

Sexual Violence in Conflict Zones A Challenge for International Law?

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Sexual and gender-based violence in conflict zones is largely regarded as an inevitable by-product of war, random acts of a few renegades, or mere collateral damage. Though a process for concerted action against SGBV during armed conflicts has taken shape in the wake of the United Nations Security Council resolutions as well as incorporation of crimes of sexual violence in the statutes of International Criminal Court and international criminal tribunals, more needs to be done to squarely address this menace.

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Sexual violence has often been used as a tactic of war. It is “not just rape out of control, but *rape under orders*, as means of pursuing military, political or economic ends.” The Indian subcontinent witnessed horrors of systematic rape of hundreds of thousands (figures range between 2,00,000 and 4,00,000) Bengali women in the Pakistani army’s effort to crush the 1971 Bangladeshi liberation movement. In recent years, the island nation of Sri Lanka is trying to come to terms with the aftermath of 26 long years of brutal violence perpetrated by both the security forces and the secessionist Liberation Tigers of Tamil Eelam (LTTE). The Office of the United Nations High Commissioner for Human Rights (OHCHR) has alleged commission of egregious crimes between 2002 and 2011. The OHCHR report has emphasised:

(O)ur investigation has laid bare the horrific level of violations and abuses that occurred in Sri Lanka, including indiscriminate shelling, extrajudicial killings, enforced disappearances, harrowing accounts of torture and sexual violence, recruitment of children and other grave crimes.

The use of sexual violence in conflict zones has been fairly common. The scale and prevalence of such sexual violence has fostered, to some extent, a sense of resignation and the notion that it is

merely an inevitable and unavoidable “evil” as a consequence of war. The struggle to ensure justice for women victims of sexual and gender-based violence (SGBV) is aggravated by pre-existing exclusions and discrimination that typifies women’s status in many societies. It, in turn, has a compounding effect in exacerbating gender vulnerability in war-torn societies.

Saga of the Comfort Women

It has been 70 years since the end of World War II. Wars often leave behind horrid stories, painful past, and many wounds, scarring the human soul that refuses to heal with the passage of time. One such simmering issue concerns the “comfort women.” In 1932, the Japanese military began to set up comfort stations, where women were kept to serve as sex slaves to men in the Japanese military. These women-slaves were drawn from the vast Japanese empire, and the Korean women constituted the bulk of these women. The system of setting up comfort stations was to check the growing number of rapes committed by the Japanese soldiers in their colonies. Initially, it recruited women who were voluntarily willing to do the task, but later the system became a vehicle for massive sexual exploitation and enslavement. Often women were tricked on the pretext of a job to lure them to leave their homes. The pain and suffering of the comfort women is often compared with the victims of the holocaust.

The diaries of these women reveal a hair-raising saga of barbarity. A Japanese scholar provides shocking account of the horrors:

Most comfort stations were crudely built barracks. Each woman would be assigned a small room with one tatami mat and was forced to have sex with soldiers. Most comfort women received an average of 20–30 men a day. Not only were they forced to have sex with the soldiers but they were also beaten. Women were kicked, punched, stabbed and even killed either for refusing sex or for no reason at all. (Tanaka 2002)

These stations became a large-scale factory for rape and torture. Comfort women were not fed well and often found themselves on the brink of starvation. After the war, the records were wiped off, and many of these women were shot by the retreating Japanese army. Even those who managed to survive, describe their lives as ones filled with constant pain and loneliness.

SGBV in Conflicts: A Neglected Crime

The widespread use of rape and other forms of sexual violence in armed conflicts around the world remains one of the most persistent and neglected injustices. At the 68th United Nations (UN) General Assembly Session (2014), 122 member states endorsed a “Declaration of Commitment to End Sexual Violence in Conflict.” The declaration resolved to end the pernicious culture of impunity by bringing to justice the perpetrators of sexual violence in conflicts. A process for concerted action against SGBV during armed conflicts took shape in the wake of the UN Security Council resolutions (1325 and 1820) as well as the incorporation of crimes of sexual violence in the statutes of International Criminal Tribunals (Yugoslavia, Rwanda, Sierra Leone) and the International Criminal Court (ICC). The Rome Statute of the ICC became the first global treaty that recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence as distinct types of war crimes. The UN reports have defined conflict related sexual violence as:

(R)ape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity perpetrated against

women, men or children with a direct or indirect (temporal, geographical or causal) link to a conflict. This link to conflict may be evident in the profile and motivations of the perpetrator, the profile of the victim, the climate of impunity or State collapse, any cross-border dimensions or violations of the terms of a ceasefire agreement. (United Nations 2013)

The criminal tribunals have limited capacity to provide justice to sufferings borne by women in conflict zones. Though courts recognise a small set of the crimes committed against women, they fall short of addressing all gender-based harms and curing gender biases entrenched in society as well as institutions. If one looks at the conviction rate in cases before the International Criminal Tribunal for Rwanda (ICTR), it does not reflect the high levels of gender violence perpetrated during the Rwandan genocide. This is despite the fact that the records of decade-long conflict clearly indicated that rape and sexual violence formed a part of the systematic attack on civilians. On the other hand, in all cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), till April 2011, 93 individuals were indicted; 44 of those individuals were indicted for crimes involving sexual violence. Of those 44 individuals, 29 were convicted of sexual violence, representing a conviction rate of 69%.

The Sierra Leone civil war also gave birth to the notorious tradition of “bush wife” in which captured or abducted civilian girls and women were forcibly assigned to rebel commanders. They, in turn, were expected to submit to sexual intercourse whenever demanded, as well as expected to provide domestic and other services such as cooking, cleaning, childbearing, and childrearing. The SGBV survivors are often tormented by routine encounters with their former rapists. At the same time, an investigation into SGBV crimes presents its own specific challenges that include the under or non-reporting of sexual violence owing to societal, cultural, or religious factors; stigma for victims of sexual and gender-based crimes; limited domestic investigations and associated lack of readily available evidence; lack of forensic or other

documentary evidence owing, inter alia, to the passage of time; and inadequate or limited support services at the national level.

Quest for Justice at the Tokyo Trial

In the aftermath of World War II, the Allied powers established a separate tribunal to prosecute and punish the “major war criminals” accused of crimes committed in the Asia-Pacific region. It came to be called the International Military Tribunal for the Far East (the Tokyo Tribunal). The tribunal had a mandate to try crimes against peace, conventional war crimes and crimes against humanity. It tried 28 political and military leaders of the Japanese empire, although the Emperor himself was granted amnesty. The people responsible for sexual enslavement, torture, abuse, and rape of the comfort women were not prosecuted at the Tokyo trial. The obvious question that one confronts is why were these serious crimes not brought before the tribunal? Perhaps, it reflects a larger societal acceptance that dismisses sexual violence merely as an inevitable by-product of war, the random acts of few renegades, or mere collateral damage!

The quest for justice for the comfort women has been a long and tortuous one. The Tokyo tribunal failed to respond to the needs of the comfort women who did not want to suffer in shame, wanted to recover their lost honour, and hold the perpetrators accountable. However, the trial that was widely dubbed as the “victor’s justice” did leave a critical “justice gap.” The valiant victims refused to be fatalistic and fought a long-drawn battle against the Japanese establishment that continued to deny its responsibility. With no hope of justice from the callous government, the victims turned to a non-governmental organisation that helped them to form a forum called the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery. It held proceedings from 8 to 12 December 2000 in Tokyo. The entire exercise of the peoples’ tribunal—that did not possess legal authority—was motivated by the sense that the governmental “failures must not be

allowed to silence the voices of survivors, nor obscure accountability for such crimes against humanity” (*The Prosecutors and the Peoples of the Asia-Pacific Region v Hirohito Emperor Showa et al* 2001).

The judgment of the tribunal remains significant in many ways. It held Emperor Hirohito guilty of the crimes committed by his subordinates under the doctrine of command responsibility, which presumed that he knew or should have known about the offences. The testimonies of the surviving comfort women and other documentary evidence corroborated that the comfort stations had been systematically instituted and operated as a matter of military policy. Thus, they constituted crimes against humanity. It held Japan accountable for violations of its treaty obligations under the international law and customary law relating to slavery, trafficking, forced labour, and rape. The tribunal concluded by recommending that the Japanese government make a meaningful apology and provide compensation to surviving victims.

The Right to Heal

The chairman of the South African Truth and Reconciliation Commission, Desmond Tutu, once remarked that “we needed to look the beast in the eye, so that past wouldn’t hold us hostage anymore.” There has been a persistent search for appropriate institutional designs that could deal with mass atrocities in conflict-ridden societies and foster justice in the post-conflict period. In recent years, the dominant discourses are led by scholars from the field of “Transitional Justice” that refers to process of dealing with the aftermath of violent conflicts and systematic human rights abuses in order to provide conditions for a peaceful future. It makes use of a number of instruments and mechanisms, including national and international tribunals, truth commissions, memory work, reparation, and institutional reforms. These measures aim at uncovering the truth about past crimes, holding perpetrators accountable, vindicating the

dignity of victims-survivors’ and contributing to reconciliation.

The comfort women victim-survivors’ cathartic transformation from being passive victims to becoming active agents in changing the sociopolitical and legal landscape is a hair-raising story of coming to terms with the gory past of the devastating war. These women went from being forced to live in oblivion to becoming a symbol of national pride. A bronze statue of a barefoot girl outside the Japanese embassy in Seoul not only has become a symbol of honour for the comfort women but also provides graphic testimony that there can be no peace without justice. In fact, in December 2015, Japan and South Korea brokered a deal over the comfort women. Japan issued a “most sincere” apology and committed to pay \$8.3 million to the surviving victims (Ministry of Foreign Affairs of Japan 2015). In return, South Korea has promised to “finally and irreversibly” end the dispute and endeavour to secure the removal of the comfort women statue in front of Japan’s embassy in Seoul. The fact that the Government of South Korea acknowledged that the government of Japan is “concerned about the statue built in front of the Embassy of Japan in Seoul,” shows how this little symbol haunted and shook the collective conscience of nations and forced them to squarely address the issue.

In the thick of post-war accountability jamboree, the struggle to ensure justice for women victims is aggravated by the “walls of silence” that often contain bricks of shame, stigma, fear, and futility. In the legal and political maze of ending or transmuting conflict, women still need to struggle to insulate and/or influence policies, laws, and institutional structures that adversely affect them. In fact, the needs and aspirations of women seldom get reflected in the current discourses on post-conflict justice mechanisms around the world. Transitions provide opportunities to further gender justice that could secure justice for individual human rights violations as well as address structural inequalities, power dynamics, gender biases, and injustices that underpin the violence.

Victim-survivors

There has been experimentation with innovative tools and techniques that could best accommodate a wide range of concerns to deliver justice and restoration of peace in war-torn societies. Gender-based approaches have gained significant attention in recent years in international criminal law, transitional justice mechanisms, and peace building processes.

The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery had sought to offer a non-judicial transitional justice platform to address SGBV in the past conflict. The aim was to empower comfort women survivors by giving them a voice to break the silence surrounding these crimes and express their needs and demands; honour survivors by publicly acknowledging their suffering, strength, and courage; and create a more accurate historical record by documenting survivor experience. The issue of comfort women resonates with unspeakable atrocities committed against women (irrespective of being Hindu, Sikh, and Muslim) during large-scale violence that resulted from the bitter partition of India in 1947. Women on both sides of the border (India and Pakistan) suffered brutalities caused by deadly combination of religion and anger of retribution. They were abducted, killed, maimed, mutilated, violated, and abandoned. Even after an agreement between the Governments of India and Pakistan to return and restore women to their original families, there were no takers. No one came to reclaim them, and many of the hapless women were forced into prostitution. In the wake of jubilation over freedom, these women victim-survivors did not just figure anywhere in the historical records. Ironically, no effort was ever made to redress the injustices and violence committed against them.

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Need for a New Legal Approach

The winds of change have led to incorporation of sGBV related provisions in the statutes of International Criminal Court and tribunals. Their recent indictments and evolving jurisprudence demonstrates significant strides made in addressing sexual and gender-based violence. The development of accountability for sGBV in conflicts as an independent crime has come a long way to underscore that such gender-based crimes are not insignificant or second-rate!

Still, there appears lack of empathy to understand the “multidimensional nature of their suffering” even as women

struggle to survive various forms of violent conflicts that dot every continent on the earth. An overwhelming emphasis on the sexual and penetrative violations of women’s bodies’ shows lack of sensitivity towards emotional harm, harm to the families and personal spaces as well as harm to children and to those with whom women are intimately connected.

The issue presents one of the biggest challenges to uphold the majesty of international law in this century. As a corollary, the sovereign states and the UN as well as international relief and humanitarian agencies shall have to squarely address menace of gender-centric violence

to usher in a more humane, secure and just world.

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