first time.¹ German women actively engaged in the fighting, making significant contributions to the supply lines while working in the weapon production industries.²

The Second World War served as a testament to how far women's involvement had come. By the end of 1943, there were 450,000 more women serving in the armed services in England than there were 80,000 women.³ In the Soviet Union, women were employed as snipers, riflemen, and air pilots, actively participating in combat. They represented 8% of the whole armed forces.⁴ There are now one million women working in German

¹ Françoise Krill, "The Protection of Women in International Humanitarian Law" 249 *International Review of the Red Cross* 1985.

² Renate Janssen, *Frauen ans Gewehr*, pp. 11-19 (Köln, 1980).

³ *Supra* note 1.

⁴ *Ibid.*



armaments manufacturing units, and they are also actively involved in the armed services.⁵

DEVELOPMENT OF LEGAL PROVISIONS IN LIGHT OF INCREASED WOMEN PARTICIPATION

Under any situation of armed conflict, hostilities are bound to arise. Under such turbulent circumstances various segments of the population might become susceptible to hostile situations at times. This may seem to be advantageous for the culprits and perpetrators. Thus, the effective implementation of international humanitarian law is a pressing concern. While deciding situations of sexual assault in armed conflict, three main bodies of law are taken into consideration namely the international criminal law, the human rights law, and the international humanitarian law, respectively.

The law with respect to the criminalisation of sexual violence in armed conflict has evolved over time. This evolution was made possible only by the differing interpretations of existing statutes while cases were being heard. Under the former two, sexual violence in the environment of armed conflicts has been comprehensively safeguarded, along with an explicit declaration of its prohibition. Why then, is the incongruity so perceptible? The answer lies in the ineffective methods of implementation of laws. First, reviewed here are some definitions of sexual violence and

rape, that form the fundamentals of the legal provisions. Different organisations have provided varied definitions of what constitutes sexual violence. For example, the ICTR (International Criminal Tribunal for Rwanda) ruled in the case of *Prosecutor v. Jean-Paul Akayesu*⁶ that sexual violence covers “any act that has a sexual nature, and that are committed under coercive circumstances”⁷. The International Criminal Court bans the following, “*sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.*”⁸ If this definition is regarded, then only ‘grave’ (the level of which is unexplained) forms of sexual violence will be criminalised. However, numerous judgements overtime has augmented the scope of sexual violence.⁹ The most commonly accepted definition of ‘rape’ is the one mentioned in ICC’s “Elements of Crime.” This wide-ranging and far-reaching definition is a result of the concluding judgements of three important cases.¹⁰ Thus, the description goes as follows-

“The perpetrator invaded a person’s body through conduct that resulted in penetration, however slight, of any part of the victim’s or the perpetrator’s body with a sexual organ, or of the anal or genital opening of the victim with any object or part of their body. The use of force or the threat of force or simply coercion was applied when the invasion was committed. That force is similar to the one caused by

⁵ Supra note 3, at 19-27.

⁶ *Prosecutor v. Jean-Paul Akayesu*, Judgment (Trial Chamber) 1998 ICTR

⁷ *Ibid* para 688

⁸ Rome Statute of the International Criminal Court, 1998 Arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi)

⁹ Supra note 2, para. 688; *Prosecutor v. Dragoljub Kunarac and Others*, (Trial Chamber) 2001, ICTY paras 766–774.

¹⁰, *Prosecutor v. Anto Furundžija*, Judgment (Trial Chamber), 1998, ICTY para. 185. Supra note 2, Supra note 5, para. 458



fear of violence, duress, incarceration, psychological oppression, or abuse of power, either against such a person or another, or by exploiting a coercive environment, or an invasion was committed against a person unable to give genuine consent.”¹¹

The level of legal protection afforded to women against sexual violence during armed conflict is decided upon not only by the nature and stage of the conflict but also by the specific role of each woman involved. For the period of World War II, the technology devised new approaches and techniques of combat due to which a large number of civilians died. Women formed the part of the civilians as well as the combatants. Thus, International Humanitarian Law has different provisions for civilian women, combatant women, women who are internally displaced, refugees, etc. Correspondingly, there are distinct provisions for international armed conflicts and non-international armed conflicts. The treaties of International Humanitarian Law handle this distinction between peculiar aspects. For example, the Geneva Conventions deal with international armed conflict, Article 3 of which deals with non-international armed conflict. Further, Additional Protocol I involve itself exclusively with international armed conflict, in contrast, Additional Protocol II solely deals with non-international armed conflicts. Following are the legal provisions with respect to rape and sexual violence-

- a) Under Fourth Geneva Convention, women are specifically protected against attacks on their honour, including rape, forced prostitution, and other forms of indecent abuse.¹²
- b) Additional Protocol I of 1977 states that “outrages against personal dignity, particularly humiliating and degrading treatment, forced prostitution, and slavery” are prohibited. And, “any form of indecent assault” is “prohibited at all times and in all places.”¹³ Women are guaranteed “specific protection from rape, forced prostitution, and any other form of exploitation.”¹⁴
- c) Protection for civilians and *hors de combat* in Additional Protocol II of 1977- “Humiliating and degrading treatment, rape, forced prostitution, and any form of indecent assault” for “all persons who do not take a direct part or have ceased to participate in hostilities.”¹⁵

A noteworthy fact about the International Humanitarian Law is its applicability. After celebrated cases like that of *Krunac*, and the *ad hoc* tribunal case, the International Criminal Court pointed out in its Elements of Crimes that for a sexual violence case which is related to the conflict to be regarded as a war crime, it is critical that either a civilian or a combatant should be the key player who committed the act in the context of an armed conflict or the act that is associated to an armed conflict. This is because it is imperative that for the International Humanitarian Law to be applicable, there are two essentials to be fulfilled. One, that there should be an armed conflict; second, that

¹¹ ICC, Elements of Crimes, 2011, Art. 8(2)(b)(xxii)-1

¹² Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 1949 Art. 27

¹³ Additional Protocol (I) to Geneva Conventions, 1977 Art. 75(2)(b)

¹⁴ *Ibid.* Art. 76(1)

¹⁵ Additional Protocol (II) to Geneva Conventions, 1977 Art. 4(2)(e).



there should be a direct nexus between the act and the armed conflict.¹⁶

VICTIMS, PERPETRATORS AND HEROIC HELPERS

Ordinarily, it is perceived and widely believed that the victims of sexual violence, particularly in the environment of an armed conflict, seldom speak against it. It is because of this reason that it remains a hidden crime. Media reports and statistics show only the peripheral aspect while the reality stands to be in an entirely different picture. What obstructs the reporting of such cases is not only the mental barricades of fear or shame, but also the physical impediments such as lack of accessibility to higher authorities, and security and financial concerns. Cases also remain unreported due to the imbalance of genders in committees that have the purpose of acquiring facts. Women tend to open up about their traumas to fellow women (investigators in the field in this case) as they perceive the problems of the female victims in a better way. Consequently, the organisations that wish to voice the hardships of the victims are unable to do so and thus, are put in a testing position. It is imperative to note that sexual violence does not limit itself to a particular gender. Although girls and women are considered to be more vulnerable, boys and men do not exist in isolation from this sprawling evil¹⁷. The dignity of the victims is violated at the hands

of individuals belonging to peace-making organisations, state or non-state players, members of private military companies, etc. These perpetrators are, in many instances, armed. This subsequently helps to establish power dynamics in order to show dominance. Humanitarian aid toward those trapped in armed conflicts has always been viewed as heroic as philanthropic. Similar has been the response to the predicament of victims of sexual violence in such situations. As already noted, men and women are equally affected by the malevolent sexual violence, jumping the superficial gender boundaries. However, women have been projected as ‘vulnerable people that have to be protected’ and in need of aid by several resolutions of the United Nations Security Council¹⁸ that only fortify the overwhelming gender stereotypes that already exist. Thus, it can be presumed that humanitarian aid finds its elementary structure in notions that are patriarchal and prejudiced. Accordingly, this great chronicle of getting under the shelter of a saviour for a promising future should also appear to be promising. What is noticed, however, is how the ‘peacekeepers’ themselves are the perpetrators of sexual violence in regions with armed conflict. Statistics show that as many as 31 cases of sexual exploitation and abuse by the UN workforces were filed in a span of 3 months in 2017.¹⁹ This situation is alarming as the only hope of victims to ever get justice out of their conditions seems to die and they are pushed back into seclusion.

¹⁶ Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court*, Cambridge University Press, p. 27 (Cambridge, 2002)

¹⁷ Gloria Gaggioli, “Sexual violence in armed conflict” *International Review of the Red Cross* 96 (894) 503–538 2014

¹⁸ Engle K The grip of sexual violence: reading UN Security Council Resolutions on human security. In: Heathcote G, Otto D (eds) *Rethinking peacekeeping*,

gender equality and collective security. *Palgrave Macmillan*, (London, 2014) pp 23–47

¹⁹ 31 sexual abuse cases against U.N. personnel filed in three months, *available at*: <https://www.reuters.com/article/un-sexcrimes/31-sexual-abuse-cases-against-u-n-personnel-filed-in-three-months-official-idINKBN1D403P?edition-redirect=in>



CONCLUSION AND SUGGESTIVE REFORMS

Recently, around 124 cases²⁰ of conflict-related sexual violence allegations against Russian troops came to light. These allegations were made by women of Ukraine. This is in blatant contrast to the framework that was signed in May 2022 for the “cooperation on the prevention and response to conflict-related sexual violence.”²¹ The International Criminal Court Statute or the Rome Statute has added rape as an addition in the list of crimes against humanity.²² Despite the existence of comprehensive and extensive laws, we encounter a plethora of instances of sexual violence and abuse being committed in situations of armed conflicts. How then, can justice be delivered to the victims? Effective and strict implementation of the laws will not, in itself, be sufficient. Noticed generally is the fact that neither Additional Protocol II of 1977, nor Article 3 of Geneva Conventions (that deal with non-international armed conflicts) criminalise or prosecute grave violations of the conventions of International Humanitarian Law. There has to be a robust system that ensures the prosecution of such violations and also of cases which are fundamentally dealing with sexual violence in armed conflicts (no matter international or non-international). This will only be made possible after substantial documentation of the victim’s experiences. To achieve this target, it is imperative to ensure the

inclusiveness of women in investigation teams working on ground and their active recruitment in security services. The security personnel should be sensitised regarding the special requirements of the victims of sexual violence so that better reparation amenities could be provided to them. Legal aid should be readily accessible to the victims with the purpose of providing assistance and maintenance. As suggested by Megan Bastick and Karin Grimm in their report²³, the chief role should be played by effectual policies of retributive and restorative justice. In the former, punishment and prosecution are determined relative to the crime committed. While the latter has procedures that help the people, that the conflict has affected, to deal with the after-effects in a collective manner with the purpose of psychological healing. At the same time, as societies shift from a phase of fierce and violent conflict to a phase that is underlined by rule of law, and peace and harmony, it takes up quite a few tactics to evade apparent abuses of human rights. These tactics form the part of the legacy of transitional justice. Thus, improved execution of transitional justice by bodies such as the International Criminal Court, ad hoc criminal tribunals, and Truth and Reconciliation Committees can aid in eliminating the pressing problem.

²⁰ Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council *available at*: <https://www.un.org/press/en/2022/sc14926.doc.htm> (last visited 25th June, 2022)

²¹ Framework on cooperation between the Government of Ukraine and the UN on prevention and response to conflict-related sexual violence, May 2022

available at: <https://reliefweb.int/report/ukraine/framework-cooperation-between-government-ukraine-and-un-prevention-and-response> (last visited 25th June, 2022)

²² Rome Statute, 1998 Art. 7 (1)(g)

²³ Megan Bastick, Karin Grimm, *et. Al* “Sexual Violence In Armed Conflict: Global Overview and Implications for the Security Sector”155 (2007)