



Women during Armed Conflict: Defenceless at the Frontier

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Wars leave an indelible scar not just on the men's battlefield but also on women's minds and bodies. The world is currently witnessing the greatest refugee crisis since World War II in the form of the ongoing Ukraine-Russia conflict. Under the substrata of the humanitarian crisis unfolding in Western Asia is the precarious position of the women 'victims' of the conflict. In the common logic, a victim-centric study of an armed conflict, whether between sovereigns or state-aided militia or par-state agency like ISIS need not be confined to a particular gender. However, the domino effect of an armed conflict operates to undermine the existing socio-political fabric and accentuates the vulnerabilities of the female sex in the affected nation. Women are almost exclusive victims of abduction and trafficking, forced impregnation, sexual offences, and sex slavery as also religious conversion and bonded labour. Instances of conflicts in Syria (2011), Myanmar (2015), and Ukraine (2022) are demonstrable of the 'recurring cost' of violence upon the other sex and ultimately upon the restoration of anti-social order. A conflict zone is an explicit referendum on the unmanifested gender disparity existing in developing societies which neutralize the scope of any constitutional reforms for achieving gender justice. On this account, a review of the legal sanctity of UNSC resolution No. 1325 (2000) on the rights of civilian women and girl children in times of conflict, is imperative along with other Security Council Resolutions on protecting gender rights during humanitarian crises and Fourth World Conference on Women (Beijing Declaration), 1995. Also, the jurisprudential niche carved by multilateral instruments like the Declaration of Commitment to End Sexual Violence in Conflicts and the national policy/action plans adopted by various nations/bodies including NATO needs to be discussed for their pragmatism in abating gender violence. In the changing rubric of most modern Asian societies, women have a role not just as a tenderer of the family or bearer of a child, but also as equal contributors to the economic and political changes around us. It is an established fact now that women are a valuable resource in expediting the

peace process and peace negotiations. Effective measures for women's security during armed conflicts and greater mobilisation of the females within the restructuring of governance systems in the strife-torn developing world could ensure more effective post-conflict management and perhaps conflict prevention.

Keywords: *Ukraine-Russia conflict, refugee crisis, abduction, trafficking, sexual offences, gender justice.*

INTRODUCTION

The crisis unfolding in Eurasia with the Russian invasion of Ukraine is hiding a dismal truth of a refugee crisis of a scale our generation could not have anticipated. This happened when the UN Charter explicitly prohibits the use of force against a sovereign nation affecting its territorial integrity or political independence expecting nations to conduct their international relations in a peaceful civilized manner¹. The UN Office for Coordination of Humanitarian Affairs (OCHA) estimated in February 2022, prior to the Russian invasion, a population of 2.9 million was in need of humanitarian aid in the region. The current military adventure of a sovereign nation against another came as a shocker for the post-UN world order and has quickly exacerbated the humanitarian situation with 6.48 million people being internally displaced² and 3.3 million seeking refugee outside of Ukraine, most notably in Poland.³ The Ukrainian refugee and displacement crisis is unique in two aspects. Firstly, the composition of those displaced is not homogeneous in respect of gender.

Many men chose to stay behind to defend their nation and home, eighty-five percent of displaced adults are women. Secondly, among the refugees, almost half are children below the legal age.⁴ Public International Law has a specific body of rules that bind the nation-states to conduct armed conflicts in the discipline of civilized order. The International Humanitarian Law, as it is known, has a broad-based protection mechanism for all civilians in conflict zones.

¹ UN Charter, 1945, art.2(4)

² Convention on Status of Refugees, 1951, art.1(2)

³ Daphne Panayotatos, Irla Atanda, & Eric P.Schwartz, 'Crisis in Ukraine: Humanitarian and Human Rights Imperatives' (*Refugee Crisis*, March 2022)

<<https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/623a3989fa68e16858723741/1647982998677/Ukraine+Report+-+March+2022+-+FINAL.pdf>> accessed 05 May 2022

⁴ *Ibid*

Article 13⁵ Protocol II to Geneva Convention IV inscribes the ‘basic rule’ to mandatorily distinguish between the combatants and the civilians and to direct their military operations against the former only. Article 51⁶ further reinforces the protection to not just general populations as a group but extends the immunity to each member in her individual capacity. The nature of prohibition is wide enough to delegitimize not just the terrorizing *acts* of violence associated with wars and armed conflicts but also the *threats* of such nature. In this study, we attempt to determine the multifarious impact of an armed conflict on the security and basic rights of women, particularly in the Asian context, which is increasingly becoming the hotbed of systemic violence by the state as well as non-state or par-state agents like ISIS. In this doing, we must review the success that IHL has been able to achieve in securing the Human Rights of women.

It shall be clarified at the onset that any gender-based study of a conflict-related humanitarian crisis needs to account for both, the *dissimilar* nature and *disproportional* effect of armed conflict on the sex still recognised as ‘weaker’ and in need of special protection. The UN has time and again acknowledged the fact of systemic violence during international conflicts *adversely and substantially* affects women and children who are faced with physical and mental agony from the death of kins, mutilation, displacement, illegal confinement, physical abuse, sexual abuse, forced impregnation, sale of internal organs, human trafficking, bonded labour, slavery, harassment, degrading treatment in captivity, the negation of health rights among others. Though it would not be within the purview of our study, to throw light on the conditions of women combatants and prisoners of war, their circumstances, at times similar, could be better dealt with under separate research.

The complex conditions in play during armed conflicts create excruciating adversities for civilian women not part of a direct conflict which is difficult to statistically estimate. A war or prolonged armed conflict often results in the subjugation of occupied territories to the victor’s socio-political ideology or a domestic political struggle which creates for women, restrains an alien culture, accentuated class differences, inequitable conditions of work, skewed economic

⁵ Geneva Convention (IV) on Civilian, 1949, art.13

⁶ Geneva Convention (IV) on Civilian, 1949, art.51

burden-sharing, insufferable psychological cost, legal apathy and myriad other sociological constraints to a normal living. In the foresight, this polarity breeds the conditions for further unrest and violence and dampens any prospects of peace-building mechanisms and positive-reinforcement measures.

It further promotes the socialization of violence, which is often expressed in a gender-specific manner.⁷ It also revitalizes regressive social practices which intend to reinforce cultural biases associated with patriarchy. It will not be an exaggeration to state that failure to promote workable institutional mechanisms at national and international levels for protection against gendered violence will destabilize intra-regional and inter-regional political order leading us all into a spiral of unmanageable chaos.

CHAPTER I

GENDERED VIOLENCE DURING ARMED CONFLICT: CAUGHT IN THE CROSS-FIRE

When war became inevitable, suffering becomes widespread.

In the Indian epic, Mahabharat, an unhesitant Gandhari, having lost all her sons in the war, helplessly, cursed Krishna. It was a woman whose curse took god's life, having suffered so much through a war. At the risk of sounding counter-intuitive, the story of modern women is not markedly different. Peace Laureate, former U.S. president Barrack Obama, during his acceptance speech stated a hard truth, that eradicating conflicts between nations may not be entirely possible.⁸ In fact, there has been a significant increase in the frequency of non-deadly conflicts since the Geneva Conventions have been signed. The profound effect of such systemic violence perpetuated with modern arms and legalized military actions can be analysed through the figures. UNHigh Commission for Refugees (UNHCR), in its 2017 report, stated that its 'people of concern' namely, asylum-seekers, refugees, and stateless persons, are rising annually by 3.5 percent.

⁷ Carol R. Ember & Melvin Ember, 'War, Socialization, and Interpersonal Violence: A Cross-Cultural Study' (1994) 38 (4) The Journal of Conflict Resolution, 620-646 <<https://www.jstor.org/stable/174332>> accessed 05 May 2022

⁸ S. Brock Blomberg & Gregory D. Hess, 'Armed Conflict' (Copenhagen Consensus Center, 1 January 2011) <<http://www.jstor.org/stable/resrep25507>> accessed 05 May 2022

There were 71.4 million people in need of assistance who have fled conflicts, the majority of them being women and minors. Eighty-five percent of those displaced are from middle- and low-income nations, among them the Syrians, Afghans, South Sudanese, and Burmese being the most affected ones. The Asian continent is arguable, most prone to violence with the Ukrainian military invasion and Sri Lankan civil-economic crisis still unfolding as the author writes about the issue.

CEDAW General Recommendation describes gender-based violence as “violence directed against a woman because *she is a woman* or which affects a woman *disproportionately*. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” Declaration on the Elimination of Violence against Women (DEVAW), recognizes that gender-based violence is one significant manifestation of historically skewed and unequal power relations between women and men, which has led to the domination of the latter over the former. Article 2(c) of the said Declaration defines gender-based violence as physical, sexual, and psychological violence perpetrated by the state or at least, condoned by the State, irrespective of where it occurs.⁹ The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, states that “*violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law*”.

A pragmatic analysis of gender relations would demonstrate how women are positioned in the context of their status. Firstly, from the perspective of progress of legal rights that follows the economic affluence of a culture. In other words, the more economically developed a nation, the better status, and rights women enjoy than their counterparts in less-developed nations. Secondly, from the perspective of gender disparity. That is, women, irrespective of their citizenry, are by virtue of their gender, assigned a subordinate role and enjoy fewer *practical* liberties than men. It is a known fact that women are comparatively more socio-politically volatile. The historically imbalanced power relation has resulted in computable disadvantages mentioned aforesaid, in terms of literacy, elementary and higher education, skill development,

⁹ Declaration on the Elimination of Violence against Women, 1992, Preamble, para 6

economic opportunities, wages, maternity benefits, social status, gender-based roles, political participation, etc. In this cross-section of the double whammy that a female is exposed to, a destabilized political order following a conflict situation accentuates the fault lines of a patriarchal existence.

For example, in the conflict in Bosnia and Herzegovina sexual assault on Muslim women was committed as a policy instrument with the intent of displacing them from Serbian-controlled territory. It was observed by the EU's investigative agency that the assaults were planned in the most sadist manner for inflicting the gravest humiliation on the person and his tribe.¹⁰ Many women reported the incident in the third person, indicating an attempt to psychologically disassociate with the horrible memory. The mission underscored the systemic nature of using rape as an instrument of furthering the political agenda. In most experiences, a society besieged by armed conflict between state or para-state actors (like ISIS, Taliban, LTTE, etc. in recent times) finds itself incapable to recuperate for decades and whole generations are subsumed under failed order. Most of the limited resources are diverted for military purposes which leaves the economy frail and civil rights in abeyance. In long run, legitimization of war is not the only outcome but also a phenomenon called *socialization of aggression*,¹¹ which would, among other forms, find an expression in offences directed at the female sex, like domestic violence, sexual harassment, emotional and verbal abuse.¹² For this reason, refugee camps are often the sites of increased abuse and violence faced by women.

In the case of sexual assaults committed during conflicts, the general conception and connotations of the crime would fail to assume the unimaginable horror perpetrated upon women by militia. Gang rapes, rape in public view or in presence of family, savage assaults during intercourse, mutilation of sexual organs, striping and parading, enslavement, forced 'marriages', etc. are 'commonly employed' in conflict zones to inflict widespread suffering on

¹⁰ Dame Anne Warburton, et. al., 'EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia' (*Warburton Mission Report II*, February 1993)
<<http://www.womenaid.org/press/info/humanrights/warburtonfull.htm?msclkid=8b5b3a8cc56c11ecaa99a22f12f36>> accessed 05 May 2022

¹¹ Carol R. Ember & Melvin Ember (n 7)

¹² 'COVID-19, Domestic Abuse and Violence: Where Do Indian Women Stand?' (*Engage*, 17 April 2020)
<<https://www.epw.in/engage/article/covid-19-domestic-abuse-and-violence-where-do>> accessed 05 May 2022

locals. It often becomes an ‘expression’ of victory over the enemy group to signify a failure of others in protecting their women. For example,¹³ the misogynist violence on the body of women has psychological underpinnings relating it to the battlefield strategy to overpower the enemy, *by all means*, to ‘dominate’ and ‘destroy too. For example, in ethnic conflicts in Sierra Leone, a West African nation, militia threatened death the women were subjected to rape if they cried.¹⁴ Generally, such crimes are seen from the prism of unfortunate outcomes of war, rather than outright pathological crimes, they have often been deprecated in general terms often with underwritten justifications for the aberrant behaviour of men acting out under harsh conditions of war and prolonged separation from families.

The slavery during wartime of “comfort women”, and the conflicts in the Democratic Republic of the Congo (DRC), Liberia, Rwanda, and erstwhile Yugoslavia, besides the documented case studies during multiple other conflicts demonstrate vigorously the factum that sexual violence is not simply an outcome of the war, but that during upheavals, women’s bodies are just as important a site of conflict for men and sexual violence is ‘strategically’ an integral part of wartime plan.¹⁵ Sexual violence of all nature remains invisible, underestimated, and an indeterminate factor for furthering the agenda of IHL. This is not, however, the only manifested interrelatedness under scrutiny in gender-based studies of violence in conflict-zone.

Alienation by the family, as the aftermath of sexual assault, is common in South Asian societies, which assign significant value to notions of ‘purity’ of women tied to the ‘honour’ of the clan.¹⁶ Cultural constraints in developing nations and a sense of shared community shame from revelation cause further aggravation in victims. ¹⁷Many are forced to destitution and vagrancy as a consequence. Inheritance rights of females, though well protected under most Asian legal systems, still are not ‘waived’ in favour of male descendants due to entrenched

¹³ Human Rights Watch, *Report on Sexual Violence in the Conflict in Sierra Leone* (HWR Vol. 15 No.1 (A) 2003) <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict#_ftnref1> accessed 05 May 2022

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ Zara Qureshi, ‘Violence Against Women During Armed Conflicts’ (2013) 1 UK L. Students Rev., 39

¹⁷ Human Rights Watch (n 13)

notions of patrilineal hierarchies. Maintenance rights are difficult to assert as lawsuits are viewed as impractical to pursue under cumbersome judicial process and also, take away any chance of reconciliation with estranged family. Factoring in the resource constraints and civil disorder a nation would suffer during an armed conflict, regional or international in character, a sole judicial remedy under domestic family laws would become far-fetched in preventing estrangement.

The relative precariousness of women in a society besieged by conflict cannot be underrated. Of the often-unaccounted impact on gender relations in conflict zones is the disruption of the normal family lives during wartime wherein women assume the primary responsibility as a *de facto* head, providing for all the needs of minors and the elderly¹⁸, including food, alternate income, and kinship security.¹⁹ Under the exigencies of performing 'outdoor roles' as the decision-makers and breadwinners of the family, the nature and gambit of routine activities rise manifold, while the urban services become a scarer. From an evolutionary point of view, women have been under the roles of 'nurturer' and 'care-givers' in the union of kinship. Working as 'providers' and 'singular' authority of decision making under extreme circumstances of a violent conflict works against gender instincts as well as their traditional wisdom.

It was only in the last century that the Women's Rights movement has gained some progress in reshaping the traditional civil and private roles of women, but that has neither been long enough nor uniform enough to create a parallel *matriarchal mind* to cope singularly under a conflict situation. This is especially true for women accustomed to limited social interactions under non-liberal regimes. This contributes to the stress experienced by a female already victimized by a strained civil order and the anxiety of waiting for the return of men from conflict zones or for the security of family members, including its males. Venturing out into the battle zone is not an easy bargain even for men, the exigency to negotiate for basic needs under

¹⁸ Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 (1) The International and Comparative Law Quarterly, 55-80 <<http://www.jstor.org/stable/760514>> accessed 05 May 2022

¹⁹ Beijing Declaration and Platform for Action, 1995

gunfire, bomb shells, arson, presence of hostile forces, and failing public services is excruciating, in the least.²⁰

Insecurity of circumstances has an ascertainable effect on women's health and well-being, who suffer from nutritional injustice, as most Asian cultures adhere to social customs that prioritise the health and well-being of males over females, particularly among children. In a conflict situation, food and water scarcity are common, which triggers malnutrition and anemia among women, leading to further health complications.²¹ Besides concerns related to primary health care, menstruation, contraceptives, prenatal care, child-rearing, mental health, HIV infections, etc. are of paramount importance and deserve similar attention during armed conflicts as during peaceful times.

The insufferable experience that a woman faces under an armed conflict situation cannot be described in words. It is mostly indirect and long-term effects of war they face as agricultural labourers, industrial employees, domestic caregivers, or simply as a woman, vulnerable sex.²² Any 'logocentrism', as noted sociologist Jacques Derrida would describe, aids in the creation of hierarchized binary oppositions that have a limiting effect on our perception of the individuality of the experience actually faced.²³ The 'individuality' of women and their experience during an armed conflict though difficult to account for, need to be attended to under IHL.

²⁰ Judith Gardam (n 18); See also, Dame Anne Warburton, et. al., (n 10)

²¹ R.K. Dixit, 'Special Protection of Children During Armed Conflicts Under The Geneva Conventions Regime' (2002) 2 ISIL Y.B. Int'l Human. & Refugee L., 148

²² Thomas Plümper & Eric Neumayer, 'The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy' (2006) 60 (3) International Organisation, 723-754
<<http://www.jstor.org/stable/3877825>> accessed 25 June 2022

²³ Nasrullah Mambrol, 'Derrida's Critique of Logocentrism' (*Literary Theory and Criticism*, 21 March 2016)
<<https://literariness.org/2016/03/21/derridas-critique-of-logocentrism/?msclid=6920ddf7cd4b11ecaef6fc65dd639c6>> accessed 05 May 2022

CHAPTER II

UNGENDERED IHL, ENDANGERED PROTECTION: WHENCE THE LIABILITY?

It is imperative to acknowledge the legal protection mechanism conceptualised under IHL against the aforementioned assault on the body and mind of women living in a conflict zone. Nature of protection to civilians under IHL can be identified under the following heads with varying degrees of consequences for parties under violations, these are:

1. Gender-neutral and gender-specific Protectionary measures under Geneva Convention and Protocols
2. Offence classified as 'grave breaches' under the Geneva Convention and Protocols
3. Offences recognised as 'war crimes' under the Rome Statute of ICC.

Protectionary measures under Geneva Convention and Protocols:

The fourth Geneva Convention accords protection to women during wars and armed conflicts that are of an international character. It provides that women need to be *especially* protected against attacks including attacks 'on their honour, specifically against rape, enforced prostitution, any form of indecent assault'.²⁴ Similar is the commitment of Article 4(2) of Additional Protocol II which prohibits, by military or by civilians, in a conflict zone, a range of offensive acts including those affecting life, health, and physical and mental well-being, murder; torture of all kinds, corporal punishment mutilation;²⁵ it further protects pregnant women from being subjected to detention, internship or capital punishment, provisions similar to the general law of civilized nations. The terminology suggests not just a legal dictate but also a moral commandment to the signatories. It declares that women '*object of special respect and protected particularly, against sexual assault, forced prostitution and other forms of indecent assault.*'²⁶

²⁴ Geneva Convention (IV) on Civilian, 1949, art.27

²⁵ Geneva Convention (IV) on Civilian, 1949, art.4 and art.4(2)

²⁶ Geneva Convention (IV) on Civilian, 1949, art.76

Besides, Article 3, which is common to the four Geneva Conventions, prohibits acts that outrage personal dignity and in particular humiliating and/or degrading treatment. The provision is gender-neutral and in equal force protects women from physical, sexual, and other forms of abuse, which can be argued to include rape. Additionally, states are under obligation to undertake positive measures for a reunion of dispersed family members ensuring the sanctity of the home is not jeopardized. The states are under a general obligation to take all measures necessary and also to do so expeditiously to execute these obligations under the four Conventions.²⁷ Violations of the provision by any state or its military forces would open the state to accountability under IHL, particularly for compensation to victims.²⁸

However, the truth cannot escape an IHL enthusiast, that despite the protection accorded under Geneva conventions, women remain highly susceptible to violence during conflicts. Gender-based crimes are often the norm than the exception, variously employed by invading forces as a military or political tactic. Gender vulnerability brims in generalized violations of international norms. Most of the women-oriented provisions under the Geneva conventions are employing positive linguistics of *protection* measures as governments' obligations. An assertive negative vocabulary of *prohibitions* is absent, presumably inadvertently.²⁹ One may assume since most violations are directed by or under systemic plans of some governmental agency, the fluidity of a protection measure only allows military commanders and states to escape direct liability. It follows that the measures intended for the protection of civilians, especially women, are flawed in design. The focus of laws of armed conflicts is on the regulation of warfare in order to minimize the violence on civilians and their properties. However, the *illegality* of proscribed actions is not called out so in certain terms. Though all provisions of the Geneva Conventions are meant to have equal force once signed, the historicity of gender relations has shown the assignment of weightage to different provisions of one legal instrument under different situations. Geo-political factors and foreign policy imperatives of the 'offending nations' also dictate the assortment of liability during conflicts.

²⁷ Geneva Convention (IV) on Civilian, 1949, art.80

²⁸ Geneva Convention (IV) on Civilian, 1949, art.91

²⁹ Judith Gardam (n 18)

It is noteworthy that the fourth Geneva Convention which deals with the protection of civilian populations was the last to be adopted, twenty years after the third convention due to the initial absence of *consensus*. The spectrum of protection too is not as wide as conventions dealing with soldiers and prisoners of war.³⁰ Lastly, the nature of protection is also subject to critical comments. What constitutes the 'grave breaches' under the Geneva Convention IV may not be sufficient for entailing a criminal and punitive liability for violence against women, particularly those that constitute outright Human Rights violations.

Grave Breaches under Geneva Convention, 1949:

Protectionary measures have been broadly discussed above, however, certain of the protections are sought to be prohibited in greater vigour based on the grievous and despicable nature of acts, these are classified as "grave breaches" of the convention. These include acts like 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully inflicting suffering or serious injury to the body, compelling a protected person to serve in the forces of a hostile Power, unlawful deportation or transfer or unlawful confinement of a protected person or wilfully depriving rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'³¹

The subjection of murder with 'wilfulness' judgement on part of assaulters or wanton infliction of unnecessary sufferings whether on person or property, not aimed for strategic lead in warfare but as wishful destruction is subjected to greater scrutiny under the law. It is here that any conclusion of violence upon women, including sexual assault, when viewed under the lens of a 'deliberate act' committed for 'purpose of' or as an 'instrument of war, obscures its identification as a crime in itself and colours it as 'furthering the strategy' or manifestation of military aggression aimed for victory. Besides, violation of the established principles of Customary International Law is identified as a grave breach of the convention. These principles provide for protection against forcible displacement of families for conflict-

³⁰ *Ibid*

³¹ Geneva Convention (IV) on Civilian, 1949, art.1 and art.147

related reasons, the practice has been dealt with under Article 49³² of the Convention well as under Article 17³³ of Protocol II.

Protection under Rome Statute of ICC:

It can be a contested question if all forms of violence during armed conflict committed as a part of an 'instrument of war against a specific gender will amount to *Crimes Against Humanity* or *War Crimes*, there is no doubt that sexual crimes and other grave crimes would categorically fall within the ambit of both the core offences under ICC. Rome Statute, under Article 7(1)(g)³⁴ : ' Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, and Enforced Sterilization, Other Forms of Grave Sexual Violence, all amount to War Crimes under the statute. Non-sexual violence like extermination, enforced disappearance, enslavement, etc. are war crimes as well. Besides, as stated, sexual violence of forms other than the abovementioned could be construed as a 'grave breach of the Geneva Conventions and hence, amount to war crimes under Article 8(1)(a)³⁵.

Additionally, article 8(1)(c) states that in cases of armed conflicts of non-international nature, certain *serious* violations of article 3³⁶ common is a war crime. This broad-based provision brings wide-natured offences under its ambit namely, subjecting a female to inhumane and degrading treatment which, inter alia, includes, arguably, sexual violence. An individual instance of sexual assault may also be brought under the jurisdiction of ICC under article 7³⁷ when a causal link is established successfully between it and other violations of convention or customary law committed in the conflict zone in a widespread or systematic manner. The court held: 'It is *sufficient* to prove that the alleged act in question took place in the

³² Geneva Convention (IV) on Civilian, 1949, art.49

³³ Geneva Convention (II) on Civilian, 1949, art.17

³⁴ Rome Statute of International Criminal Court (ICC), 1998, art.7(1) (g)

³⁵ Rome Statute of International Criminal Court (ICC), 1998, art.8(1) (a)

³⁶ Rome Statute of International Criminal Court (ICC), 1998, art.3

³⁷ Rome Statute of International Criminal Court (ICC), 1998, art.7

background of other systemic acts of violence though each, *may vary greatly in its nature and gravity*.³⁸

Besides, if the crime is committed as an 'instrument of war' for causing widespread and systemic attack upon civilians, the same would also qualify as a 'Crime Against Humanity'.³⁹ However, as documentary or formal proof of any policy or conspiracy of such attack is near-impossible to furnish, the prosecution is at liberty to use circumstantial evidence. With the precedent of tribunals for investigating crimes in former Yugoslavia and Rwanda, explicit evidence need not be necessary to demonstrate the systemic nature of the attack, but mere failure to act is sufficient, Rome statute can follow the lead.⁴⁰ The liability of the military commanders and senior officers is also fixed in vicarious terms albeit within the standards of proof beyond a reasonable doubt, for sexual crimes committed by the regiment under their command.⁴¹

ICC acquires authority, even without the state being a party to the statute or not acknowledging its jurisdiction, to investigate such offences and seek justice for victims. Though the statute does not explicitly mention sexual assault as one of the heads under Article 7, it has been argued by Human Rights activists that the broad category of 'degrading and inhumane treatment' is inclusive of sexual offences. As mentioned earlier, rape during conflict often accompanies sadist and misogynist tendencies to demean victims and disgrace the entire race or ethnicity of a group under attack, it will be counter-intuitive to exclude rape from the jurisdiction of the international court under Article 7.

The Rome statute is a marked departure from the earlier international criminal jurisprudence in dealing with gender-sensitive violence during conflicts. For example, the charter for the Nuremberg tribunal, to prosecute the horrific atrocities perpetrated under the Nazi regime did not specifically mention rape or sexual violence, but only hinted at possible prosecution under

³⁸ *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* [2002] IT-96-23 and IT-96-23/1

³⁹ Rome Statute of International Criminal Court (ICC), 1998, art.7

⁴⁰ *The Prosecutor* (n 38)

⁴¹ Rome Statute of International Criminal Court (ICC), 1998, art.28

a rather obscure ‘other inhumane acts’ clause⁴². Notably, no prosecution was made for sexual aggressions made during the war. The *protection-based* regime of IHL stops short of actualizing a final authoritative pronouncement on the gender-based crimes in conflicts and a realizable judicial remedy before a court with universal jurisdiction not subject to the whims of rogue regimes taking protection under Westphalian models of the sovereign notion of power.

Rome statute ‘corrects’ this historical error that has had an immense human cost for all of us. The new-found approach was furthered in *The Prosecutor v Thomas Lubanga Dyilo*⁴³ wherein, ICC espoused a gender-sensitive approach to the needs of victims of armed conflict in the Democratic Republic of Congo (DRC). Awarding reparations and directions to channel the same for furthering gender equality was high on the agenda of ICC. Court emphasized the particular needs of children and women who have suffered sexual or gender-based violence, and need medical attention including plastic surgeries, and antiretroviral medication for HIV. In conclusion, it may be said that gender-based crimes under IHL have been conceptualized as offences affecting the *honour* of women or their dignity, which under a strict feminist lens, is shying away from the acknowledgment of violation of her physical integrity and mental trauma. This conceptualization has, as I noted above, transferred gender-based crimes from the realm of International Law to one of international diplomacy dissipating the criminal culpability into mere political condemnation until the Rome statute was effective in the year 2002.

CONCLUSION

It can hardly be argued that the special concerns of women living in conflict zones have not been elaboratively taken care of nor the criminal responsibility for heinous acts committed by belligerents, often wantonly, otherwise purposefully, fully estimated and booked under the current IHL regime. Though, raping women of conquered territories were viewed as a ‘spoils of war’, a product of medieval warfare, which led to the normalization of rape culture during conflict and has us believe that ‘war’ is an extreme event and sexual assault as a lesser evil. We

⁴² Rome Statute of International Criminal Court (ICC), 1998, art.6(c)

⁴³ *The Prosecutor v Thomas Lubanga Dyilo* (n 38)

have come forward a long way. Sexual assault is a war crime, at least since ICTY judgement on former Yugoslavia's conflict, where, perhaps for the first instance, some semblance of accountability was fixed for gender violence inflicted. In that regard, credit is certainly due to the international humanitarian organisations, particularly, ICRC. In the new millennium, the increasingly vital role which ICC is tasking itself with is highly appreciated by the right-spirited citizenry of the developing world. Within its limited core jurisdiction, ICC presents itself as an alternative to domestic courts when agents of government are themselves violators and states are *unable* or *unwilling* to act lawfully.⁴⁴ There has been greater global awareness of women's rights. World Conference on Human Rights⁴⁵ was a major international event that was successful in claiming moral authority under Human Rights while seeking justice in and for women-oriented concerns. Underneath the larger movement for ending violence against women, it created space for explicit declaration in form of the Vienna Declaration and Programme of Action which announced to the globe that women's rights are an integral and indivisible part of universal Human Rights.⁴⁶ Ending gender-specific violence in all areas of life, whether public or private, was now a legal responsibility of all states and central to attaining women's Human Rights.

Two years into action, another landmark in form of the Beijing Declaration and Platform for Action, re-asserted women's rights like never before, with the humongous participation of 17,000 activists inside the conference room and 30,000 outside, from 189 countries for two weeks of the Fourth World Conference on Women in September 1995. One of the remarkable achievements of the Beijing conference was that it put women's rights on the global agenda, describing in an affirmative fashion that the success of any concerted action of global players requires assertive participation of women in the current issues. The conference especially dealt with the issues of violence against women, vulnerability during conflicts, Human Rights of women, the need for political participation, and institutionalization of women empowerment

⁴⁴ Rome Statute of International Criminal Court (ICC), 1998

⁴⁵ World Conference on Human Rights, 1993

⁴⁶ Alejandra Sardá-Chandiramani, 'Vienna+20 : "Women's Rights are Human Rights" Views from Latin America and the Caribbean (LAC)' (*Awid*, 6 September 2013) <<https://www.awid.org/news-and-analysis/vienna20-womens-rights-are-human-rights-views-latin-america-and-caribbean-lac?msclkid=478686d0cd6111ec80e1421c0d0fa737>> accessed 05 May 2022

measures.⁴⁷The conclusion drawn from these mega-events and the current state of affairs regarding women's rights is simple enough to be impressed the mind.

Peace is inextricably linked with equality between women and men and development is premised on the dissipation of social stress under gender-based conflicts of rights.⁴⁸Where aggression is internalized by a polity it presents a not-so-remote threat to the equality of women. A plethora of legal rules, no matter how sanctimonious, would be an insufficient defence for women's rights when the moral code of society preaches violence as justified means to achieve its goals. Gender impropriety in every form is only an 'incidence' of such an order. It is suggested, that a new peaceful world order aspired for, is predicated on the egalitarian implementation of "cooperative approaches" which systematically and pragmatically adjust to the prospects of women's participation in socio-political processes.

The absence of women in conflict-resolution processes during and after violent conflicts is of concern for world organisations engaged in humanitarian works in conflict zones. The same extends to the conspicuous absence of legal provisions under IHL mandating the political participation of women. At the national level, Defence and foreign affairs are arenas where the participation of women is vital, especially during periods of civil unrest. SDG Goal 5, identifies the intrinsic relationship between gender equality and a sustainable future where stable conditions of economic development can be achieved. As aforesaid, the nurturing instincts of women can act as an anchor for a collapsing community. However, it is not women's representation in conflict-resolution and peace-building measures in the conflict-torn establishments, which *per se*, supplies credibility to the process, but internalization of gender values and developing social mores which realise collaborative participation as fundamental to conflict prevention and peace-building initiatives. Effective participation of men in gender-related concerns of women is equally imperative. We must remember, as a global community,

⁴⁷ Beijing Declaration and Platform for Action, 1995

⁴⁸ *Ibid*

the obligation of our national governments to respect and ensure respect for the Conventions *under all circumstances*.⁴⁹

⁴⁹ Geneva Convention (IV) on Civilian, 1949, art.1