



## **Human Rights Law Clinic Papers 2019**

# Exploring the Boundaries Between Conflict Related Sexual and Gender-Based Violence and Sexual and Gender-Based Violence in Conflict Settings: State Responsibility, Access to Justice, and Legal Remedies for Victims at the Intersections of IHL, ICL and IHRL

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This memorandum is a research paper prepared on a pro bono basis by students undertaking the LLM in International Human Rights Law at Sussex Law School at the University of Sussex. It is a pedagogical exercise to train students in the practice and application of international human rights law. It does not involve the giving of professional legal advice. This memorandum cannot in any way bind, or lead to any form of liability or responsibility for its authors, the convenor of the Human Rights Law Clinic, the Sussex Centre for Human Rights Research or the University of Sussex.

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Law of the Republic of Kosovo on Gender Equality (adopted 28 May 2015) Law No 05/L-020

Law of the Republic of Kosovo on the Protection from Discrimination (adopted 28 May 2015) Law No 05/L-021

Law of the Republic of Kosovo on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and Their Families (adopted 8 December 2011) Law No 04/L-054

Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men (adopted 8 September 2005) Law No 2866-IV

Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended on 27 October 2004) (adopted 2 January 2001) NS/RKM/1004/006 (ECCC)

Ordinance No 2010-086 of the Republic of the Niger (adopted 16 December 2010)

Regulation No 22/2015 of the Republic of Kosovo on Defining the Procedures for Recognition and Verification of the Status of Sexual Violence Victims During the Kosovo Liberation War (adopted 30 December 2015)



### ***iii. List of Abbreviations and Terms***

<b>AP I</b>	Additional Protocol I to the Geneva Conventions of 1945
<b>AP II</b>	Additional Protocol II to the Geneva Conventions of 1945
<b>APs</b>	Additional Protocols I and II to the Geneva Convention of 1945
<b>BiH</b>	Bosnia and Herzegovina
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CC</b>	Criminal Code
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CRSGBV</b>	Conflict related sexual and gender-based violence
<b>CRSGBV-SGBV in conflict</b>	Conflict related sexual and gender-based violence and sexual and gender-based violence in conflict
<b>ECHR</b>	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
<b>ECtHR</b>	European Court of Human Rights
<b>GBV</b>	Gender-based violence
<b>GC IV</b>	Fourth Convention of the Geneva Conventions
<b>GCs</b>	Geneva Conventions of 1945
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICL</b>	International Criminal Law
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
<b>IHL</b>	International Humanitarian Law
<b>IHRL</b>	International Human Rights Law
<b>Istanbul Convention</b>	Convention on Preventing and Combating Violence Against Women and Domestic Violence

<b>NGOs</b>	Non-Governmental Organisations
<b>Rome Statute of the ICC</b>	Rome Statute of the International Criminal Court
<b>SCSL</b>	Special Court for Sierra Leone
<b>SFRY CC</b>	Criminal Code of the Socialist Federal Republic of Yugoslavia
<b>SGBV</b>	Sexual and gender-based violence
<b>SGBV in conflict</b>	Sexual and gender-based violence in armed conflict
<b>SPLA</b>	Sudan People's Liberation Army
<b>SV</b>	Sexual violence
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNAMA</b>	United Nations Assistance Mission in Afghanistan
<b>UNAMI</b>	United Nations Assistance Mission for Iraq
<b>UNFPA</b>	United Nations Population Fund (formerly the United Nations Fund)
<b>UNGA</b>	United Nations General Assembly
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>UNMISS</b>	United Nations Mission in South Sudan
<b>UNSC</b>	United Nations Security Council
<b>USA</b>	United States of America

## 1. Introduction

Conflict situations result in an increase of sexual and gender-based violence (SGBV).<sup>1</sup> Depending on circumstance, SGBV which occurs in conflict can either be conflict related sexual and gender-based violence (CRSGBV), or sexual and gender-based violence in conflict (SGBV in conflict). The distinction between CRSGBV and SGBV in conflict is required to determine what international framework is appropriate; international humanitarian law is always applicable to the former, whereas the circumstance affects whether it can be applied to the latter.

Sexual violence (SV) entails an attempted, caused or committed sexual act by a perpetrator which occurs via force, the threat of force or coercion, or when the victim is incapacitated, whereby the victim is unable to consent.<sup>2</sup> Consent is being understood as it is used in ordinary language, namely to give permission, or agree to something.<sup>3</sup> SV can occur by coercion under certain circumstances; for instance via psychological oppression or when the victim is detained or held against their will.<sup>4</sup> Although women and girls in armed conflict are disproportionately affected by SV, men and boys can also be victims.<sup>5</sup> SV is a form of gender-based violence (GBV).<sup>6</sup> Internationally there is no universally agreed definition of GBV.<sup>7</sup> A definition was first provided by CEDAW, which defined it as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>8</sup> This definition has later been used for a number of acts including sexual violence.<sup>9</sup> Whereas CEDAW’s focus is on women, the Inter-Agency Standing Committee and the International Committee of the Red Cross (ICRC) defined GBV to include any act of violence based on the

<sup>1</sup> UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), ‘General Recommendation No 19’ on ‘Violence Against Women’ (1992) UN Doc CEDAW/C/GC/19.

<sup>2</sup> World Health Organisation: Etienne G Krug and others (eds), *World Report on Violence and Health* (WHO 2002) 147, 149 and 150; *Akayesu Case* (Judgment) ICTR-96-4 (2 September 1998) para 688; *Musema Case* (Judgment) ICTR-96-13 (27 January 2000) para 965.

<sup>3</sup> ‘Consent’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/us/dictionary/english/consent>> accessed 14 May 2019.

<sup>4</sup> *Kunarac Case* (Appeals Chamber Judgment) IT-96-23 & IT-96-23/1 (12 June 2002); *Jean-Pierre Bemba Gombo Case* (Judgment) ICC-01/05-01/08 (21 March 2016).

<sup>5</sup> UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106; UNSC Res 2467 (23 April 2019) UN Doc S/RES/2467.

<sup>6</sup> UNSC, ‘Report of the Secretary-General on Conflict-Related Sexual Violence’ (16 April 2018) UN Doc S/2018/250 (Secretary-General April 2018 Report); Gloria Gaggioli, ‘Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law’ (2014) 96 *International Review of the Red Cross* 503, 510.

<sup>7</sup> Gaggioli (n 6) 509.

<sup>8</sup> CEDAW General Recommendation No 19 (n 1).

<sup>9</sup> UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), ‘General Recommendation No 24’ on ‘Article 12 of the Convention’ (1999) UN Doc A/54/38/Rev.1, chap. I; UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), ‘General Recommendation No 35’ on ‘Gender-Based Violence Against Women, Updating General Recommendation No 19’ (26 July 2017) UN Doc CEDAW/C/GC/35.

victim's gender.<sup>10</sup> As SV is a form of GBV,<sup>11</sup> this memorandum reviews SV and GBV as one concept, and recognises that males can also be victims of GBV. The following report is specifically interested in SGBV in the context of armed conflict, which can be either international or non-international.<sup>12</sup> Armed conflict involves State and/or non-State armed forces or factions attempting to gain control of at least part of the State.<sup>13</sup>

'CRSGBV' is used by the United Nations (UN) to encompass SGBV which is both directly and indirectly related to the conflict.<sup>14</sup> In a similar respect, this memorandum will use the term 'CRSGBV-SGBV in conflict' to cover both SGBV with a direct, and/or with an indirect relationship to the conflict. CRSGBV, which is being limited to civilians, will be understood as when there is a direct link between the violence and the conflict. Therefore, this memorandum defines CRSGBV as SGBV which is committed by a group of State or non-State armed actors against civilians with a collective intention or purpose such as a tactic or strategy of war, to torture or to create terror or for the purpose of genocide. For example, SV was used against civilians of South Sudan by the Sudan People's Liberation Army (SPLA) to intimidate and punish those who refused to reveal the location of their male relatives.<sup>15</sup> Accordingly, SGBV in conflict can be either indirectly related to the conflict or have no relation at all. Indirectly related SGBV tends to occur as a result of a culture and environment formed by the conflict, such as a culture of impunity where perpetrators are not held accountable. State collapse,<sup>16</sup> underreporting,<sup>17</sup> lack of enforcement by authorities as well as lack of access to resources,<sup>18</sup> the absence of clear orders prohibiting sexual violence<sup>19</sup> and normalized extreme patterns of violence<sup>20</sup> all contribute towards a climate of impunity. For simplicity, this memorandum will

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<sup>10</sup> Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (ICRC 2001) 35-36. See also Inter-Agency Standing Committee (IASC), *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience and Aiding Recovery* (IASC 28 August 2015).

<sup>11</sup> Secretary-General April 2018 Report (n 6); Gaggioli (n 6) 510.

<sup>12</sup> ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (ICRC March 2008); Common Article 3 of the Geneva Conventions of 1949 and Additional Protocols I and II (GCs and APs); Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II) art 1. See also Common Article 2 of the Geneva Conventions of 1949 and Additional Protocols I and II (GCs and APs); Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I). However, ICTY adopts a broader definition of international armed conflict in the *Tadić Case* (Judgment) ICTY-94-1 (26 January 2000).

<sup>13</sup> Project Ploughshares, *Armed Conflicts Report* (Project Ploughshares, 2018).

<sup>14</sup> Secretary-General April 2018 Report (n 6).

<sup>15</sup> UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (15 April 2017) UN Doc S/2017/249 (Secretary-General April 2017 Report).

<sup>16</sup> UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (23 March 2018) UN Doc S/2018/250 (Secretary-General March 2018 Report).

<sup>17</sup> Amnesty International, 'Combating Sexual Violence in Conflict: Recommendations to States at the Global Summit to End Sexual Violence in Conflict (10-13 June 2014)' (Amnesty International 30 May 2014) (Combating SV in Conflict).

<sup>18</sup> *ibid.*

<sup>19</sup> Gaggioli (n 6) 505.

<sup>20</sup> Secretary-General April 2017 Report (n 15).

use 'CRSGBV-SGBV in conflict' to cover both directly and indirectly related SGBV to the armed conflict when a distinction is not necessary. This memorandum is not interested in SGBV where there is no link to the armed conflict.

The distinction between CRSGBV and SGBV in conflict settings impacts which international legal framework is applicable. To provide recommendations, the relevant legal framework will be initially established using international humanitarian law (IHL), international criminal law (ICL), and international human rights law (IHRL). Secondly, domestic implementation of this legal framework will be identified and analysed. Recommendations will then be formed using States international obligations and extracting recommendations from the analysis of domestic implementations. From the analysis, we will form several recommendations for the OSCE to advise States.

## 2. International Framework

States are obliged to respect international law<sup>21</sup> and prosecute perpetrators of CRSGBV-SGBV in conflict.<sup>22</sup> When violations of IHL, ICL and IHRL have occurred, reparations must be provided to the victims.<sup>23</sup> IHRL requires the prevention of, and reparations for human right violations, including, but not limited to, the trafficking of women,<sup>24</sup> sexual abuse against children,<sup>25</sup> acts of torture and degrading treatment, and other acts of violence against women.<sup>26</sup> This section will establish the international framework in place protecting and preventing CRSGBV-SGBV in conflict to allow for analysis of States implementation as well as the identification of themes for preventing and protecting CRSGBV-SGBV in conflict. As stated previously, this section only focuses on acts of CRSGBV-SGBV in conflict and their place within the international framework.

### 2.1. Forms of Sexual and Gender-Based Violence

Depending on the context, rape and other forms of sexual assault in conflict situations can occur within the context of an armed conflict or as a consequence of it. As stated in several instruments such as GCs and the Additional Protocols (APs), the Lieber Code 1863 and the Rome Statute of the International Criminal Court (Rome Statute of the ICC), the act of rape

<sup>21</sup> Common Article 1 of the Geneva Conventions of 1949 and Additional Protocols I and II (GCs and APs); AP I art 1; ICRC: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Database, Volume I: Rules* (Cambridge University Press 2005) (ICRC Customary IHL Database) Rule 139.

<sup>22</sup> ICRC Customary IHL Database (n 21) Rule 158; Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I) art 49; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II) art 50; Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 129; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 146; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 (Rome Statute of the ICC).

<sup>23</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999) 2253 UNTS 172 (Protocol II to the Hague Convention) art 38. League of Nations, Statute of the Permanent Court of International Justice (amended by the Protocol of 14 September 1929) (adopted 16 December 1920, entered into force 8 December 1921) 6 LNTS 170 (Statute of the PCIJ) art 36; Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993 (Statute of the ICJ) art 36.

<sup>24</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 6.

<sup>25</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 34.

<sup>26</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 (Istanbul Convention) art 5; CEDAW art 2; UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 30' on 'Women in Conflict Prevention, Conflict and Post-Conflict Situations' (1 November 2013) UN Doc CEDAW/C/GC/30; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) arts 2 and 14; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

violates IHL, IHRL and ICL.<sup>27</sup> SGBV in conflict, on the other hand, violates ICL and IHRL. However, whether IHL is violated depends on the context and circumstances.

Which acts constitute sexual violence is indicated by the GCs and APs.<sup>28</sup> The Fourth Convention of the GCs (GC IV) and AP I explicitly define and prohibit rape alongside other forms of SGBV in conflict settings; however, they only protect women and do not directly mention other forms of SGBV.<sup>29</sup> Additionally, everyone is protected from rape under Article 4 of the Additional Protocol II to the Geneva Conventions of 1945 (AP II), although it only applies to non-international armed conflict.<sup>30</sup> However, SGBV extends beyond rape; attempted rape and sexual threats, sexual exploitation or humiliation, involuntary prostitution, human trafficking, sexual slavery, forced pregnancy and abortions, genital mutilation, forced circumcision or castration, forced nudity and sexual assault or threats are all forms of SGBV.<sup>31</sup> The first three Conventions of the GCs cover all forms of SGBV as well as GC IV, though rape is not explicitly mentioned.<sup>32</sup> In terms of regional protections, the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) recognises the systematic use of rape and sexual assault in armed conflict and notes the potential increase of GBV in conflict settings.<sup>33</sup> The Convention calls for State parties to criminalise rape and sexual assault, as well as ensure support is available for victims.<sup>34</sup>

Protection from trafficking and enforced prostitution is mentioned in numerous international treaties and instruments, such as the AP I, CEDAW, and UN Security Council (UNSC) Resolutions.<sup>35</sup> Nonetheless, protections are limited by the scope of these instruments. While AP I only applies to international armed conflict,<sup>36</sup> AP II covers non-international armed conflict.<sup>37</sup> However, most of the relevant international instruments are applicable to both international and non-international conflicts, and/or post-conflict situations.<sup>38</sup> In contrast,

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<sup>27</sup> GC IV art 27; International Committee of the Red Cross (ICRC) Instructions for the Government of Armies of the United States in the Field (adopted 24 April 1863) (Lieber Code); Rome Statute of the ICC art 7. See also UNSC Res 820 (17 April 1993) UN Doc S/RES/820; Statute of the Special Court for Sierra Leone (adopted 16 January 2002) 2178 UNTS 138 (Statute of the SCSL).

<sup>28</sup> This section has covered the main forms of SGBV, it is not exhaustive; there may be forms of SGBV which may have not been included.

<sup>29</sup> GC IV art 27; AP I; ICRC Customary IHL Database (n 21) Rule 93.

<sup>30</sup> AP II art 4.

<sup>31</sup> CEDAW General Recommendation No 30; Istanbul Convention arts 36 and 39; ICRC Customary IHL Database (n 21) Rule 92; UN Secretary-General, 'Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence' (June 2014) (Secretary-General Guidance Note).

<sup>32</sup> GC I; GC II; GC III.

<sup>33</sup> Istanbul Convention preamble.

<sup>34</sup> Istanbul Convention arts 25 and 36.

<sup>35</sup> AP I arts 76-77; CEDAW art 6; Statute of the SCSL; Rome Statute of the ICC art 7; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271 (CSTPEPO); UNSC Res 2331 (20 December 2016) UN Doc S/RES/2331.

<sup>36</sup> AP I art 1.

<sup>37</sup> AP II art 1.

<sup>38</sup> GC I; GC II; GC III; GC IV; Statute of the SCSL; UNSC Res 2106 (n 5); UNSC Res 2331 (n 35).

instruments in relation to IHRL are applicable at all times, including peacetime.<sup>39</sup> Although, the scope of those instruments also varies depending on their main focus. For example, the CEDAW only focusses on women;<sup>40</sup> whereas the UNSC Resolution 2331 and 2467 covers men and boys as well.<sup>41</sup>

International laws on slavery encompass, and therefore prohibit, sex-slaves.<sup>42</sup> The Rome Statute of the ICC states that forced pregnancy is “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition”.<sup>43</sup> Forced pregnancy in conflict situations has been identified as a crime against humanity as well as a war crime and a violation of Common Articles 2 and 3.<sup>44</sup> Finally, genital mutilation violates the Istanbul Convention,<sup>45</sup> and has been condemned by UN treaty monitoring bodies.<sup>46</sup> Consequently, States are obliged to prevent, investigate and provide reparations for rape, trafficking, sex-slaves, forced pregnancy, forced abortions, genital mutilation and other forms of CRSGBV-SGBV in conflict.<sup>47</sup>

### 2.1.1. SGBV as a War Crime, a Crime Against Humanity or Genocide

SV, including rape, can constitute war crimes, crimes against humanity or genocide depending on the individual circumstance.<sup>48</sup> The Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (ICTY) stated in the *Kunarac* case that for a crime to amount to a war crime, the existence of an armed conflict must be pertinent to it.<sup>49</sup> The term “war crime” encompasses all serious violations of IHL, including grave breaches.<sup>50</sup> According to the UNSC and UN General Assembly (UNGA) Resolutions, SV in armed conflict is a war crime when it is used or commissioned as a method or tactic of war and a deliberate weapon of war.<sup>51</sup> Therefore, the distinction between CRSGBV and SGBV in conflict is paramount in determining

<sup>39</sup> CEDAW; CSTPEPO; Rome Statute of the ICC.

<sup>40</sup> CEDAW art 1.

<sup>41</sup> UNSC Res 2331 (n 35); UNSC Res 2467 (n 5).

<sup>42</sup> ICRC Customary IHL Database (n 21) Rule 94; European Convention for the Protection of Human Rights and Fundamental Freedoms (amended by Protocols Nos 11 and 14) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 4.

<sup>43</sup> Rome Statute of the ICC art 2.

<sup>44</sup> Statute of the SCSL art 3; Rome Statute of the ICC arts 7 and 8; Common Articles 2 and 3 of the GCs and APs.

<sup>45</sup> Istanbul Convention art 38.

<sup>46</sup> UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), ‘General Recommendation No 14’ on ‘Female Circumcision’ (1990) UN Doc A/45/38 and Corrigendum; CEDAW General Recommendation No 19; CEDAW General Recommendation No 24.

<sup>47</sup> CEDAW arts 2 and 6; CEDAW General Recommendation No 19; CEDAW General Recommendation No 30; CRC art 34; CAT arts 2 and 14; UNSC Res 1820 (n 26); UNSC Res 1325 (n 26); UNGA Res 54/263 (25 May 2000) UN Doc A/RES/54/263; Istanbul Convention art 5; Protocol II to the Hague Convention art 38; Statute of the PCIJ art 36; Statute of the ICJ art 36; GC I arts 49 and 51; GC II arts 50 and 52; GC III arts 129 and 131; GC IV arts 146 and 148; AP I art 1; Common Article 1 of the GCs and APs; ICRC Customary IHL Database (n 21) Rules 139, 149 and 158.

<sup>48</sup> Secretary-General Guidance Note (n 31) 3.

<sup>49</sup> Gaggioli (n 6) 515. See also *Kunarac Case* (Trial Judgment) ICTY-96-23 & ICTY-96-23/1 (22 February 2001).

<sup>50</sup> Antonio Cassese, *Cassese’s International Criminal Law* (OUP 2013) 63-66. See ICRC, ‘What Are “Serious Violations of International Humanitarian Law”? Explanatory Note’ (ICRC).

<sup>51</sup> UNSC Res 2106 (n 5). See also UNGA Res 48/143 (20 December 1993) UN Doc A/RES/48/143; UNGA Res 51/115 (7 March 1997) UN Doc A/RES/51/115; UNGA Res 50/193 (11 March 1996) UN Doc A/RES/50/193.



whether the crime is a war crime. Only CRSGBV constitutes a war crime as it is SGBV in direct relation to the armed conflict with a purpose behind the act. States are obliged to protect civilians from war crimes,<sup>52</sup> respect IHL<sup>53</sup> and prosecute perpetrators.<sup>54</sup> When violations have occurred, reparations must be provided to the victims.<sup>55</sup> CRSGBV-SGBV in conflict can also amount to genocide. Genocide specifically aims to “destroy an identified group either in whole or in part”.<sup>56</sup>

SV in conflict can be a constitutive act of genocide when they are committed “in pursuit of the abhorrent policy of ethnic cleansing”.<sup>57</sup> This approach is also adopted by the case law of the International Criminal Tribunal for Rwanda (ICTR).<sup>58</sup>

Article 7 of the Rome Statute of the ICC defines crimes against humanity as “acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>59</sup> In contrast to war crimes, crimes against humanity can be committed during peace time as well as in conflict.<sup>60</sup> While some international instruments only consider rape as a crime against humanity,<sup>61</sup> the Rome Statute of the ICC and the Special Court for Sierra Leone (SCSL) adopt broader understandings, where crime against humanity also includes sexual slavery, forced prostitution and pregnancy as well as other serious forms of sexual violence.<sup>62</sup> The UNSC and UNGA further support the SCSL’s understanding, as they have stated that SGBV can constitute a crime against humanity if it is committed as part of a widespread or systematic attack against civilian populations.<sup>63</sup>

### 2.1.2. *Torture, Cruel, Inhuman or Degrading Treatment*

In accordance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the term ‘torture’ is being used to mean an act where there

<sup>52</sup> Article 51 of the GC I; Article 52 of the GC II; Article 131 of the GC III; Article 148 of the GC IV; ICRC Customary IHL Database (n 21) Rule 149; UNGA Res 54/263 (n 47); UNSC Res 1820 (n 26).

<sup>53</sup> Common Article 1 of the GCs and APs; AP I art 1; ICRC Customary IHL Database (n 21) Rule 139.

<sup>54</sup> GC I art 49; GC II art 50; GC III art 129; GC IV art 146; ICRC Customary IHL Database (n 21) Rule 158.

<sup>55</sup> Protocol II to the Hague Convention art 38; Statute of the PCIJ art 36; Statute of the ICJ art 36.

<sup>56</sup> OHCHR, ‘UN Mapping Report on Democratic Republic of the Congo 1993-2003: War Crimes, Crimes Against Humanity and Genocide’ (OHCHR). See also Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 2; Rome Statute of the ICC art 6; Statute of the International Criminal Tribunal for Rwanda (as last amended by S/RES/1717 of 13 October 2006) (adopted 8 November 1994) UN Doc S/RES/995 (Statute of the ICTR) art 2.

<sup>57</sup> UNGA Res 47/121 (18 December 1992) UN Doc A/RES/47/121. See also UNGA Res 51/115 (n 51); UNSC Res 2106 (n 5).

<sup>58</sup> *Akayesu* (n 2); *Musema* (n 2).

<sup>59</sup> Rome Statute of the ICC art 7.

<sup>60</sup> Margaret M DeGuzman, ‘Crimes Against Humanity’ in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edgar Elgar Publishing 2011).

<sup>61</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (as last amended by S/RES/1411 of 17 May 2002) (adopted 25 May 1993) UN Doc S/RES/827 (Statute of the ICTY) art 5; Statute of the ICTR art 3; Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended on 27 October 2004) (adopted 2 January 2001) NS/RKM/1004/006 (ECCC) art 5.

<sup>62</sup> Rome Statute of the ICC art 7; Statute of the SCSL art 2.

<sup>63</sup> UNSC Res 2106 (n 5); UNGA Res 51/115 (n 51).

is intentional suffering committed by someone acting in an official capacity for a purpose such as extracting information, punishing, or coercing the victim(s).<sup>64</sup> There is significant overlap in the criteria for CRSGBV and the criteria for torture; both acts require there to be suffering of the victim and the act to occur with a purpose, such as obtaining information or punishing, coercing or intimidating the victim.<sup>65</sup> However, the definition in the CAT states that the act 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”.<sup>66</sup> In contrast, CRSGBV can also be committed by people not acting in an official capacity as it can be committed by non-State armed actors. Therefore, most CRSGBV will amount to torture. However, both CRSGBV and SGBV in conflict inherently constitute inhumane and degrading treatment. Within IHL; the GCs, the APs and ICRC Customary IHL Study Rule 90, torture and other types of inhuman treatment in both international and non-international armed conflicts is prohibited in various provisions.<sup>67</sup> Cruel treatment, torture and degrading treatment is prohibited in non-international armed conflict,<sup>68</sup> against wounded members of the armed forces<sup>69</sup> and prisoners.<sup>70</sup> Furthermore, inhumane treatment against civilians,<sup>71</sup> and torture, cruel and degrading treatment<sup>72</sup> are all contrary to the GCs. There are special protections for women specifically contained within the articles.<sup>73</sup>

As grave breaches constitute war crimes under customary IHL,<sup>74</sup> they are international crimes as well. Thus, ICL prohibits torture, cruel, inhuman, humiliating or degrading treatment in conflict settings in the Rome Statute of ICC,<sup>75</sup> Statute of the ICTR,<sup>76</sup> the Statute of the SCSL<sup>77</sup> and case-law of the ICTY.<sup>78</sup> The ICTR explicitly includes rape, although it is limited to non-international armed conflicts.<sup>79</sup>

The most significant international human rights instrument that prohibits torture and cruel, inhuman and degrading treatment is the CAT<sup>80</sup> and the subsequent General Comments adopted by the CAT Committee.<sup>81</sup> In the CAT General Comment No.2, the responsibility of States and State officials in preventing and punishing torture is explicitly recognised as being

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<sup>64</sup> CAT.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> GC I art 12; GC II art 12; GC III arts 13 and 14; GC IV art 27; AP I arts 75-77; ICRC Customary IHL Database (n 21) Rule 90.

<sup>68</sup> Common Article 3 of the GCs and APs; AP II art 4; ICRC Customary IHL Database (n 21) 315.

<sup>69</sup> GC I art 12; GC II art 12.

<sup>70</sup> GC III arts 13 and 14.

<sup>71</sup> GC IV art 27.

<sup>72</sup> AP I art 75.

<sup>73</sup> GC I art 12; GC II art 12; GC III arts 13-14; GC IV art 27; AP I arts 76-77.

<sup>74</sup> ICRC Customary IHL Database (n 21) Rules 90 and 158.

<sup>75</sup> Rome Statute of the ICC art 8.

<sup>76</sup> Statute of the ICTR art 4.

<sup>77</sup> Statute of the SCSL art 3.

<sup>78</sup> *Furundzija Case* (Trial Judgement) ICTY-95-17/1 (10 December 1998); *Kunarac Trial Judgment* (n 49).

<sup>79</sup> Statute of the ICTR art 4

<sup>80</sup> Gaggioli (n 6) 521; CAT art 2.

<sup>81</sup> UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ‘General Comment No 2’ on ‘Implementation of Article 2 by States Parties’ (2008) UN Doc CAT/C/GC/2.

applicable to SGBV.<sup>82</sup> Furthermore, Articles 2(1), 4 and 16 of CAT provide State parties' obligations to take effective measures in their domestic laws in order to prevent and investigate those acts defined in Article 1 of the Convention.<sup>83</sup> Extending beyond CAT, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful attacks on one's honour and reputation.<sup>84</sup> In Europe, Article 3 of the European Convention on Human Rights (ECHR) explicitly prohibits "torture and inhuman or degrading treatment or punishment".<sup>85</sup> In light of this provision, the European Court of Human Rights (ECtHR) amounted rape with other ill-treatments against a civilian in order to obtain information to "torture" in the *Aydin v Turkey* case.<sup>86</sup> The Court stated in the *Valašinas v Lithuania* case that the act of being stripped naked by State officials constituted degrading treatment and therefore violated ECHR Article 3.<sup>87</sup> The ECtHR also decided in the *M.C. v Bulgaria* case that non-consensual sexual act constituted a violation of ECHR Article 3.<sup>88</sup> Therefore, States are obliged take effective measures domestically to prevent and investigate CRSGBV-SGBV in conflict which constitutes torture, inhuman or degrading treatment.

### 2.1.3. Sexual and Gender-Based Violence as a Form of Discrimination

GBV, which can include SV,<sup>89</sup> is discriminatory and therefore violates CEDAW, ICCPR, CAT as well as being contrary to the CAT General Comment No.2.<sup>90</sup> The definition of GBV in CEDAW is clarified in the CEDAW General Recommendation No.19, where it states that GBV is where the violence occurs because of the victim's gender or it affects that gender disproportionately.<sup>91</sup> Although CEDAW's scope is limited to women, it is acknowledged within international human rights law that GBV can happen to anyone; the CAT General Comment No.2 notes that men and boys can also be victims of "gendered violations of the Convention".<sup>92</sup> States are required to refrain from engaging in discriminatory acts, take all appropriate measures to prevent and punish gendered violations, prohibit and protect against discrimination.<sup>93</sup>

### 2.1.4. The Right to Private and Family Life

Freedom from interference of one's private and family life is in Article 17 of the ICCPR and

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<sup>82</sup> CAT General Comment No 2.

<sup>83</sup> CAT arts 1, 2, 4 and 16.

<sup>84</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17.

<sup>85</sup> ECHR art 3.

<sup>86</sup> *Aydin v Turkey* App no 23178/94 (ECtHR, 25 September 1997).

<sup>87</sup> *Valašinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001).

<sup>88</sup> *MC v Bulgaria* App no 39272/98 (ECtHR, 3 December 2003).

<sup>89</sup> CAT General Comment No 2.

<sup>90</sup> CEDAW art 2; ICCPR art 26; CAT art 1; CAT General Comment No 2.

<sup>91</sup> *ibid* (n 16); CEDAW General Recommendation No 19; UNSC Res 2106 (n 5).

<sup>92</sup> CAT General Comment No 2.

<sup>93</sup> CEDAW art 2; ICCPR art 26; CAT General Comment No 2.

Article 8 of the ECHR.<sup>94</sup> Cases relating to one's sexual life, including sexual violence and assault,<sup>95</sup> have been brought before the ECtHR on the basis of this provision. In *M.C. v Bulgaria*, the rape of a 14-year-old girl, and the subsequent failure to sufficiently investigate and prosecute was found to violate the right to respect private life.<sup>96</sup> Similarly, States have a duty to not violate the victims' personal integrity in the process of investigating cases of SGBV and providing reparations.<sup>97</sup>

#### 2.1.5. Implications of CRSGBV and SGBV in Conflict on Health

There are direct consequences of CRSGBV-SGBV in conflict on civilian's health.<sup>98</sup> Following an act of CRSGBV-SGBV in conflict, the victim's physical or psychological health is often affected; SGBV can be traumatic, which negatively impacts the victim's psychological health. Sexual violence can additionally physically injure the victim, in particular it can affect their reproductive health.<sup>99</sup> Furthermore, both the UNSC Resolution 2106 and the CEDAW General Recommendation No.30 have identified that SV in armed conflict results in an increased risk of HIV infections and unwanted pregnancies.<sup>100</sup> There are several factors which result in this correlation. Firstly, the CEDAW Committee has explicitly identified that rape is used in conflict to intentionally transmit HIV as a weapon on war, which is a form of CRSGBV.<sup>101</sup> Secondly, women and girls are more likely to get sexually transmitted infections as a result of SGBV in conflict because the conflict reduces access to health services, including sexual health services.<sup>102</sup> Lastly, conflict-settings emphasizes the power imbalances. The more pronounced gender norms increase women and girl's vulnerability to sexually transmitted diseases.<sup>103</sup> Consequently, CRSGBV and SGBV in armed conflict violates Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which asserts that States should "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".<sup>104</sup>

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<sup>94</sup> ICCPR art 17; ECHR art 8.

<sup>95</sup> *X & Y v The Netherlands* App no 8978/80 (A/91) (ECtHR, 26 March 1985).

<sup>96</sup> *MC v Bulgaria* (n 88).

<sup>97</sup> *EB v Romania* App no 49089/10 (ECtHR, 19 March 2019).

<sup>98</sup> CEDAW General Recommendation No 30

<sup>99</sup> Secretary-General Guidance Note (n 31); CEDAW General Recommendation No 30; CEDAW General Recommendation No 19; CEDAW General Recommendation No 24.

<sup>100</sup> CEDAW General Recommendation No 30; UNSC Res 2106 (n 5).

<sup>101</sup> CEDAW General Recommendation No 30.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

### 3. Analysis of Domestic Implementation and Protection

As mentioned previously, States are obliged to take effective measures regarding CRSGBV-SGBV in conflict under IHL, ICL and IHRL. To analyse how CRSGBV-SGBV in conflict has been handled at a national level, this section will review how States have implemented their international obligations domestically. The analysis provides a foundation for our recommendations.

#### 3.1. Preventative Measures

As established in the ‘international framework’ section, different acts of CRSGBV-SGBV in conflict are explicitly prohibited. States are obliged to take effective measures to prevent and investigate these acts, and CRSGBV-SGBV in conflict violates the right to: private and family life, highest attainable physical and mental health, be equal before the law, free from torture, inhuman or degrading treatment, and to not be discriminated against. Although many States have fulfilled this obligation to different extents, there are flaws within the measures taken by States which renders the preventative provisions ineffective. In some instances, States’ recognition of SGBV has been problematic. In many domestic laws, there are difficulties establishing which acts constitute SGBV as it has not been explicitly defined. Ukraine, for instance, prohibits different forms of SGBV in various laws, but none of them lay out an explicit definition of SGBV.<sup>105</sup> As there is no coherent definition, different forms of SGBV are prohibited separately or not referred to at all. While some of the Ukrainian law mentions sexual harassment,<sup>106</sup> the Criminal Code (CC) defines and prohibits rape separately.<sup>107</sup> This provision falls short in acknowledging the severity of all forms of SGBV as other forms of SGBV can only amount to “violent unnatural gratification of sexual desire”.<sup>108</sup> Similarly, the Russian CC fragments SGBV; it prohibits rape with various aggravating factors,<sup>109</sup> violent actions of sexual character<sup>110</sup> and compulsion to perform sexual actions respectively.<sup>111</sup> In Kosovo, rape and other forms of SGBV are separated in their domestic legislation. Kosovo’s criminal law

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<sup>105</sup> OHCHR, ‘Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017’ (OHCHR 11 February 2017) (CRSV in Ukraine).

<sup>106</sup> *ibid* (n 105). See also Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men (adopted 8 September 2005) Law No 2866-IV art 1.

<sup>107</sup> *ibid* (n 105). See also Criminal Code of Ukraine (adopted 1 September 2001) art 152.

<sup>108</sup> *ibid* (n 105).

<sup>109</sup> World Organisation Against Torture (OMCT): Carin Benninger-Budel and Lucinda O’Hanlon, ‘Violence Against Women in Russia: A Report to the Committee on Economic, Social and Cultural Rights’ in Carin Benninger-Budel and Lucinda O’Hanlon, *Violence Against Women: For the Project and Promotion of the Human Rights of Women 10 Reports/Year 2003* (OMCT 2004) (Violence Against Women in Russia). See also Criminal Code of the Russian Federation (adopted 13 June 1996) No 64-FZ art 131.

<sup>110</sup> Criminal Code of the Russian Federation art 132.

<sup>111</sup> Criminal Code of the Russian Federation art 133.

recognises rape and forced abortion as criminal offences separately, while listing other forms of “non-consensual acts” as sexual assault.<sup>112</sup> Similarly, although the Syrian Constitution and Penal Code criminalises torture, which encompasses rape and sexual assault and requires an aggravated sentence if it is committed by a government official, there is no clear recognition of SGBV as an independent, unified category.<sup>113</sup> The lack of explicit definition results in some forms of SGBV being considered as less important, and consequently the criminal sanctions are not as serious. Therefore, it becomes difficult for victims of less recognised SGBV to be acknowledged as a survivor and receive adequate justice. Consequently, the inability to properly define CRSGBV-SGBV in conflict entails States fail to meet their international obligations to prevent, protect and prosecute SGBV.

Although isolating rape from other forms of SGBV has the potential to overshadow other forms of sexual violence, providing an explicit definition of rape allows people to be protected from it. Therefore, it must be ensured that the definition of rape is close to international standards. Afghanistan demonstrates good practice as the Penal Code now distinguishes rape from adultery, thereby simplifying the complaint procedure.<sup>114</sup> However, some States seem to have overlooked or avoided mentioning SGBV against men, boys and same-sex SGBV. In Ukraine, the CC only recognises rape between opposite sexes.<sup>115</sup> Consequently, many rapes are excluded; when a man rapes a man, or when the perpetrator is a woman, the victims are not recognised as victims and the perpetrators are not held responsible.<sup>116</sup> Therefore, Ukraine fails to meet its obligation under AP II which prohibits rape against “all persons who do not take a direct part or who have ceased to take part in hostilities”.<sup>117</sup> Although this provision only applies to non-international armed conflict, it has already been established that CRSGBV often amounts to torture which applies to all persons in all situations.<sup>118</sup> Therefore, to meet international obligations, States’ definition of CRSGBV-SGBV in conflict cannot exclude certain groups of people from being victims or perpetrators.

Additionally, acts of SGBV that happen in conflict have been explicitly referred to in order to protect civilians and prisoners in accordance with State obligations under international law. The Ukrainian CC criminalises violence against civilians specifically in armed conflict,<sup>119</sup>

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<sup>112</sup> Council of Europe: Paula Krol, ‘Mapping Support Services for Victims of Violence Against Women in Kosovo’ (Council of Europe 10 June 2017) (Mapping Support Services). See also Criminal Code of the Republic of Kosovo (adopted 20 April 2012) Law No 04/L-082 arts 184, 230 and 236; Law of the Republic of Kosovo on the Protection from Discrimination (adopted 28 May 2015) Law No 05/L-021 art 4 (1.3); Law of the Republic of Kosovo on Gender Equality (adopted 28 May 2015) Law No 05/L-020 art 3 (1.12).

<sup>113</sup> OHCHR, “‘I Lost My Dignity’: Sexual and Gender-Based Violence in the Syrian Arab Republic’ (8 March 2018) UN Doc A/HRC/37/CRP.3.

<sup>114</sup> *ibid* (n 16).

<sup>115</sup> *ibid* (n 105). See also Criminal Code of Ukraine art 152.

<sup>116</sup> *ibid* (n 105).

<sup>117</sup> AP II arts 4 (1) and (2) (e).

<sup>118</sup> CAT; Common Article 3 of the GCs and APs; AP II art 4; AP I art 75; ICRC Customary IHL Database (n 21) Rule 90.

<sup>119</sup> *ibid* (n 105). See also Criminal Code of Ukraine art 433.

violations of laws and customs of war,<sup>120</sup> and requires the criminal responsibility of persons in authority.<sup>121</sup> Those violations can be shaped on the grounds of gender, sexual purposes as well as other kinds of violence.<sup>122</sup> Specific provisions on CRSGBV-SGBV in conflict are significant as they protect persons in conflict settings, as well as bringing justice for survivors of SGBV post-conflict.

### 3.2. Investigation and Prosecution

For preventative measures to work, there needs to be further, effective and consistent measures regarding the investigation and prosecution of CRSGBV-SGBV in conflict. As established in the international framework section, States are obliged to investigate complaints of CRSGBV-SGBV in conflict and prosecute perpetrators. The CC of Bosnia and Herzegovina (BiH) provides explicit provisions on the prosecution of crimes against humanity, which encompasses SV.<sup>123</sup> The CC was amended to comply with international treaties as well as the ICTY, ICTR and International Criminal Court (ICC) jurisprudence.<sup>124</sup> Therefore, victims will not be requested to provide any proof of force or threat of attack to prove the lack of consent.<sup>125</sup> These amendments brought by BiH authorities have removed some obstacles victims face when seeking justice. However, this law only applies to the 1992-95 armed conflict at State level.<sup>126</sup> At district level, courts apply the former CC, Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC), to the 1992-95 armed conflict.<sup>127</sup> The SFRY CC prohibits a list of war crimes and genocide; however, the prosecution of crimes against humanity has not been envisaged.<sup>128</sup> Not only do the inconsistency of national courts and lack of comprehensive provision make reporting harder for the survivors of the armed conflict, but it also makes the prohibitions lose their significance as they are not adequately enforced and therefore contribute to a culture of impunity. Consequently, survivors of the armed conflict have not been getting justice.

Alongside investigatory measures, there needs to be trust within the justice system and an effective reporting procedure for protection measures to work. Victims of SGBV do not seek justice for numerous reasons including a fear of social exclusion, limited accountability of the perpetrators, lack of faith in the law enforcement and issues relating to the forensic

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<sup>120</sup> *ibid* (n 105). See also Criminal Code of Ukraine art 438.

<sup>121</sup> *ibid* (n 105). See also Criminal Code of Ukraine art 426.

<sup>122</sup> *ibid* (n 105).

<sup>123</sup> OSCE, 'Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress Before Courts in BiH 2014–2016' (OSCE 20 June 2017) (Towards Justice for Survivors).

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid*.

<sup>126</sup> OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges' (OSCE June 2015) (Combating Impunity).

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid* (n 123).

evidence system, among others.<sup>129</sup> In Ukraine, there are only limited, and sometimes unavailable, evidence kits in the hospitals.<sup>130</sup> Furthermore, it is required that the forensic evidence is provided within 72 hours following the act of rape.<sup>131</sup> The time limit for forensic evidence is problematic in cases of CRSGBV-SGBV in conflict as it is often unachievable due to the environment and lack of enforcement in conflict situations.<sup>132</sup> In Russia, victims of SGBV face a risk of further violence at the police station, and the poorly laid obligations and lack of training for public officials mean that victims are taken to the hospital late by law enforcement.<sup>133</sup> Preventative and investigatory measures are less likely to work without a proper reporting procedure. States are obliged to adequately investigate and prosecute perpetrators of CRSGBV-SGBV in conflict according to the ECtHR in the *M.C. v Bulgaria* case,<sup>134</sup> the CEDAW General Recommendation No.30,<sup>135</sup> Istanbul Convention,<sup>136</sup> and Geneva Conventions.<sup>137</sup> As an ineffective reporting procedure and lack of trust of the justice system hinders the victims ability to get justice, these States are not complying with their international obligations.

### 3.3. Reparations

States which have not guaranteed or accomplished proper redress for victims risk the victims being further traumatised. For instance, in South Sudan, SGBV victims are forced by the law to marry their perpetrators as a remedy.<sup>138</sup> In BiH, psychological suffering is an issue for many survivors.<sup>139</sup> Some survivors are too traumatised to return to the home they had before the war as it is where the SGBV incident occurred.<sup>140</sup> In other cases, the fear of rape and discrimination prevents survivors of SGBV from finding a job, and therefore they live in poverty.<sup>141</sup> Survivors of CRSGBV-SGBV in conflict as well as the children conceived out of a wartime rape are stigmatised.<sup>142</sup> Kosovo appears to demonstrate good practice by recognising the status of civilian victims of CRSGBV-SGBV in conflict and further amended its law to preclude the exclusion of those who are already victims.<sup>143</sup> This amendment entailed special

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<sup>129</sup> *ibid* (n 105).

<sup>130</sup> *ibid*.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid*.

<sup>133</sup> Violence Against Women in Russia (n 109).

<sup>134</sup> *MC v Bulgaria* (n 88).

<sup>135</sup> CEDAW General Recommendation No 30.

<sup>136</sup> Istanbul Convention arts 36-39, 49.

<sup>137</sup> GC I art 49; GC II art 50; GC III art 129; GC IV art 146; ICRC Customary IHL Database (n 21) Rule 158.

<sup>138</sup> *ibid* (n 16).

<sup>139</sup> Amnesty International, 'Whose Justice? The Women of Bosnia and Herzegovina Are Still Waiting' (Amnesty International 30 September 2009) (Whose Justice?).

<sup>140</sup> *ibid*.

<sup>141</sup> *ibid*.

<sup>142</sup> *ibid* (n 16).

<sup>143</sup> Mapping Support Services (n 112); Amnesty International, "'Wounds That Burn Our Souls' Compensation for Kosovo's Wartime Rape Survivors, but Still No Justice' (Amnesty International 13 December 2017) (Wounds That



services for victims, such as priority in access to housing and health care, in accordance with the Istanbul Convention.<sup>144</sup> However, special services in Kosovo are unable to fulfil the relevant needs; the time frame a victim can apply is limited, compensation is not for those who receive different types of financial support.<sup>145</sup> Additionally, while there are special services and support for the survivors of CRSGBV-SGBV in conflict in Kosovo, they are reportedly provided by non-governmental organisations (NGOs) and civil society rather than the State.<sup>146</sup>

There is also an issue regarding the distribution of resources which affects victims' accessibility to redress. In some instances, victims with low income or from rural areas are not able to receive services. Medical, psychological and legal services in South Sudan are only provided in limited areas.<sup>147</sup> Similarly, the quality, accessibility and affordability of Ukraine's services provided by civil societies are problematic;<sup>148</sup> there is limited services provided to victims in territory controlled by armed groups.<sup>149</sup>

Additionally, the lack of explicit recognition of survivors of CRSGBV-SGBV in conflict in the reparations means their needs are overlooked. Therefore, States need to adopt more comprehensive and explicit right to reparation for survivors of all forms of CRSGBV-SGBV in conflict. For instance, in the Democratic Republic of the Congo, a general right to reparation is recognised in the Civil Code.<sup>150</sup> In addition to this, the new strategy of the Congolese law has adopted "a reparations fund for sexual violence victims whose perpetrators are unknown or are not arrested".<sup>151</sup> The Government of Niger adopted an ordinance that provides a reparation system, although this is only for the victims of human trafficking.<sup>152</sup> As shown in Section 2.1, States' failure to provide sufficient reparations to victims of rape, trafficking, sex-slaves, forced pregnancy, forced abortions, genital mutilation and other forms of CRSGBV and SGBV in conflict violates IHL, ICL and IHRL. Therefore, for States to sufficiently adhere to their international obligations, States ought to ensure proper redress, which acknowledges the difficulties faced by the victims, is supplied.

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Burn Our Souls). See also Law of the Republic of Kosovo on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and Their Families (adopted 8 December 2011) Law No 04/L-054; Law of the Republic of Kosovo on Amending and Supplementing the Law No 04/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and Their Families (adopted 20 March 2014) Law No 04/L-172; Regulation No 22/2015 of the Republic of Kosovo on Defining the Procedures for Recognition and Verification of the Status of Sexual Violence Victims During the Kosovo Liberation War (adopted 30 December 2015).

<sup>144</sup> Mapping Support Services (n 112); Wounds That Burn Our Souls (n 143).

<sup>145</sup> Wounds That Burn Our Souls (n 143).

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.* (n 16).

<sup>148</sup> *ibid.* (n 105).

<sup>149</sup> *ibid.* (n 105).

<sup>150</sup> Oxford Pro Bono Publico, 'A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence Reparations' (University of Oxford January 2016) (Oxford Report). See also Civil Code of the Democratic Republic of the Congo arts 258-259.

<sup>151</sup> Oxford Report (n 150).

<sup>152</sup> *ibid.* See also Ordinance No 2010-086 of the Republic of the Niger (adopted 16 December 2010).

### 3.4. Training and Other Measures

Non-legislative measures are also important for preventing and protecting against CRSGBV-SGBV in conflict. This subsection will analyse non-legislative measures, including capacity building and redressing services done by non-State actors. States, civil societies, NGOs and international organisations, especially the UN agencies, addressed and encouraged investigations of CRSGBV-SGBV in conflict.<sup>153</sup> These measures can be capacity building trainings, services for survivors and global State events among others. However, the events and measures need to be supported by States through appropriate and adequate actions or practice at domestic level. For instance, the United Kingdom (UK) launched the 2014 Global Summit to End Sexual Violence in Conflict which hosted delegations from many countries. Practical steps were agreed upon to grab global attention on the issue of CRSGBV-SGBV in conflict and change States' approach towards the problem via the "Statement of Action".<sup>154</sup> Similarly, the United States of America (USA) also attended the Global Summit hosted by the UK in 2014<sup>155</sup> and, in different occasions, committed to establish an appropriate strategy to address, prohibit and counter SGBV in different contexts through action plans.<sup>156</sup> Although these appear remarkable in addressing CRSGBV-SGBV in conflict, they have not taken further and explicit steps towards the implementation to make a significant difference.<sup>157</sup> As every action is only sufficient when they are implemented, the success of adoption of various actions depends on their proper implementation. South Sudan committed to end CRSGBV-SGBV in conflict through the joint communique on sexual violence between the Government and the UN in 2014 and there have been several meetings in 2017 to establish an implementation method.<sup>158</sup> These meetings resulted in further improvements on trialling SPLA soldiers who were claimed to have committed rape.<sup>159</sup> Furthermore, victim's identification was preserved

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<sup>153</sup> 'Geneva Event Examines Impact of Expert Investigations into SGBV in Conflict' (*Justice Rapid Response*, 15 May 2018) <<http://www.justicerapidresponse.org/geneva-event-sgbv/>> accessed 28 March 2019; 'Investigating Conflict-Related Sexual and Gender-Based Crimes—Lessons from Iraq and Syria' (*UN Women*, 26 October 2017) <<http://www.unwomen.org/en/news/stories/2017/10/news-event-wps-investigating-conflict-related-sexual-and-gender-based-crimes>> accessed 28 March 2019. See the UN event on "Investigating Conflict-Related Sexual and Gender-Based Violence: The Case of Syria and Iraq."

<sup>154</sup> House of Lords Select Committee on Sexual Violence in Conflict, 'Sexual Violence in Conflict: A War Crime' (House of Lords 12 April 2016).

<sup>155</sup> Jamille Bigioand and Rachel Vogelstein, *Countering Sexual Violence in Conflict* (Council on Foreign Relations Press 2017) 13.

<sup>156</sup> *ibid* 13-14. See also The White House, 'The United States National Action Plan on Women, Peace and Security' (The White House June 2016); USAID, 'The United States Strategy to Prevent and Respond to Gender-Based Violence Globally' (USAID 2016); Declaration of Commitment to End Sexual Violence in Conflict (24 September 2013). See also Benjamin Elisha Sawe, 'Group of Seven (G7) Countries' (*World Atlas*, 25 April 2017) <<https://www.worldatlas.com/articles/group-of-seven-g7-countries.html>> accessed 15 March 2019.

<sup>158</sup> *ibid* (n 16). See also UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Joint Communiqué of the Republic of South Sudan and the United Nations on the Prevention of Conflict-Related Sexual Violence (12 October 2014).

<sup>159</sup> *ibid* (n 16).

via video conference.<sup>160</sup> Consequently, the obligation to sufficiently investigate CRSGBV-SGBV in conflict was met.

As seen in the examples above, States often collaborate with the UN and its agencies to progress towards the elimination of CRSGBV-SGBV in conflict. Governments request the UN's assistance and the UN establishes agencies particular to those countries that obtain an ongoing conflict within their territories, such as the United Nations Assistance Mission in Afghanistan (UNAMA), the United Nations Assistance Mission for Iraq (UNAMI) and the United Nations Mission in South Sudan (UNMISS).<sup>161</sup> As well as assisting governments in legal steps to bring further policies,<sup>162</sup> these establishments also take measures outside of law. For example, UNMISS helped reduce acts of CRSGBV-SGBV in conflict by guarding high-risk areas, providing food and other needs and ensuring that health services have rape kits.<sup>163</sup> Furthermore, regardless of whether States receive this assistance from the UN, many have come closer to the UN's standards. Some States, including BiH, UK, USA, Afghanistan, Ukraine, Kosovo, South Sudan, Rwanda and Iraq, have adopted national action plans for the implementation of UNSC Resolution 1325.<sup>164</sup>

In addition to the mandate of State-particular establishments, the UN has done significant work through its agencies, especially the United Nations Population Fund (UNFPA), UN Women, the United Nations Children's Fund (UNICEF) and the Office of the United Nations High Commissioner for Refugees (UNHCR). South Sudan has undertaken significant efforts to prevent CRSGBV-SGBV in conflict by lighting rural areas, providing kits for personal hygiene, and other services specifically for women and girls who are the most affected by the conflict.<sup>165</sup> Additionally, UNFPA assisted BiH by improving laws on SGBV and services for victims, including access to free legal aid, between 2013-2016 in accordance with the Country Programme Action Plan.<sup>166</sup> UNFPA also established Sound of Silence in order to raise awareness to the women victims of CRSGBV-SGBV in conflict.<sup>167</sup>

While these are important responses from the UN, there is a lack of implementation or legislation to assist it. Afghanistan fails to budget for the implementation of their national action plan and to comprehensively implement the revised Penal Code. In South Sudan, suspects of CRSGBV-SGBV in conflict remain in its armed forces, thereby indicating that South Sudan

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<sup>160</sup> *ibid* (n 16).

<sup>161</sup> *ibid* (n 15); *ibid* (n 16); UNSC Res 1401 (28 March 2002) UN Doc S/RES/1401; UNSC Res 1500 (14 August 2003) UN Doc S/RES/1500; UNSC Res 1996 (8 July 2001) UN Doc S/RES/1996.

<sup>162</sup> Although it varies in different States, the UN's mission through those establishments is mostly stated as "assisting the government". See UNSC Res 2421 (14 June 2018) UN Doc S/RES/2421.

<sup>163</sup> *ibid* (n 15).

<sup>164</sup> National Action Plan Resource Centre <<https://web.archive.org/web/20170703215409/https://actionplans.inclusivesecurity.org/>> accessed 26 March 2019.

<sup>165</sup> *ibid* (n 15).

<sup>166</sup> UNFPA, 'Combating Sexual Violence in Conflict' (UNFPA 17 September 2012).

<sup>167</sup> *ibid*.

fails to comprehensively investigate and prosecute the perpetrators.<sup>168</sup> In Syria, SGBV is still used as a weapon of war and has not been mentioned in the ceasefire agreement.<sup>169</sup> Although preventative measures taken by the UN are important, to overcome CRSGBV-SGBV in conflict there needs to be the implementation of those measures by States.

Preventative measures are not enough on their own; States need to further ensure that there is a support infrastructure following the conflict. The Afghan Ministry of Interior Affairs, for instance, created only-female-officer stations to encourage women victims to report CRSGBV-SGBV in conflict.<sup>170</sup> However, in many States, redressing measures and services for the victims is not adequate or provided at all. Those services are mostly supported or replaced by civil society, NGO and international organisation work. In some areas of Sierra Leone, the International Rescue Committee runs Rainbo Centres and ensures that the survivors of CRSGBV-SGBV in conflict receive physical and psychological health care as well as legal aid services and medical certificates for police officers to be able to help those who want to report CRSGBV-SGBV in conflict.<sup>171</sup> Therefore, with the assistance of the International Rescue Committee, Sierra Leone is providing medical services, thereby fulfilling their obligation to recognise the right to physical and mental health outlined in Section 2.1.5 of this memorandum. Nonetheless, public officials do not know how to deal with survivors of SGBV and trainings are often insufficient. In Kosovo, capacity building trainings are not widespread throughout the service providers,<sup>172</sup> consequently risking a violation of the right to non-discrimination stated in Article 26 of the ICCPR.<sup>173</sup> Even though some educational trainings are provided by non-State actors, they do not go further than basic level which causes issues in dealing with victims of CRSGBV-SGBV in conflict by public officials.<sup>174</sup>

Another problem with redress measures taken by both State and non-State actors is that they tend to direct their focus on women and girls. For instance, there is a woman-to-woman health care service provided by Bureij Women's Health Centre in the Occupied Palestinian Territories.<sup>175</sup> This gender-specific approach excludes male victims, which leaves them without post-trauma support and explicit legal protection. In other words, male victims are further victimised by this gender-specific approach. Though women and girls are most likely to be affected by conflict settings, men and boys are also victims of CRSGBV-SGBV in conflict.<sup>176</sup> In a few States such as Jordan and Lebanon, NGOs have explicitly focused on

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<sup>168</sup> *ibid* (n 16).

<sup>169</sup> *ibid* (n 16).

<sup>170</sup> *ibid* (n 16).

<sup>171</sup> UNFPA: Jeanne Ward and Mendy Marsh, 'Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources' (UNFPA 21-23 June 2006) (SV Against Women and Girls).

<sup>172</sup> Mapping Support Services (n 112).

<sup>173</sup> ICCPR art 26

<sup>174</sup> Mapping Support Services (n 112).

<sup>175</sup> *ibid* (n 171).

<sup>176</sup> UNSC Res 2106 (n 5).

men. In Lebanon, some NGOs that work on LGBTQI+ rights have done some significant work to raise awareness on sexual violence against men and boys.<sup>177</sup> Additionally, some male-centred services and groups have been established by different organisations, including ABAAD and Concern.<sup>178</sup> Similarly, the Institute for Family Health in Jordan provides services for both men and women, and collaborates with community in relation to raising awareness about CRSGBV-SGBV in conflict against men as well as women.<sup>179</sup> States ought to provide sufficient protection against CRSGBV-SGBV in conflict for men and boys as they are obliged to provide equal protection in accordance with Article 26 of the ICCPR.<sup>180</sup> Furthermore, UNSC Resolution 2106 and the CAT General Comment No.2 recognise that men and boys can also be victims of CRSGBV-SGBV in conflict.<sup>181</sup>

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<sup>177</sup> UNHCR: Sarah Chynoweth, 'Sexual Violence Against Men and Boys in the Syria Crisis' (UNHCR October 2017).

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> ICCPR art 26

<sup>181</sup> CAT General Comment No 2; UNSC Res 2106 (n 5).

## 4. Conclusion

There are protections in place against CRSGBV-SGBV in conflict in international law. The following recommendations are for the OSCE to advise states. These recommendations are derived from the analysis of the domestic implementations, which revealed what has been successful and what has not in preventing and protecting civilians from CRSGBV-SGBV in conflict.

### 4.1. Preventative Measures

To prevent CRSGBV-SGBV in conflict, States should initially ensure there is an explicit, inclusive and comprehensive definition of SGBV in their domestic legislation. In addition to explicitly defining and prohibiting SGBV, States shall explicitly and sufficiently define and prohibit CRSGBV-SGBV in conflict. Not only should violence in conflict which occurs on the basis of gender be considered an aggravating circumstance, all forms of SGBV, same-sex SV and SGBV against men and boys should be explicitly prohibited.<sup>182</sup> The definition of SGBV should be comprehensive and in addition to rape it should include forced abortion, forced pregnancy, sexual assault, trafficking and others.<sup>183</sup> Furthermore, the definition ought to reflect that anyone can be a victim of SGBV.

Additionally, the definition of rape needs to be explicit and clearly distinguish from consensual sexual acts, just as Afghanistan distinguishes rape from adultery.<sup>184</sup> In doing so, an emphasis is placed on the importance of consent as well as acknowledging the severity of rape. Finally, the definition of rape should be consistent with international standards. According to the ICTR Trial Chamber, any sexual act where the victim's is under coercive circumstances constitutes SV.<sup>185</sup> Therefore, to meet international standards, force or threat are not required for there to be lack of consent.

### 4.2. Investigation and Evidence in Prosecutions

It is necessary for States to have comprehensive and consistent measures regarding investigation and prosecution. For instance, in contrast to BiH, there should be just one criminal code to ensure consistency and therefore effectiveness in prosecutions and reparations.<sup>186</sup> In terms of evidence for cases relating to CRSGBV-SGBV in conflict, it should

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<sup>182</sup> *ibid* (n 105). See also Criminal Code of Ukraine art 152.

<sup>183</sup> CEDAW General Recommendation No 30; Istanbul Convention art 36-39.

<sup>184</sup> *ibid* (n 16).

<sup>185</sup> *Akayesu* (n 2).

<sup>186</sup> *ibid* (n 123).

be acknowledged and taken into consideration that the armed conflict environment, and the subsequent pressures which affects consent.<sup>187</sup> There also needs to be clarification on what evidence may be permissible. As previously stated, in Ukraine there is only 72 hours after the incident to submit forensic evidence, which in an environment of conflict may be challenging.<sup>188</sup> To account for the conflict setting the SGBV occurs in, the time limit for evidence needs to be abolished or extended and there needs to be less weight placed on physical evidence at the prosecution stage. To ensure this recommendation is met, law enforcement officers ought to act in a timely manner. Finally, to encourage witnesses to come forward and assist in the prosecution, it is important that sufficient witness protection is provided.

### 4.3. Reparations

As stated above, time limits are not appropriate in conflict environments; this further applies to time limits for reparations. Reparations are essential to rectify the damage caused by CRSGBV-SGBV in conflict. Both the example where the victim must marry their perpetrator in South Sudan<sup>189</sup> and where housing is required in Bosnia<sup>190</sup> demonstrate, it is essential that the victims of CRSGBV-SGBV in conflict need to be recognised and given special status. To fulfil the purpose of reparations and to adhere to the standard set by the Istanbul Convention regarding protection and support,<sup>191</sup> States should acknowledge victims' status as survivors of CRSGBV-SGBV in conflict to provide medical, legal and psychological services to all victims, and to be aware of the potential for an uneven distribution of services. Both short and long-term, mental and physical, health care should be provided by the State, including therapy and trauma support. As victims may be unable to return to their house due to trauma or stigmatisation,<sup>192</sup> there should be shelters available for victims of CRSGBV-SGBV in conflict.

Finally, the victim is entitled to legal support in holding the perpetrator to account.<sup>193</sup> Similarly, it should be clear that financial reparations are not solely for compensating financial loss due to things such as trauma; they also hold a symbolic meaning by acknowledging the victim's rights were violated. Therefore, unlike Kosovo where financial compensation is only given if you don't receive other financial support,<sup>194</sup> reparations should exist independently

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<sup>187</sup> *ibid.* See also Criminal Procedure Code of Bosnia and Herzegovina (last amended by Official Gazette of Bosnia and Herzegovina 72/13) (entered into force 1 March 2003).

<sup>188</sup> *ibid* (n 105).

<sup>189</sup> *ibid* (n 16).

<sup>190</sup> *ibid* (139).

<sup>191</sup> Istanbul Convention ch IV.

<sup>192</sup> Mapping Support Services (n 112).

<sup>193</sup> Istanbul Convention art 20.

<sup>194</sup> Mapping Support Services (n 112).

from any other financial gains or incomes.

#### 4.4. Training and Other Measures

For institutions to be effective in preventing, protecting and providing reparations from CRSGBV-SGBV in conflict, officials and agencies need to have specialised training relating to the issue.<sup>195</sup> The capacity building needs to be widespread and consistent.<sup>196</sup> To comprehend the seriousness of CRSGBV-SGBV in conflict and the needs of survivors, the purpose of the training first should be awareness raising, in particular, addressing the myths and preconceptions and harmful gender stereotypes, surrounding SGBV.<sup>197</sup> One major lack of understanding which needs to be addressed using trainings is the concept of consent, especially as consent can be further impacted by the conflict.<sup>198</sup> Furthermore, stereotypes and power relations should be addressed as that is a core cause of SGBV and it contributes to SGBV in society.<sup>199</sup> To ensure everyone is protected from SGBV, the education provided should address stigma faced by victims and the fact that men and boys can be victims of CRSGBV-SGBV in conflict.

Finally, the training of officials should contribute towards the long-term goal of ending a culture of impunity, which can be tackled in part by successful prosecution and redress.<sup>200</sup> Therefore, there should be a focus in encouraging victims to come forward. Law enforcement officers ought to be approachable and be informed on how to handle SGBV cases in an appropriate and sensitive way.<sup>201</sup> Furthermore, as SGBV disproportionately affects women and girls, there should be actions taken to encourage more women to get into the police force which encourages women victims to come forward.<sup>202</sup>

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<sup>195</sup> Gaggioli (n 6).

<sup>196</sup> Mapping Support Services (n 112).

<sup>197</sup> Institute for International Criminal Investigations (IICI), 'Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys' (IICI 29 February 2016).

<sup>198</sup> *ibid* (n 123).

<sup>199</sup> Secretary-General Guidance Note (n 31).

<sup>200</sup> *ibid* (n 17).

<sup>201</sup> Secretary-General Guidance Note (n 31).

<sup>202</sup> *ibid* (n 16).



## Bibliography

### Articles

DeGuzman MM, 'Crimes Against Humanity' in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edgar Elgar Publishing 2011)

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

### Books

Bigio and J and R Vogelstein, *Countering Sexual Violence in Conflict* (Council on Foreign Relations Press 2017)

Cassese A, *Cassese's International Criminal Law* (OUP 2013)

Lindsey C, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (ICRC 2001)

### Reports

Amnesty International, "'Wounds That Burn Our Souls" Compensation for Kosovo's Wartime Rape Survivors, but Still No Justice' (Amnesty International 13 December 2017) (Wounds That Burn Our Souls)

Amnesty International, 'Combating Sexual Violence in Conflict: Recommendations to States at the Global Summit to End Sexual Violence in Conflict (10-13 June 2014)' (Amnesty International 30 May 2014) (Combating SV in Conflict)

Amnesty International, 'Whose Justice? The Women of Bosnia and Herzegovina Are Still Waiting' (Amnesty International 30 September 2009) (Whose Justice?)

Council of Europe: Krol P, 'Mapping Support Services for Victims of Violence Against Women in Kosovo' (Council of Europe 10 June 2017) (Mapping Support Services)

Declaration of Commitment to End Sexual Violence in Conflict (24 September 2013)

European Parliament: Zamfir I, 'Fighting Conflict-Related Sexual Violence' (European Parliament Report December 2016) PE 595.846

House of Lords Select Committee on Sexual Violence in Conflict, 'Sexual Violence in Conflict: A War Crime' (House of Lords 12 April 2016)

ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (ICRC March 2008)

ICRC, 'What Are "Serious Violations of International Humanitarian Law"? Explanatory Note' (ICRC)

ICRC: Henckaerts JM and L Doswald-Beck, *Customary International Humanitarian Law Database, Volume I: Rules* (Cambridge University Press 2005) (ICRC Customary IHL Database)

Institute for International Criminal Investigations (IICI), 'Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys' (IICI 29 February 2016)

Inter-Agency Standing Committee (IASC), *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience and Aiding Recovery* (IASC 28 August 2015)

OHCHR, 'Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017' (OHCHR 11 February 2017) (CRSV in Ukraine)

OHCHR, 'UN Mapping Report on Democratic Republic of the Congo 1993-2003: War Crimes, Crimes Against Humanity and Genocide' (OHCHR)

OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges' (OSCE June 2015) (Combating Impunity)

OSCE, 'Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress Before Courts in BiH 2014–2016' (OSCE 20 June 2017) (Towards Justice for Survivors)

Oxford Pro Bono Publico, 'A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence Reparations' (University of Oxford January 2016) (Oxford Report)

Project Ploughshares, *Armed Conflicts Report* (Project Ploughshares, 2018)

The White House, 'The United States National Action Plan on Women, Peace and Security' (The White House June 2016)

UNFPA, 'Combating Sexual Violence in Conflict' (UNFPA 17 September 2012)

UNFPA: Ward J and M Marsh, 'Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources' (UNFPA 21-23 June 2006) (SV Against Women and Girls)

UNHCR: Chynoweth S, 'Sexual Violence Against Men and Boys in the Syria Crisis' (UNHCR October 2017)

USAID, 'The United States Strategy to Prevent and Respond to Gender-Based Violence Globally' (USAID 2016)

World Health Organisation: Krug EG and others (eds), *World Report on Violence and Health* (WHO 2002)

World Organisation Against Torture (OMCT): Benninger-Budel C and L O'Hanlon, 'Violence Against Women in Russia: A Report to the Committee on Economic, Social and Cultural Rights' in Carin Benninger-Budel and Lucinda O'Hanlon, *Violence Against Women: For the Project and Promotion of the Human Rights of Women 10 Reports/Year 2003* (OMCT 2004) (Violence Against Women in Russia)

### UN Documents

OHCHR, "I Lost My Dignity": Sexual and Gender-Based Violence in the Syrian Arab Republic' (8 March 2018) UN Doc A/HRC/37/CRP.3

UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 'General Comment No 2' on 'Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 24' on 'Article 12 of the Convention' (1999) UN Doc A/54/38/Rev.1, chap. I

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 14' on 'Female Circumcision' (1990) UN Doc A/45/38 and Corrigendum

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 19' on 'Violence Against Women' (1992) UN Doc CEDAW/C/GC/19

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 30' on 'Women in Conflict Prevention, Conflict and Post-Conflict Situations' (2013) UN Doc CEDAW/C/GC/30

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 'General Recommendation No 35' on 'Gender-Based Violence Against Women, Updating General Recommendation No 19' (26 July 2017) UN Doc CEDAW/C/GC/35

UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Joint Communiqué of the Republic of South Sudan and the United Nations on the Prevention of Conflict-Related Sexual Violence (12 October 2014)

UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (23 March 2018) UN Doc S/2018/250 (Secretary-General March 2018 Report).

UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (16 April 2018) UN Doc S/2018/250 (Secretary-General April 2018 Report)

UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (15 April 2017) UN Doc S/2017/249 (Secretary-General April 2017 Report)

UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (23 March 2015) UN Doc S/2015/203

UN Secretary-General, 'Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence' (June 2014) (Secretary-General Guidance Note)

### Other Sources

'Consent' (*Cambridge Dictionary*)

<<https://dictionary.cambridge.org/us/dictionary/english/consent>> accessed 14 May 2019.

'Geneva Event Examines Impact of Expert Investigations into SGBV in Conflict' (*Justice Rapid Response*, 15 May 2018) <<http://www.justicerapidresponse.org/geneva-event-sgbv/>> accessed 28 March 2019

'Investigating Conflict-Related Sexual and Gender-Based Crimes—Lessons from Iraq and Syria' (*UN Women*, 26 October 2017)

<<http://www.unwomen.org/en/news/stories/2017/10/news-event-wps-investigating-conflict-related-sexual-and-gender-based-crimes>> accessed 28 March 2019

National Action Plan Resource Centre

<<https://web.archive.org/web/20170703215409/https://actionplans.inclusivesecurity.org/>>

accessed 26 March 2019

Sawe BE, 'Group of Seven (G7) Countries' (*World Atlas*, 25 April 2017)

<<https://www.worldatlas.com/articles/group-of-seven-g7-countries.html>> accessed 15 March

2019

'Sexual and Gender-Based Violence' (*UNHCR UK*) <[https://www.unhcr.org/sexual-and-](https://www.unhcr.org/sexual-and-gender-based-violence.html)

[gender-based-violence.html](https://www.unhcr.org/sexual-and-gender-based-violence.html)> accessed 2 March 2019