

*No. 1*

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# LEGAL NOTE: CONFLICT RELATED SEXUAL VIOLENCE

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## EXECUTIVE SUMMARY

- International law unequivocally prohibits conflict related sexual violence, but the perpetration of crimes of this nature is systematic, recurrent and widespread globally
- Civilians of any sex or gender are impacted by conflict related sexual violence and gender based violence
- Impunity prevails and to ensure accountability States need to show political ownership
- Gender-sensitive national strategies are required to prevent conflict and to fight impunity with a victims-based approach

## BACKGROUND

### *Definitions and prevalence of sexual violence in conflict situations*

1. Gender based violence, broadly, is violence that is directed against a person on the basis of their sex or socially constructed gender roles. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.<sup>1</sup> Gender based violence, not to be narrowly confined to female victims and male perpetrators, is sometimes used interchangeably with the phrase “violence against women” which is “violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>2</sup> Sexual violence, in particular, concerns “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting”.<sup>3</sup>

2. Sexual violence prevails both during and after conflict situations and is perpetrated primarily against civilians, who account for the vast majority of those adversely affected by it. People of any sex or gender can be impacted by conflict-related sexual violence, but women and girls are particularly vulnerable as demonstrated by the frequency and scale of violations against them.<sup>4</sup> Certain characteristics of women, such as sexual orientation, ethnicity, disability status and contextual factors, such as humanitarian crises, can increase the propensity for sexual violence in conflict settings.<sup>5</sup> The disintegration of social norms, breakdown of regulatory state

structures and power imbalance created during conflict situations are some of the facilitating conditions that increase sexual violence.<sup>6</sup> The position of women in a society is important, as the subjugation of women has been seen to lead to an increase in gender based violence, which can be a predisposing condition for sexual violence in conflict.<sup>7</sup> The form, pattern and frequency of sexual violence can differ in peacetime and in conflict.<sup>8</sup>

3. Sexual violence is often used as a strategy of warfare (to displace, humiliate, punish, or cleanse territories); as a means to create cohesion by narrowly defined groups of combatants; as a reward; as a means to destroy a group defined by social, ethnic or cultural cohesion; or as a means of obtaining information, for economic ends or purely opportunistically in a legal vacuum.<sup>9</sup> Acts of conflict related sexual violence can be perpetrated by individuals and by groups, as well as by combatants and non-combatants.<sup>10</sup>

4. At an individual level, people who are subjected to sexual violence suffer not only from physical or psychological damage but experience social stigma, spousal abandonment, rejection, isolation, physical abuse, exclusion from public life, reduced access to services and economic insecurity.<sup>11</sup> Prevalence of sexual violence in conflict situations also results in the breaking of the backbone of societies due to long-term and multi-faceted damage on survivors and communities.<sup>12</sup>

## INTERNATIONAL LAW

### *Prohibition of sexual violence under international law*

5. Acts of sexual violence by State or non-State actors are proscribed as crimes by many national and international laws,

both customary and normative, and are defined to encompass: rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, forced marriage and any other form of sexual violence of a comparable gravity, including indecent assault and trafficking.<sup>13</sup> Conflict related sexual violence is recognised, codified and prosecuted by international bodies/tribunals/courts as the underlying act of the most serious of international crimes: war crimes, crimes against humanity and in certain circumstances genocide.<sup>14</sup> States parties to international treaties are under a duty to prevent or prosecute perpetrators of such crimes both under international criminal law (ICL) and international human rights law (IHRL).<sup>15</sup> Under ICL individuals are held accountable for criminal conduct whereas under IHRL, the State is held accountable when it fails to address sexual violence through the prosecution of crimes. Since different standards and rules may apply respectively, assessing which regime is being considered is imperative.

### *International criminal law*

6. ICL prohibits certain categories of serious criminal conduct and gives rise to individual criminal responsibility for the perpetrators. The International Tribunals for the Former Yugoslavia (ICTY) and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court (ICC) have adjudicated on acts of sexual violence as crimes against humanity, war crimes and/or genocide. Crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence, committed as part of an armed conflict that are grave

breaches of the Geneva Conventions<sup>16</sup> or otherwise amount to serious violations of the customs and laws of war constitute war crimes under ICL.<sup>17</sup> If committed as part of a widespread or systematic attack directed against any civilian population, acts of sexual violence can constitute crimes against humanity, both in conflict situations and in peace time.<sup>18</sup> Moreover, rape or others acts of sexual violence can constitute genocide if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>19</sup>

#### *International human rights law*

7. While there is no binding human rights treaty specifically aiming to eliminate sexual violence, such acts can lead to violations of the right to life, prohibition of torture, inhumane or degrading treatment, prohibition of discrimination, right to family life, prohibition of slavery, prohibition of trafficking which are serious breaches of IHRL. In situations of armed conflict, IHRL complements the customs and rules of war; the Convention on the Elimination of Discrimination Against Women (CEDAW), in particular, accords women and girls the right to equal and non-discriminatory application of these rules.<sup>20</sup> CEDAW imposes upon States parties an obligation, including due diligence, to prevent, investigate, punish and ensure redress for crimes against women by either State or non-State actors.<sup>21</sup> This duty extends to non-citizens of a State including internally displaced persons, refugees, asylum-seekers and stateless persons, within their territory or effective control which could, therefore, require States to apply the provision extra-territorially.<sup>22</sup>

#### *International resolutions*

8. The UN Security Council (UNSC), following resolution 1325 (2000), called upon all parties to armed conflict to take special measures to protect women and girls from sexual violence, particularly rape and other forms of sexual abuse.<sup>23</sup> The UNSC has adopted eight resolutions so far on Women, Peace and Security in respect of sexual violence being used as a tactic of war, enacting measures to end sexual violence, emphasising the need to combat impunity for sexual violence, recognising women's crucial role in restoring and maintaining peace and security and promoting women's leadership in conflict prevention and resolution.<sup>24</sup> UNSC resolutions are legally binding and, therefore, can create obligations on its addressees, which could include all UN members States.

9. UNSC resolution 1888 (2009) created the Office of the Special Representative of the Secretary General for Sexual Violence in Conflict which prioritises: ending impunity; strengthening criminal accountability; increasing judicial capacity for survivors; empowerment of civilians; mobilising governments to engage in developing strategies for combat sexual violence; raising awareness at international and national levels; and emphasising greater national ownership.

## **IMPLEMENTATION OF INTERNATIONAL LAW**

#### *Accountability mechanisms*

10. The primary duty to prevent and prosecute conflict-related sexual violence ordinarily falls on the State having active or passive personality jurisdiction. In situations in which the State with active or passive personality jurisdiction is unable or unwilling to prosecute crimes, the concept of

“universal jurisdiction” allows and requires other States to prosecute and punish perpetrators of war crimes, torture, crimes against humanity or genocide (assuming perpetrators and, sometimes, victims are present in their jurisdiction).<sup>25</sup> Universal jurisdiction, however, is limited in legal terms (due, usually, to requirements for the perpetrator to be present on the territory of the prosecuting state), practical terms (due, often, to difficulties in obtaining evidence), and due to diplomatic considerations.<sup>26</sup>

11. 189 of 193 UN member States have ratified CEDAW<sup>27</sup> and 122 member States have endorsed the UN Declaration of Commitment to End Sexual Violence in Conflict in 2013, but States parties who are committed to ending sexual violence could still restrict individual complaints mechanisms by putting reservations on IHRL treaties.<sup>28</sup>

12. The UNSC is competent to intervene in armed conflicts where sexual violence occurs.<sup>29</sup> The UNSC could adopt measures that include but are not limited to referral to ICC (where a State is not a party) or the creation of *ad hoc* tribunals.<sup>30</sup> Limited resources and lack of political willingness remain the biggest challenges in using the intervention powers of the UNSC as a complementary mechanism to national mechanisms of implementation.

13. Victims of sexual or gender based violence, as well as their families, can suffer from shame, social stigma, fear, self-loathing, depression, anxiety and a lost sense of dignity which prevent them from coming forward and using available justice mechanisms. Lack of psychosocial and medical assistance as well as security threats to victims reduce the ability to document sexual or gender based violence in

conflict situations, which precludes successful investigations and ultimately prosecution.<sup>31</sup> Accordingly, redress for victims ought to be guided by a “do no harm” principle and should aim to address varied concerns and experiences of survivors due to socially constructed gender roles and context-specific security risks and psychological sufferings.<sup>32</sup>

14. The most effective way to prevent sexual violence is to make conflict prevention a priority, through early-warning systems, preventive diplomacy and pre-emptive dialogue at the local, national and international levels.<sup>33</sup> There is a correlation between the increased prevalence of gender-based violence and discrimination in peace time and the outbreak of conflict<sup>34</sup> and efforts should therefore be put to tackle the root causes of sexual violence in peace-time before they lead to conflict related sexual violence. Women’s participation, leadership and an overall gender-lens in the security sector, including on issues of military expenditure and nuclear disarmament, is an important way to adopt non-military approaches to political conflicts and to reduce the risk of sexual violence accordingly. States, with strong participation of women, should adopt gender-specific security measures, include gender-related indicators and benchmarks to early-warning result management frameworks, and address the gender impact of military strategies.<sup>35</sup> National strategies should be adopted to combat impunity for crimes, seek redress for survivors and provide accountability. States should, further, adopt a zero-tolerance policy and undertake effective investigation, prosecution and punishment of gender-based violence in peace and post-



conflict in order to prevent and deter sexual violence in the future.<sup>36</sup>

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## CONTACT INFORMATION

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