Sexual Violence in Conflict: What Use is the Law?

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Introduction

This is a summary of an event held by the International Security Department and the International Law Programme at Chatham House on 23 January 2015. The meeting was organized to discuss the role of the law in criminalizing sexual violence, changing behaviour and providing effective responses to the needs of victims. This summary draws on the speeches delivered by the panellists, as well as on the subsequent discussion to present the main points and themes.

The summary is divided according to the following sub-topics:

1. The current legal framework
2. The requirement for a victim-centred analytical framework
3. Addressing context
4. Challenges and opportunities in the law

The meeting was not held under the Chatham House Rule.

The current legal framework

It is important to note that sexual violence in armed conflict is only a part of the wider problem of sexual violence against women. The UK-sponsored Preventing Sexual Violence in Conflict Initiative (PSVI) has as its goals: to eradicate rape as a weapon of war; to deter and prevent sexual violence; to support and recognize survivors; to change global attitudes that stigmatize survivors and grant impunity to perpetrators; and to embed an international acknowledgment and agreement that it is possible to end sexual violence in conflict.

Law is only one part of the means to meeting these goals; some would say that it is the least important part. Political will is key. But it is important to understand the legal frameworks to appreciate how they interact and complement one another. International humanitarian law (IHL), international human rights law (IHRL), international criminal law (ICL) and soft law are conceptually distinct areas that share a common, protective goal.

IHL, which regulates conduct during armed conflict, should be the starting point for examining the issue of sexual violence in armed conflict. Rape is expressly prohibited in international and non-international armed conflict under the Geneva Conventions and the Additional Protocols. Other forms of serious sexual assault are also explicitly or implicitly prohibited. As sexual violence constitutes a grave breach of the Geneva Conventions, it gives rise to universal jurisdiction. States are therefore obliged to search for and prosecute any individual who is alleged to have committed or ordered a grave breach, regardless of the nationality of the suspect or victim or where the crime occurred. It was stated that as a matter of treaty...
interpretation, sexual violence can constitute torture, which is also considered a grave breach. IHL therefore provides a strong tool for ensuring respect of human rights principles during armed conflict.

It was acknowledged that IHL has several limitations in its protective capacity. In order for the provisions of the Geneva Conventions and the Additional Protocols to apply, a situation of violence must amount to an ‘armed conflict’ in the legal sense. Additionally, grave breaches only arise from international armed conflicts. As conflicts are increasingly non-international, rights violations cannot be classified as ‘grave breaches’, which in turn means that universal jurisdiction (in the obligatory form of requiring investigation and prosecution) does not apply. It was also noted that universal jurisdiction is a contentious concept and that it has significant limitations in practical application.

Unlike IHL, IHRL is relevant in conflict situations as well as in non-conflict situations. It was noted that in the course of committing sexual violence, the right to life, the prohibition on slavery, the prohibition on torture and the rights of the child may be infringed. Other less apparent rights such as the right to equal participation in public affairs, the right to equal access to public services and the right to a private life may also be affected. While IHRL has broad application, most human rights obligations are imposed on the state and public officials of the state. As such, IHRL may be a useful tool for identifying and addressing systemic failings, but it is not necessarily helpful in individual cases. This limitation may be exacerbated by the inability of individuals to bring challenges and seek remedies.

ICL principally addresses genocide, war crimes and crimes against humanity. International criminal courts and tribunals have helped with counteracting impunity, ensuring accountability, punishing perpetrators and assisting with prevention. They have also contributed to the development of the law: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Panel for Serious Crimes (Timor-Leste) have all adjudicated on the elements of rape and sexual violence. ICL cannot, however, deal with all crimes in conflicts, and different courts have different mandates. Additionally, as ICL does not have a strict hierarchy of courts, interpretations of the elements of crimes may differ (and have done so in some cases). Therefore, there may be a question of whether access to justice is really equal. It was suggested that national criminal courts may be able to overcome some of the limitations of the international courts and tribunals.

Soft law refers to quasi-legal instruments that do not have legally binding force or whose binding force is somewhat weaker than the binding force of traditional law. However, it has the advantage of being able to incorporate elements of different areas of law as it is not mandate-specific. Soft law instruments can also be advantageous as they may reflect the views of a variety of actors and disciplines; states are not necessarily the only or most influential actors in developing guidelines contained in soft law instruments. Documents such as the PSVI declaration and UN General Assembly resolutions help to build up and share best practice and may show developments towards a generally accepted international standard. Additionally, soft law may reflect an understanding of what states consider to be their international legal obligations.

It was noted that each of the strands of international law has its limitations. However, as the limitations are not the same, different areas of law are able to complement one another in support of the shared goal of protecting individuals and preventing further situations of rights infringement.

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3 This view is supported by international practice. See Prosecutor v. Zdravko Mucić et al, IT-96-21-T, Trial Judgment (16 November 1998) para 1060 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), G8 Declaration on Preventing Sexual Violence in Conflict (2013) and UN General Assembly Declaration.
The requirement for a victim-centred analytical framework

Frameworks developed to address sexual violence in conflict must focus on the needs and requirements of victims and put the victim at the centre of any attempts to address the problem. Addressing sexual violence in conflict requires a holistic, multidisciplinary approach; the needs of victims are not always appropriately assessed or reflected in legal, administrative and policy frameworks. Analytical frameworks must therefore connect the multifaceted needs of the victim to the correlative obligations of authorities.

The International Committee of the Red Cross (ICRC) has developed such a framework; it is based on: providing protection and assistance for victims and their families (the Remedy Pillar); building stronger legal frameworks, including when it comes to the domestication of rape and sexual violence at the domestic level and incorporating ICL and IHL at the national level (the Normative Pillar); and strengthening institutions by ensuring that courts have jurisdiction over those most susceptible to committing acts of sexual violence, and ensuring that investigative bodies have adequate forensic capacity. This framework thus takes into consideration short-term as well as long-term needs of victims in relation to health care as well as to legal and administrative process. It also proposes elements of a preventive approach, grounded in the belief that normative and policy frameworks that are in full compliance with international law, combined with stronger institutions, could bring a change of culture and positively influence patterns of behaviour.

It was acknowledged that the ICRC’s analytical framework only looks to ordering state obligations. It does not address non-state armed groups or individuals. There is therefore an analytical gap. In order to ensure rights are protected, it is necessary to change behaviour; strictures alone are not adequate. This requires finding a common ground between the fundamental elements of the law and the objectives of groups and individuals that are susceptible to committing acts of sexual violence. It was argued that clearer rules with strong leadership and sanction could lead to better respect of the law.

It was emphasized that addressing sexual violence is not only about having good tools and skilled professionals. It is also about breaking the silence and fighting against commonly held taboos. This is only possible if victims are in environments and with people they trust. As such, any analytical frameworks developed must be combined with community-based approaches.

Addressing context

Effective frameworks must give due consideration to context and the reality of the situation. Issues of justice cannot be addressed without taking into account the immediate issues arising out of conflict. Short-term, pressing concerns of women in conflict situations include returning home, locating missing family members and finding ways to clothe and feed their children. Access to justice is only possible in practice once these short-term needs are met. Other short-term issues include ensuring access to health care and psychosocial counselling.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) applies to conflict and post-conflict situations, and States Parties are bound to apply the Convention ‘when they exercise territorial or extraterritorial jurisdiction, whether individually, for example in unilateral military action, or as members of international or intergovernmental organizations and coalitions, for example as part of an international peacekeeping force’. The protections afforded by the Convention, as well as those under international humanitarian law, refugee and criminal law must come together to protect the

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4 Para. 9 of the CEDAW committee’s General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.
individual woman from beginning to end. Doing otherwise would be subjecting her to cruel, inhuman and degrading treatment, which is one of the objectives of sexual violence in the first place.

Addressing the context also requires creating an environment that is supportive in perpetuity. The post-conflict transition should result in a continuum of change that is transformative of the context in which the violations take place. The importance of the long term was emphasized; the signing of a peace agreement does not mark the end of a conflict for women. It was noted that instances of sexualized violence, or gender-based violence more broadly, escalate at the end of conflict. Creating a supportive environment requires that the root causes of conflict be addressed through improved access to socioeconomic rights and participation. It was argued that conflict areas require the long-term presence of humanitarian organizations, the earlier presence of development organizations and better bridges between the two groups.

It is also important that women have equal and full participation as active agents in the prevention and resolution of conflicts, peace-building and peacekeeping. It was noted that there is empirical evidence from the financial sector to support the assertion that better decisions are made when both men and women are consulted. Additionally, examination of more than 40 peace agreements would suggest a correlation between the inclusion of women’s rights and sustainable peace.

**Challenges and opportunities in the law**

It was noted that legal structures and institutions are highly gendered. The different relationships that men and women have to structures of power affect the application, implementation and interpretation of the law. As a result, there is a highly differential impact on the way in which men and women are treated under the law. This unequal treatment causes problems evidenced by the statistics on the prosecution of sexual violence. Rape, which predominately affects women, is one of the most badly prosecuted crimes. Cases involving the rape of men in armed conflict situations are usually prosecuted as torture cases, which means that the issue of consent does not come into consideration. It was noted that these differences are derived from a patriarchal, heteronormative framework that has a particular view of female sexuality. It is therefore necessary to address issues of social and cultural inculcation in order to ensure that the law treats and responds to both men and women equally. The training of the military, both state and non-state, is a necessary part of any solution.

In conclusion, the importance of dealing with the problem of sexual violence as a whole was emphasized. It should not be dealt with via a silo approach. The Istanbul Convention on preventing and combating violence against women and domestic violence was mentioned.