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## Sexual Exploitation and Abuse in Conflict: An International Crime?

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# SEXUAL EXPLOITATION AND ABUSE IN CONFLICT: AN INTERNATIONAL CRIME?

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I. TERMINOLOGY.....	504
II. INTRODUCTION.....	505
III. BACKGROUND.....	508
A. CONFLICT RELATED SEXUAL VIOLENCE COMMITTED BY SECURITY FORCES.....	508
B. TYPES OF CONFLICT RELATED SEXUAL VIOLENCE COMMITTED BY SECURITY FORCES.....	509
C. ACCESS TO JUSTICE.....	510
D. CONFLICT RELATED SEXUAL VIOLENCE BY SECURITY FORCES AS AN INTERNATIONAL CRIME.....	513
IV. APPLICATION OF THE LAW: RECLASSIFYING SEA AS RAPE AS AN INTERNATIONAL CRIME.....	517
A. SPECIFIC ELEMENTS OF RAPE.....	518
1. Abuse of Power.....	519
2. Coercive Environments.....	521
B. SEA AS RAPE AS A CRIME AGAINST HUMANITY.....	523
C. SEA AS RAPE AS A WAR CRIME.....	528
V. IMPACT OF RECLASSIFICATION.....	530
VI. CONCLUSION.....	532

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## I. TERMINOLOGY

This article refers to “security forces”, a category which includes state militaries and police (“state security forces”) and peacekeepers.<sup>1</sup> It refers to both conflict-related sexual violence (CRSV) and the more specific category of sexual exploitation and abuse (SEA).<sup>2</sup> SEA is not adequately defined in any legal instrument or international case.<sup>3</sup> “Sexual abuse” is used to refer to acts that are obviously forced or coercive.<sup>4</sup> “Sexual exploitation” is the term generally used for sexual relations entered into where a veneer of consent is present, including the categories of “transactional sex” and “sexually exploitative relationships” listed in the United Nations (UN)’s online database of SEA allegations against peacekeepers<sup>5</sup> and in the UN Special Coordinator on improving the UN’s response to SEA’s *Glossary of Terms*.<sup>6</sup> This article focuses on internally displaced person (IDP) camps with a high presence of security forces in conflict countries because of the prevalence of all of the abovementioned forms of SEA in such environments. While the article continues to refer to CRSV, rape and SEA as distinct categories of crimes, it argues that in most circumstances, SEA will constitute rape and should be defined as such in the UN allegations database and *Glossary of Terms* and for the

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1. See *infra* Part III.

2. U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, ¶¶ 2, 8, UN Doc. S/2018/250 (Apr. 16, 2018) [hereinafter *2018 Report of the Secretary-General on CRSV*].

3. Case law from the ad hoc tribunals does not refer to ‘sexual exploitation and abuse’ as a term and it is not included in any treaty law. The Special Coordinator on improving the United Nations response to sexual exploitation and abuse has released a glossary attempting to define different types of SEA, to be used as guidance. See Task Team on the SEA Glossary for the Special Coordinator on Improving the United Nations Response to Sexual Exploitation and Abuse, *Glossary on Sexual Exploitation and Abuse: Thematic Glossary of Current Terminology Related to Sexual Exploitation and Abuse (SEA) in the Context of the United Nations*, ¶¶ 4-6 (Oct. 5, 2016), [https://reliefweb.int/sites/reliefweb.int/files/resources/un\\_glossary\\_on\\_sea.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/un_glossary_on_sea.pdf) [hereinafter *Glossary on SEA*] (highlighting the vagueness of SEA definitions).

4. See *id.* (“Actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”).

5. See *Sexual Exploitation and Abuse: Table of Allegations*, CONDUCT IN UN FIELD MISSIONS, <https://conduct.unmissions.org/table-of-allegations> (last visited Mar. 21, 2019).

6. See *Glossary on SEA*, *supra* note 3, ¶¶ 6, 13, 16.

purposes of prosecution. Finally, “international crimes” is used as a general term describing war crimes and crimes against humanity.<sup>7</sup> A consideration of whether SEA may constitute rape as an act of genocide is beyond the scope of this article.

## II. INTRODUCTION

Since the early 1990s, the international legal community has recognized the devastating impact of sexual violence committed in conflict by recognizing that rape and other sexual acts may constitute torture, war crimes, crimes against humanity, and acts of genocide under international law.<sup>8</sup> Despite this progress, accountability and access to justice for CRSV committed by security forces in conflicts worldwide remains extremely limited.<sup>9</sup> The historic failure of the international community to prevent and punish CRSV is most acute in relation to addressing sexual violations that are committed in private, without an obviously violent, public or performative dimension.<sup>10</sup> Historically, one of the biggest challenges for anti-sexual violence activists has been the perception of rape as an intimate, private act, committed outside the reach of legal regimes focused on public action.<sup>11</sup> Though decades of work by women’s rights activists have

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7. Rome Statute to the International Criminal Court arts. 1, 5, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

8. *See, e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23/I-A, Judgment, ¶¶ 1-10 (June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>. While for some time this focus was almost exclusively on rape committed by combatants from one side of the conflict against women belonging to the other, there is growing recognition that sexual violence against victims from the same side of the conflict as the perpetrator also increases during conflict. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06 OA5, Judgment, ¶¶ 1-2 (June 15, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_03920.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF) (rejecting the argument of the accused that he could not be tried for the rape of his own soldiers).

9. *See, e.g.*, 2018 Report of the Secretary-General on CRSV, *supra* note 2, ¶¶ 23, 61 (citing Afghanistan and Somalia as examples).

10. *See* Rhonda Copleon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L. REV. 243, 264-65 (1994) (discussing the public/private dichotomy of rape).

11. *See, e.g.*, Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, 13 EUR. J. INT’L L. 697, 700, 712 (2002).

increased accountability for both the domestic crime of rape and rape as a war crime and crime against humanity, cases that prosecute rape committed in private as an international crime are extremely rare.<sup>12</sup> The experience of the ad hoc tribunals and jurisdictions around the world has been that sexual violations are considered conflict-related acts of violence only where there is some “public” dimension to their commission:<sup>13</sup> for example, if they are carried out as part of an attack,<sup>14</sup> committed publicly;<sup>15</sup> or serve a purpose that is solely related to the conflict, such as forcing subordination, punishing the victim or rewarding soldiers.<sup>16</sup> Sexual violence carried out in private is often considered opportunistic, and therefore unrelated to the conflict.<sup>17</sup> Such crimes are rarely prosecuted, much less prosecuted as war crimes or crimes against humanity.<sup>18</sup>

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12. The author has done significant research into the existence of such cases over the past 30 years and found evidence of prosecutions or civil cases being prepared or brought in Bosnia and Herzegovina, Serbia and Montenegro, Croatia, the Netherlands, Norway, Colombia, Guatemala, Ecuador, Peru, Argentina, Bangladesh, Uganda, Canada, the United States, and the United Kingdom. Each of these cases is the result of significant civil society activism and pressure, and they represent a small fraction of total war crimes, crimes against humanity, and genocide cases taken.

13. See Rhonda Copleon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 197, 205 (Alexandra Stiglmeier ed., Marion Faber trans., Univ. Neb. Press 1994).

14. See, e.g., Prosecutor v. Katanga, Case ICC-01/04-01/07, Judgment, ¶¶ 1-13 (Mar. 7, 2014), [https://www.icc-cpi.int/courtrecords/cr2015\\_04025.pdf](https://www.icc-cpi.int/courtrecords/cr2015_04025.pdf) (finding rape was committed as a war crime and crime against humanity, but the linkage element was missing and so Katanga was not convicted of rape); Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶¶ 1-12 (Mar. 14, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_03942.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF).

15. See, e.g., Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 115 (Sept. 1, 2004), <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 731 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

16. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 501 (Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Dyilo, Case No. ICC-01/04-01/06, ¶¶ 32, 892-95.

17. See Elisabeth J. Wood, *Conflict-Related Sexual Violence and the Policy Implications of Recent Research*, 96 INT'L REV. RED CROSS 457, 470-71 (2015), <https://www.icrc.org/en/international-review/article/conflict-related-sexual-violence-and-policy-implications-recent>.

18. See *supra* note 12 and accompanying text.

Cases of SEA have been treated even less seriously. While UN documents acknowledge that rape is a form of sexual abuse, they do not describe sexual exploitation as amounting to rape and in practice distinguish SEA as a category from other serious crimes.<sup>19</sup> The contention that SEA is a form of rape and that it may constitute a war crime or crime against humanity in certain circumstances, is conspicuously absent from both these documents and more general conversations within the UN and the wider international community about how to respond to such allegations.<sup>20</sup> The UN Secretary-General's 2017 report *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, for example, identifies four categories of SEA: (i) exploitative relationships; (ii) transactional sex; (iii) sexual activities with minors; and (iv) sexual assault.<sup>21</sup> It only describes the last category as including rape, and makes no mention that any of the named acts may constitute war crimes or crimes against humanity.<sup>22</sup>

This article argues firstly that SEA committed by security forces in a conflict environment will constitute rape under international law in most circumstances. The context of the conflict and the unequal power relationship between the security forces and local populations constitutes “coercive circumstances” and/or “abuse of power” under international criminal law, both factors negating the possibility of consent to a sexual act under the Elements of Crime document that accompanies the Rome Statute to the International Criminal Court (ICC).<sup>23</sup> Secondly, this article argues that SEA committed by security forces during conflict will in most circumstances constitute a war crime, and in some circumstances constitute a crime against humanity.

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19. See, e.g., UN Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: A New Approach*, annex IV, UN Doc. A/71/818 (Feb. 28, 2017) [hereinafter *A New Approach*] (making a distinction between sexual exploitation and sexual abuse at the outset but then goes on to classify SEA in general terms in a way that appears to exclude rape).

20. See generally *id.* at 2-82.

21. *Id.* annex IV.

22. *Id.*

23. The Elements of Crime document guides practitioners on interpreting the Rome Statute, most of which has now attained the status of international customary law. See ICC ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE, ELEMENTS OF CRIMES art. 7(1)(g)-1, UN Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2002).

Finally, this article discusses the practical ramifications of the above legal positions for security forces operating in IDP camps during times of conflict. While the full list of implications are likely to be numerous, this article focuses on this situation because it is in these circumstances that SEA by the security forces appears to be perpetrated most widely.<sup>24</sup> Though a case by case analysis will always be needed, this article concludes that SEA committed by security forces against people in IDP camps during times of conflict will almost always constitute rape as a war crime, and may constitute rape as a crime against humanity in certain circumstances. Further, unless extraordinary circumstances exist, IDPs residing in camps during a conflict are not legally capable of consenting to sex with security forces under international criminal law (ICL) or international humanitarian law (IHL).

### III. BACKGROUND

#### A. CONFLICT RELATED SEXUAL VIOLENCE COMMITTED BY SECURITY FORCES

Sexual violence committed by security forces, including both state forces and peacekeeping troops, has long been a challenge in the fight against impunity for conflict-related sexual violence.<sup>25</sup> A comprehensive study published in 2014 looking at 129 conflict and post-conflict environments and 625 armed actors in those conflicts from the period of 1989–2009 found that sexual violence was more frequently perpetrated by state militaries than rebel or militia groups.<sup>26</sup> The UN Secretary-General's 2017 Report on Conflict-Related Sexual Violence, which describes fourteen active conflicts in 2016, names

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24. Author's experience in working in Somalia and South Sudan; *see generally* Marija Obradovic, *Protecting Female Refugees Against Sexual and Gender-based Violence in Camps*, U.N. U. (Nov. 9, 2015), <https://unu.edu/publications/articles/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps.html>.

25. *See 2018 Report of the Secretary-General on CRSV, supra* note 2, ¶¶ 21, 23, 25, 38-39, 47, 55-56 (denoting instances when security officials perpetrated sexual violence in Cote D'Ivoire, Afghanistan, Democratic Republic of Congo, Libya, Mali, and Myamar).

26. Dara Kay Cohen & Ragnhild Nordås, *Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989-2009*, 51 J. PEACE RES. 418, 418-19 (2014).

state security forces as perpetrators of widespread sexual violence in ten of those conflicts.<sup>27</sup> Nine of the countries surveyed in the report have active UN, African Union (AU), or hybrid UN/AU peacekeepers present, and in 2016 and 2017, there were allegations of SEA recorded against every one of these missions.<sup>28</sup>

## B. TYPES OF CONFLICT RELATED SEXUAL VIOLENCE COMMITTED BY SECURITY FORCES

Sexual violence carried out against civilians by national forces and peacekeeping troops range from rape, abductions, and sexual slavery (recognized in most literature as sexual violence or CRSV),<sup>29</sup> to sexual relationships occurring in coerced circumstances or with unequal power dynamics and sex in exchange for money, goods, services, or security (recognized in most literature as SEA).<sup>30</sup> An assessment of the allegations made against both categories of security actors in the UN Secretary-General's 2017 Report on Conflict Related Sexual Violence reveals that allegations of mass rape, abductions, and largescale sexual slavery were more likely to be alleged against national forces, while allegations of SEA were more likely to be alleged against the peacekeepers.<sup>31</sup> Anecdotal reports in Somalia, South Sudan, and Nigeria indicate that SEA perpetrated by state security forces is also common, though rarely reported.<sup>32</sup> These two categories of crimes, despite their differences, also have similarities: the vast majority are perpetrated against vulnerable communities, with women and children, IDPs, and members of ethnic and religious minorities being

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27. U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, ¶¶ 14, 16, 34-35, 46, UN Doc. S/2017/249 (Apr. 15, 2017) [hereinafter *2017 Report of the Secretary-General on CRSV*].

28. *Sexual Exploitation and Abuse: Table of Allegations*, *supra* note 5.

29. See *2018 Report of the Secretary-General on CRSV*, *supra* note 2, ¶¶ 2, 8.

30. Glossary on SEA, *supra* note 3, ¶¶ 4-7.

31. See *2017 Report of the Secretary-General on CRSV*, *supra* note 27, ¶¶ 19, 35, 47, 61-62 (listing the number of sexual violence cases against state security forces that the United Nations documented in 2016); *Sexual Exploitation and Abuse: Table of Allegations*, *supra* note 5.

32. *2017 Report of the Secretary-General on CRSV*, *supra* note 27, ¶¶ 55-56, 60; *Nigeria: Officials Abusing Displaced Women, Girls*, HUM. RTS. WATCH (Oct. 31, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/31/nigeria-officials-abusing-displaced-women-girls>.



the most affected.<sup>33</sup>

This article will focus specifically on SEA perpetrated by the security forces against people living in IDP camps. In environments where IDP and refugee camps and settlements have a heavy presence of police, military or peacekeepers, or exist in close proximity to national or peacekeeping military bases, the rates of sexual violence committed by security and peacekeeping forces appear to rise.<sup>34</sup> In South Sudan for example, a UN study conducted in 2016 found that seventy percent of women residing in Protection of Civilian (POC) camps in Juba had been raped.<sup>35</sup> A preliminary study conducted by the South Sudan Law Society in the same year found that the residents of the camps named government security forces as the primary perpetrators.<sup>36</sup> There are numerous reports of IDP and refugee camp residents entering into “transactional sex” or otherwise sexually exploitative relationships with state security forces in Nigeria<sup>37</sup> and Northern Uganda,<sup>38</sup> and with peacekeepers in Haiti,<sup>39</sup> Democratic Republic of the Congo (DRC),<sup>40</sup> Somalia,<sup>41</sup> Liberia, Sudan, and South Sudan.<sup>42</sup>

### C. ACCESS TO JUSTICE

Justice for CRSV committed by security forces is notoriously

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33. Diana Therese M. Veloso, De La Salle Univ., Multiple Marginalization and Gender-Based Violence in Post-Conflict Settings: The Experiences of IDPs in Zamboanga City, Presentation at the 10th De La Salle University Arts Congress (Feb. 16, 2017).

34. See 2017 Report of the Secretary-General on CRSV, *supra* note 27, ¶¶ 15, 62, 64; Cohen & Nordås, *supra* note 26, at 425.

35. Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan, Statement at the 26th Special Session of the U.N. Human Rights Council (Dec. 14, 2016).

36. S. SUDAN LAW SOC'Y, SEARCH FOR A NEW BEGINNING: PERCEPTIONS OF TRUTH, JUSTICE, RECONCILIATION AND HEALING IN SOUTH SUDAN 44 (2015).

37. Nigeria: Officials Abusing Displaced Women, Girls, *supra* note 32.

38. SWEDISH RED CROSS, IHL AND GENDER – LESSONS LEARNED FROM A FIELD STUDY IN UGANDA 31 (2015).

39. *Sexual Exploitation and Abuse: Table of Allegations*, *supra* note 5.

40. *Id.*

41. HUMAN RIGHTS WATCH, “THE POWER THESE MEN HAVE OVER US:” SEXUAL EXPLOITATION AND ABUSE BY AFRICAN UNION FORCES IN SOMALIA 18 (2014) [hereinafter HUMAN RIGHTS WATCH SOMALIA].

42. *Sexual Exploitation and Abuse: Table of Allegations*, *supra* note 5.

difficult to obtain.<sup>43</sup> The UN Secretary-General's 2017 report did not find evidence of any convictions against national security forces in ten of the fourteen conflict affected countries described.<sup>44</sup> The Deputy Prime Minister of Libya cited the failure of the authorities to prevent and prosecute sexual violence committed by state forces as one of the reasons for his resignation in January 2017.<sup>45</sup> The 2017 UN Secretary-General report recorded some prosecutions of security forces for CRSV in Afghanistan (convictions of two border police); Colombia (two percent conviction rate for allegations documented by the Constitutional Court); and Sudan (three trials for CRSV, though it is unclear whether they resulted in a conviction).<sup>46</sup> The only country listed that made significant progress in making largescale convictions for sexual violence was the DRC, where the UN recorded 100 convictions of members of the state security forces in 2016, and where twenty-six of the gravest cases of CRSV had been prioritised for prosecution by the year's end.<sup>47</sup>

Access to justice for sexual violations committed by peacekeepers is often even more elusive.<sup>48</sup> The culture of impunity surrounding SEA committed by peacekeeping forces has gained international attention in recent years, prompting the UN to adopt a "new approach", in the March 2016 report *Special Measures for Protection from Sexual Exploitation and Abuse*.<sup>49</sup> Even with the adoption of this new approach, convictions of perpetrators remain extremely limited for several reasons. First, despite information collected by the UN indicating that approximately half of the UN personnel accused of SEA are civilian staff, the Convention on the Privileges and Immunities of the United Nations continues to give this category of employees immunity from suit in any court.<sup>50</sup> Second, where the

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43. See *2017 Report of the Secretary-General on CRSV*, *supra* note 27, ¶ 11.

44. *Id.*

45. Aidan Lewis, *Deputy Leader of Libya's U.N.-Backed Government Resigns*, REUTERS (Jan. 2, 2017, 2:39 PM), <https://www.reuters.com/article/us-libya-security-politics-idUSKBN14M13A>.

46. *2017 Report of the Secretary-General on CRSV*, *supra* note 27, ¶¶ 16, 27, 67.

47. *Id.* ¶ 35.

48. *A New Approach*, *supra* note 19, ¶¶ 8, 12.

49. *Id.* ¶ 13.

50. Convention on the Privileges and Immunities of the United Nations art. 6,

accused are military staff, UN policy mandates that they be investigated and then referred to the prosecution authority of their own countries if there is sufficient evidence to support a case.<sup>51</sup> In such circumstances, however, troop contributing countries (TCCs) have proven reluctant to prosecute.<sup>52</sup> Third, the victim of the sexual violation must report the incident to the peacekeeping unit in order to begin the investigation process—a step many victims are reluctant to undertake, considering they would be reporting to the same institution that abused them in the first place.<sup>53</sup>

While the UN's new approach does not address these challenges in full, it does include mechanisms to follow up more effectively on domestic prosecutions.<sup>54</sup> The adoption of this new policy document in 2017 does not seem to have had a practical impact.<sup>55</sup> Notably, there have not been any convictions made against the French peacekeepers which were accused of sexual abuse in the Central Africa Republic (CAR), despite the international attention given to the case and the issue of SEA by peacekeepers more generally.<sup>56</sup> Charges in one case have been dropped, and three investigations remain open almost three years after the allegations were made public.<sup>57</sup> The outcome of investigations into SEA by peacekeepers in the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSC), which received the most allegations of SEA between June 2016 and the end of 2017, is also illustrative: of 56 allegations of

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Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16.

51. *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, *supra* note 19, § 5.

52. See MARIE DESCHAMPS ET AL., TAKING ACTION ON SEXUAL EXPLOITATION AND ABUSE BY PEACEKEEPERS 25, 86 (2015).

53. Press Release, Code Blue Campaign, The UN's Fatally Flawed 'New Approach' to Sexual Abuse (Mar. 10, 2017), <http://www.codebluecampaign.com/press-releases/2017/3/10>.

54. See *A New Approach*, *supra* note 19, ¶ 13.

55. See, e.g., Angélique Chrisafis & Sandra Laville, *No Charges Sought Over Abuse Claims Against French Troops in CAR*, GUARDIAN (Jan. 5, 2017, 12:23 PM), <https://www.theguardian.com/world/2017/jan/05/no-charges-sought-over-abuse-claims-against-french-troops-in-car>.

56. See *id.*

57. *Id.*; Interview by author with employee of Code Blue Campaign (on file with author).

SEA made, only one resulted in a prison sentence of ten months.<sup>58</sup>

#### D. CONFLICT RELATED SEXUAL VIOLENCE BY SECURITY FORCES AS AN INTERNATIONAL CRIME

While the number of cases taken against members of the security forces for sexual violence as a domestic crime is low across conflict countries, the number prosecuted for sexual violence as a war crime or crime against humanity is even lower.<sup>59</sup> The duty to investigate and prosecute international crimes is enshrined in the Geneva Conventions,<sup>60</sup> the Rome Statute,<sup>61</sup> and the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles).<sup>62</sup> These instruments do not explicitly require domestic tribunals to prosecute such offences as international rather than ordinary crimes.<sup>63</sup> However, the very purpose of international criminal and humanitarian law is to criminalize acts that shock the conscious of humanity, rather than a specific domestic political community.<sup>64</sup> The recognition of rape as an international crime from the 1990s onwards was a major victory for advocates of access to justice and accountability for sexual violence.<sup>65</sup> It is important that domestic

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58. Sexual Exploitation and Abuse Allegations in MONUSCO, CONDUCT IN UN FIELD MISSIONS, <https://conduct.unmissions.org/> (follow “Table of Allegations” hyperlink; then select only “MONUSCO” under “Missions” and select only “2016 and 2017” under “Year”).

59. See, e.g., LaShawn R. Jefferson, *In War as in Peace: Sexual Violence and Women’s Status*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 325, 338 (2004) (noting that the ICTY has “failed to meet expectations for establishing accountability for sexual violence”).

60. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3.

61. Rome Statute, *supra* note 7, pmb1.

62. G.A. Res. 60/147, annex, ¶ 1 (Mar. 21, 2006).

63. See PAUL SEILS, INT’L CTR. FOR TRANSITIONAL JUSTICE, HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 14 (2016) (noting that the Rome Statute provisions do not affect national laws and punishment).

64. See Massimo Renzo, *Crimes Against Humanity and the Limits of International Criminal Law*, 31 L. & PHIL. 443, 467 (2012).

65. *Background Information on Sexual Violence Used as a Tool of War*, UN,

tribunals adjudicating on offences committed in conflict environments treat rape and other forms of CRSV with the seriousness such crimes deserve.

According to the Coalition for the International Criminal Court, only seventy of the world's 195 countries have criminalized war crimes and crimes against humanity in their domestic legislation.<sup>66</sup> The majority of conflict-affected countries have not done so.<sup>67</sup> Again, the DRC stands out—in the past five years, creative interventions led by civil society and supported by the international community have seen numerous ground-breaking instances of sexual violence committed by the security forces prosecuted as international crimes.<sup>68</sup> Globally, there are also examples of rape being prosecuted as an international crime in recent years in Colombia, Guatemala, Peru,<sup>69</sup> Bosnia,<sup>70</sup> Kosovo,<sup>71</sup> Uganda,<sup>72</sup> and the UK (prosecuting crimes committed in Liberia).<sup>73</sup> Altogether however, these cases represent

<http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml> (last visited Mar. 21, 2019).

66. *Our Story*, COALITION FOR THE INT'L CRIM. CT., <http://www.coalitionfortheicc.org/about/our-story> (last visited Jan. 27, 2019).

67. See *2017 Report of the Secretary-General on CRSV*, *supra* note 27, ¶¶ 17, 27, 50, 53, 57, 58, 67 (demonstrating that the majority of conflict affected countries have no legal framework to deal with sexual violence crimes, and of the few that do, only Afghanistan has incorporated the Rome Statute to make sexual violence rise to the level of an international crime).

68. See, e.g., Diana Z. Alhindawi, *They Will be Heard: The Rape Survivors of Minova*, AL JAZEERA AM. (Mar. 14, 2014, 2:59 PM), <http://america.aljazeera.com/multimedia/2014/3/they-will-be-heard-therapesurvivorsofminova.html>.

69. Daniela Kravetz, *Promoting Domestic Accountability for Conflict Related Sexual Violence: The Cases of Guatemala, Peru, and Colombia*, 32 AM. U. INT'L L. REV. 707, 711 (2017).

70. *Bosnia: Key Lessons from War Crimes Prosecutions*, HUM. RTS. WATCH (Mar. 12, 2012, 12:35 AM), <https://www.hrw.org/news/2012/03/12/bosnia-key-lessons-war-crimes-prosecutions>.

71. Edona Peci, *Two Serbs Acquitted of War Rape in Kosovo*, BALKAN INSIGHT (Apr. 19, 2013), <http://www.balkaninsight.com/en/article/serbs-acquitted-of-war-rapes-in-kosovo>.

72. Thomas Kwoyelo, TRIAL INT'L (Apr. 25, 2016), <https://trialinternational.org/latest-post/thomas-kwoyelo/>.

73. Scott Campbell, *Ex-wife of Former Liberian President is Refused Bail Ahead of Her Trial for 'Torturing Children and Plotting to Commit Rape During the Civil War Nearly 30 Years Ago'*, DAILY MAIL (Dec. 18, 2017, 3:58 PM), <https://www.dailymail.co.uk/news/article-5192203/Ex-wife-former-Liberian-president-refused-bail.html>.

only a handful of the cases taken to prosecute CRSV, and only a tiny fraction of the CRSV actually committed.<sup>74</sup>

As stated above, the idea that SEA committed by peacekeeping troops may amount to rape as a war crime or crime against humanity is glaringly absent from the both the legal literature and global debate surrounding this issue.<sup>75</sup> Most sources make a distinction between SEA and rape, despite the fact that SEA is coercive by definition, thereby eliminating the possibility of real consent.<sup>76</sup> The *Glossary of Terms* released by the UN Special Representative of SEA not only distinguishes between rape and other forms of SEA but states in section 1.3 that sexual assault differs from rape in that it “may be committed by other means than force or violence.”<sup>77</sup> The requirement for force or violence to be present to prove an allegation of rape reflects an outdated understanding of sexual violence and is not supported by current international law.<sup>78</sup>

As recognised by the Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the CAR:

If the UN and the TCCs are to rebuild the trust of victims, local civilian populations, and the international community, deliberate, effective, and immediate action is required. The first step is to acknowledge that sexual violence perpetrated by peacekeeping troops is not merely a disciplinary matter, but also a serious human rights violation and may amount to a crime.<sup>79</sup>

The UN Secretary-General’s “new approach” report is silent on the issue of how SEA should be categorised under ICL or IHL.<sup>80</sup> Even

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74. See Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT’L L.J. 639, 640-641 (2015) (stating that although the occurrence of sexual violence in conflict is high, perpetrators are not often prosecuted).

75. See, e.g., MARIA ERIKSSON, *DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW?* 11 (Örebro Univ. 2010).

76. ERIKSSON, *supra* note 75, at 17.

77. Glossary on SEA, *supra* note 3, ¶ 9.

78. ELEMENTS OF CRIMES, *supra* note 23, art. 7(1)(g)-1; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 598 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

79. DESCHAMPS ET AL., *supra* note 52, at xiii.

80. See generally *A New Approach*, *supra* note 19.

Code Blue, a campaign by the international non-governmental organisation (NGO) Aids Free Word dedicated to ending impunity for sexual violence by UN peacekeeping personnel, does not argue in its materials that such violence could constitute rape as an international crime.<sup>81</sup> Again, one of the only places this argument is made is in the abovementioned Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the CAR, which found that “the procurement of sex from children in exchange for food or money”—the subject of the investigation—“may constitute grave violations of international human rights, international humanitarian law, and international criminal law.”<sup>82</sup> While SEA committed by peacekeeping forces is the subject of worldwide scrutiny, SEA committed by state forces has not received the same attention.<sup>83</sup> It is unclear if any international policies or cases attempt to classify SEA by state forces as rape as a crime under international law.

Vague classifications of SEA committed by security forces in conflict as a category separate to rape, and silence about whether it could constitute an international crime, reflect a misapplication of the law.<sup>84</sup> First, it is well documented that many instances of SEA perpetrated by the security forces in times of conflict are committed against children.<sup>85</sup> It is settled under ICL and IHL that any sexual act committed against a child constitutes rape.<sup>86</sup> Second, there are numerous reports in conflict affected countries of police forces

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81. See generally *The Problem: Impunity for Sexual Exploitation and Abuse by UN Personnel*, CODE BLUE CAMPAIGN, <http://www.codebluecampaign.com/the-problem> (last visited Mar. 21, 2019).

82. DESCHAMPS ET AL., *supra* note 52, at 21.

83. See JENI WHALAN, DEALING WITH DISGRACE: ADDRESSING SEXUAL EXPLOITATION AND ABUSE IN UN PEACEKEEPING 16-17 (2017), <https://www.ipinst.org/wp-content/uploads/2017/08/IPI-Rpt-Dealing-with-Disgrace2.pdf> (discussing the “grey area” of sexual abuse committed by non-UN forces).

84. See ERIKSSON, *supra* note 75, at 11.

85. See, e.g., *2018 Report of the Secretary-General on CRSV*, *supra* note 2, ¶ 38 (noting that a significant number of crimes committed by security forces in the Democratic Republic of Congo were committed against children).

86. See NO PEACE WITHOUT JUSTICE AND UNICEF INNOCENTI RESEARCH CTR., INTERNATIONAL CRIMINAL JUSTICE AND CHILDREN 78 (2002).

committing SEA against people in detention.<sup>87</sup> The Elements of Crimes of the Rome Statute recognizes detention as a form of coercion, which eliminates the possibility that the detainee could consent to the sexual act.<sup>88</sup> Even before the adoption of the Rome Statute, judges at the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) had concluded that detainees held in prison camps were legally unable to consent to sexual activity with the camp guards on the basis that the situation was inherently coercive, regardless of what they said or how they acted.<sup>89</sup> IDP camps are distinguishable from prison camps because their residents have significantly more freedom of movement and are less vulnerable to sustained abuse.<sup>90</sup> However, an argument can be made that international jurisprudence in this area, though under-developed, supports a finding that sexual encounters between security forces and displaced persons in IDP camps will always be coercive, preventing the potential for consent to be given.

#### IV. APPLICATION OF THE LAW: RECLASSIFYING SEA AS RAPE AS AN INTERNATIONAL CRIME

The section below will apply ICL and IHL treaties and jurisprudence to the question of whether SEA committed by security forces against IDPs residing in camps during times of conflict will constitute rape as a war crime and/or a crime against humanity under international law. It concludes that SEA against minors will always constitute rape and SEA against adults will almost always constitute rape because of the inherently coercive circumstances and unequal power relationship between the parties. In other words, the presumption in such circumstances should be that the sexual act—whether violent abuse or exploitative—is an act of rape, and a strong

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87. See 2018 Report of the Secretary-General on CRSV, *supra* note 2, ¶¶ 47, 50 (noting this issue has occurred in Libya).

88. ELEMENTS OF CRIMES, *supra* note 23, 7(1)(g)-1(2).

89. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

90. See Erin Mooney, *The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern*, 24 REFUGEE SURVEY Q. 1 (2005) (defining internally displaced persons as only those uprooted by conflict, violence, or persecution).



counter argument would need to be made to prove that the circumstances were not coercive or that the relationship was not unequal. In terms of whether such acts will constitute crimes against humanity, it concludes that they will if sufficiently widespread and committed habitually by security forces. In terms of whether they will constitute war crimes, it concludes that they would in the vast majority of circumstances.

Under ICL, three categories of elements of crime must be demonstrated to prove the existence of a war crime or a crime against humanity: (i) the specific elements of the crime (e.g., proving that the crime is rape); (ii) the contextual elements of the crime (i.e., proving that the crime was committed as a war crime or a crime against humanity); and (iii) a nexus or link between the conduct of the perpetrator and the widespread and systematic attack (in relation to crimes against humanity) or the armed conflict (in relation to war crimes).<sup>91</sup> The following section outlines the specific elements of rape, the contextual elements of war crimes and crimes against humanity, and the nexus requirement. While the argument could also be made that SEA may constitute sexual violence, sexual slavery, and enforced prostitution in certain circumstances, these crimes are outside the scope of this article.

#### A. SPECIFIC ELEMENTS OF RAPE

Rape is defined under the Rome Statute as penetration of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or body part, in circumstances where the penetration is committed:

- by force, or by threat of force;
- by coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power;
- by taking advantage of a coercive environment;
- against a person incapable of giving genuine consent.<sup>92</sup>

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91. See HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 33-65 (2004).

92. ELEMENTS OF CRIMES, *supra* note 23, arts. 7(1)(g)-1, 8(2)(b)(xxi).

For SEA committed against children, allegations of which are common,<sup>93</sup> the most relevant and easily proved category from this list is that the person was legally incapable of giving consent due to being a minor.<sup>94</sup> For SEA committed against adults, the most relevant categories are abuse of power as a form of coercion and the existence of a coercive environment.<sup>95</sup>

### 1. Abuse of Power

Within international criminal jurisprudence, circumstances in which abuse of power has been found to exist generally coincide with circumstances where the victim is detained or in custody.<sup>96</sup> However, it is clear from these cases that “abuse of power” is a broader category than one that relates to detention alone, and includes a range of “situations where the perpetrator is in a position of political, military or other power over the victim.”<sup>97</sup> In *Kvočka*, for example, though the facts of the case occurred in conditions of detention, abuse of power was found to have occurred not because the detainees were detained *per se* but because of their position of vulnerability in relation to the camp manager.<sup>98</sup> The case of *Krnojelac*,<sup>99</sup> also concerning a detention centre, further illustrates that abuse of power may exist even where the person involved appears to have a choice about whether to do the act that underpins the criminal charge. In that case, the Chamber found

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93. See, e.g., DESCHAMPS ET AL., *supra* note 52, at ii.

94. AMNESTY INT’L, RAPE AND SEXUAL VIOLENCE: HUMAN RIGHTS LAW AND STANDARDS IN THE INTERNATIONAL CRIMINAL COURT 32 (2011) [hereinafter AMNESTY INT’L RAPE AND SEXUAL VIOLENCE].

95. U.N. HIGH COMM’R FOR REFUGEES, SEXUAL AND GENDER-BASED VIOLENCE AGAINST REFUGEES, RETURNEES, AND INTERNALLY DISPLACED PERSONS: GUIDELINES FOR PREVENTION AND RESPONSE 13 (2003), <https://www.unhcr.org/3f696bcc4.html> [hereinafter UNHCR GUIDELINES FOR PREVENTION AND RESPONSE].

96. AMNESTY INT’L RAPE AND SEXUAL VIOLENCE, *supra* note 94, at 23.

97. *Id.*

98. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 548 (Intl Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

99. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶¶ 226, 229 (Intl Crim. Trib. for the Former Yugoslavia Sept. 17, 2003), <http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf>.

that a group of people had been subject to forced labour, notwithstanding that they were given a choice whether to participate and no threats were made against them in the case that they refused.<sup>100</sup> It came to this determination because it was “satisfied that the detainees worked in order to avoid being beaten or in the hope of obtaining additional food.”<sup>101</sup>

Though this case concerned forced labour rather than rape, the facts used to prove the abuse of power element are comparable to those existing in SEA concerning security forces and residents of IDP camps during times of conflict.<sup>102</sup> While an IDP may appear to have a choice about whether to enter into a “sexually exploitative” relationship or “transactional sex”, it is well documented that IDPs enter into these relationships and encounters in exchange for money, food, medicine, security, and other benefits in extremely dangerous and difficult environments.<sup>103</sup> Meaningful choice and agency for an IDP tasked with providing for his or her family in such circumstances may not exist. The Inter-Agency Standing Committee (IASC) Task Force on Protection from SEA’s Standards of Conduct and the UN zero tolerance policy both recognize the existence of an unequal power relationship by prohibiting any sexual relations between peacekeeping and humanitarian personnel and beneficiaries.<sup>104</sup> The consequence of this unequal relationship is that an IDP residing in a camp cannot legally consent to a sexual encounter with a member of the security forces, as any such encounter will constitute an abuse of power.<sup>105</sup>

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100. *Id.* ¶¶ 194-95.

101. *Id.* ¶ 194.

102. AMNESTY INT’L RAPE AND SEXUAL VIOLENCE, *supra* note 94, at 6 (showing that abuse of power occurs when there is a lack of consent); Krnojelac, Case No. IT-97-25-A, ¶ 191.

103. Office of Internal Oversight Services, Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, ¶ 26, UN Doc. A/59/661 (Jan. 5, 2005) [hereinafter Investigation by the Office of Internal Oversight Services].

104. INTER-AGENCY STANDING COMM., REPORT OF THE INTER-AGENCY STANDING COMMITTEE TASK FORCE ON PROTECTION FROM SEXUAL EXPLOITATION AND ABUSE IN HUMANITARIAN CRISES 8 (2002), [https://interagencystandingcommittee.org/system/files/legacy\\_files/IASC%20english%20POA%20and%20report.pdf](https://interagencystandingcommittee.org/system/files/legacy_files/IASC%20english%20POA%20and%20report.pdf).

105. UNHCR GUIDELINES FOR PREVENTION AND RESPONSE *supra* note 95, App.

## 2. Coercive Environments

Another strong argument is that an IDP camp with a high presence of security forces during a conflict is an inherently coercive environment. The text of the Rome Statute on the circumstances in which sexual penetration will constitute rape reads as follows: “[t]he invasion was committed by force, *or* by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, *or* by taking advantage of a coercive environment.”<sup>106</sup> “Coercion” and the existence of a “coercive environment” are clearly two separate possible circumstances under the statute.<sup>107</sup> The difference between “coercion” and “coercive environments” is that the latter does not require the perpetrator to act in a coercive manner but instead describes a situation in which the perpetrator merely takes advantage of an environment that already exists.<sup>108</sup> Rule 70 of the *Rules of Procedure and Evidence* of the ICC provides that consent may not be inferred by the words or conduct of a victim in circumstances where the perpetrator is taking advantage of such an environment.<sup>109</sup> Thus, even someone who appears to be consenting is not legally able to do so.

There is no description of what constitutes a coercive environment in the Rome Statute.<sup>110</sup> In the landmark case of *Akayesu*, the Tribunal notes that coercion can include “forms of duress which prey on fear or desperation and coercion may be inherent in certain circumstances, such as armed conflict or the military presence [of a hostile group].”<sup>111</sup> Though the *Akayesu* case was referring to military presence of an opposing party to the conflict, international jurisprudence has since developed to recognize sexual violence committed by combatants on

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106. ELEMENTS OF CRIMES, *supra* note 23, art. 7(1)(g)-1 (emphasis added).

107. *Id.*

108. *Id.*

109. Int’l Criminal Court [ICC], *Rules of Procedure and Evidence*, at 24-25, ICC-PIDS-LT-02-002/13\_Eng (2013).

110. *See* Rome Statute, *supra* note 7, art. 7.

111. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

one side of the conflict against civilians and even other combatants on that same side as a war crime.<sup>112</sup> The ICC Trial Chamber in the case of *Ntanganda* found that “such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status [of the victims].”<sup>113</sup>

Taken in light of this more recent case, the ordinary meaning of the words “coercive circumstances,” “fear and desperation,” and “military presence” all apply easily to the context of IDPs in camps with a high presence of security forces exchanging sexual favours for protection and basic necessities.<sup>114</sup> According to a policy paper released by the ICC Office of the Prosecutor, any vagueness in the meaning of the Rome Statute should be interpreted “in line with internationally recognised human rights, including those relating to women’s human rights and gender equality.”<sup>115</sup> Such an interpretation requires international jurists to recognize the vulnerability of women and inherently coercive nature of this situation.<sup>116</sup> Therefore, IDP camps in which security forces are present in conflict situations are coercive environments in which it is not legally possible for a displaced person to consent to a sexual act with a member the security forces. In the

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112. Gloria Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96 INT’L REV. RED CROSS 503, 516 (2014), <https://www.icrc.org/en/international-review/sexual-violence-armed-conflict> (discussing the factors of war crimes and humanitarian law violations as determined by the Kunarac case).

113. Prosecutor v. Ntanganda, Case No. ICC-01/04-02/06, Second Decision on the Defense’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, ¶ 52 (Jan. 4, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_00011.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF).

114. See, e.g., Investigation by the Office of Internal Oversight Services, *supra* note 103, ¶ 26 (describing the conditions that child IDPs live under in Congo and specific instances of coercion leading to sexual exploitation that have occurred there).

115. Int’l Criminal Court Office of the Prosecutor [ICC], *Policy Paper on Sexual and Gender-Based Crimes* 16 (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>.

116. *Promoting Accountability for Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis of International and Domestic Laws Relating to IDP and Refugee Men in Uganda* 63 (U.C. Berkeley Sch. of Law Int’l Human Rights Law Clinic & Makerere Univ. Sch. of Law Refugee Law Project, Working Paper No. 24, 2013), [https://www.law.berkeley.edu/files/Sexual\\_Violence\\_Working\\_Paper\\_%28FINAL%29\\_130709.pdf](https://www.law.berkeley.edu/files/Sexual_Violence_Working_Paper_%28FINAL%29_130709.pdf) (clarifying the criteria, whether situational or inherent, that suggests that individuals are vulnerable and stating that women are not inherently vulnerable, they are placed in situations of vulnerability).

same way detainees cannot consent to sexual acts with prison camp guards, IDPs should be considered unable to legally consent to sexual acts with members of the security forces deployed in IDP camps during conflict.

### B. SEA AS RAPE AS A CRIME AGAINST HUMANITY

A crime against humanity is committed when the criminal act constitutes an “attack” which is “widespread or systematic” and “directed against any civilian population.”<sup>117</sup> The Rome Statute defines an “attack” as a “course of conduct involving the multiple commission of acts [including rape]”.<sup>118</sup> It is not necessary to show that the conduct of the perpetrator was itself widespread and systematic, but only that it was linked to such an attack.<sup>119</sup> Further, the conduct constituting the requisite attack may be that of people other than the alleged perpetrator—in this case, the security forces—so long as the specific conduct of the security forces is linked in some way to the attack.<sup>120</sup> This element would be proven in the context of state security forces or peacekeeping missions against which there are proven incidents of SEA that form part of a wider attack on the civilian population. In this sense, both further instances of SEA and other violations against the civilian population, such as inhuman or degrading treatment, wilfully causing great suffering, and violence to life, could be considered evidence of a more general attack.

The attack must be “widespread or systematic.”<sup>121</sup> This is a disjunctive rather than conjunctive definition: it is enough to prove that the attack is either widespread or systematic.<sup>122</sup> ICL jurisprudence indicates that “widespread” refers to the number of people affected—

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117. Rome Statute, *supra* note 7, art. 7(1).

118. *Id.* art. 7(2)(a).

119. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 417 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

120. *Id.* ¶¶ 416-20.

121. Rome Statute, *supra* note 7, art. 7(1).

122. Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶¶ 174–75 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 201-02 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

a figure that can be ascertained either by the number of victims or the scale of the offence, and therefore the number of people who suffer because of the offense.<sup>123</sup> The number of people subjected to rape does not have to be a significant portion of the population for it to reach the requisite level of suffering or to be considered “widespread.”<sup>124</sup> International criminal law has developed significantly over the last thirty years to reach a point at which it considers rape one of the most egregious international crimes.<sup>125</sup> When committed against women in camps or settlements, rape affects significantly more people than those specifically targeted by the offence, as the majority of IDP, refugee and asylum seeker households in most camps and settlements globally are female-headed.<sup>126</sup> Further, the number of people affected need not be limited to those within the camps or settlements.<sup>127</sup> It need only be proven that those who are targeted in these areas are subjected to SEA as part of a larger widespread or systematic attack.<sup>128</sup> SEA by security forces against IDPs will therefore, in many circumstances, fulfill the “widespread” requirement under international law.

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123. See Prosecutor v. Tadić, Case No. IT-94-Tbis-R117, Sentencing Judgment, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts991111e.pdf> (discussing the gravity of crimes against humanity because of their widespread effects on not only the large number of victims, but on humanity as a whole).

124. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 577 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

125. *Policy Paper on Sexual and Gender-Based Crimes*, supra note 115, at 5.

126. See, e.g., U.N. High Comm'r for Refugees, *Nigeria Protection Monitoring Thematic Report*, 1 (2018), <https://data2.unhcr.org/fr/documents/download/65111> (finding that with every new arrival of IDPs, the numbers of female-headed households are high); BROOKINGS INST., *IMPROVING THE PROTECTION OF INTERNALLY DISPLACED WOMEN: ASSESSMENT OF PROGRESS AND CHALLENGES 3* (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/Improving-the-Protection-of-Internally-Displacement-Women-October-10-2014.pdf> (detailing the effect of violence and rape on IDP women in Somalia and the larger issues with lack of security and the stigma surrounding reporting).

127. See, e.g., *Study Highlights Rape in Northern Uganda's Largest IDP Camp*, UNICEF, [https://www.unicef.org/media/media\\_27378.html](https://www.unicef.org/media/media_27378.html) (last visited Mar. 21, 2019) (stating that sexual violence, in this case against children, must be confronted by a reliable system that victims can turn to).

128. See Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶¶ 201-02 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj0102226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj0102226e.pdf).

The “systematic” nature of an attack refers to the organized, non-accidental repetition of an offence and the improbability of its random occurrence.<sup>129</sup> Initial trial judgments of the ICTR and ICTY found that this required a policy or plan put in place governing the commission of the offences.<sup>130</sup> Later appeals judgments overturned this finding in favour of a vaguer requirement of a “pattern of crime”—that is, “the non-accidental repetition of similar criminal conduct on a regular basis.”<sup>131</sup> There is a culture of SEA associated with many security forces, including police forces, militaries and peacekeeping operations—meaning such acts are widely perpetrated and widely accepted.<sup>132</sup> In Somalia, for example, a 2014 Human Rights Watch report, relying on both its own findings and findings from the UN Monitoring Group for Somalia and Eritrea, alleges:

[T]he sexual exploitation by Ugandan soldiers at the AMISOM [African Union Mission in Somalia] base camp and by Burundian soldiers at the Burundian contingent’s camp appears routine and organized. . . . Somali women having paid sex with soldiers have been able to obtain AMISOM badges allowing them easy access in and out of [the bases]. . . . Some Somali women having paid sex with soldiers have also resided in housing on the base camp.<sup>133</sup>

In such circumstances, SEA may also fulfill the “systematic” criteria, as it is defined under current ICL jurisprudence.<sup>134</sup>

The phrase “directed against any civilian population” contains three requirements: (i) the attack must be “directed”; (ii) it can be directed against “any” victims; and (iii) the victims must constitute a

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129. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

130. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 580 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

131. Kunarac, IT-96-23& IT-96-23/1-A, ¶ 94; Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶¶ 916–20 (Nov. 28, 2007), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict99-52/appeals-chamber-judgements/en/071128.pdf>.

132. HUMAN RIGHTS WATCH SOMALIA, *supra* note 41, at 25.

133. *Id.*

134. See Rome Statute, *supra* note 7, art. 7(1).



“population”.<sup>135</sup> That the attack must be directed draws parallels with the requirement that it be purposeful and non-accidental.<sup>136</sup> For crimes against humanity that are proven on the basis that they are widespread, but not systematic, this introduces an extra requirement that they cannot have been randomly committed.<sup>137</sup> In many instances of security forces committing SEA in IDP camps, these criteria will be satisfied. Whether each requirement is met must be determined on a case by case basis. The term “any” confirms that the civilians need not be members of an opposing party to the conflict; all civilians are protected.<sup>138</sup> This is important in the case of IDPs, refugees, and asylum seekers, who are often from the same side of the conflict as, and often ostensibly under the protection of, the peacekeepers and national security forces.<sup>139</sup> Finally, the term “population” reflects the collective nature of the object of the attack.<sup>140</sup> This too is satisfied where numerous allegations of SEA exist against a peacekeeping or national security force.

The Rome Statute introduces another requirement that the widespread or systematic attack be carried out “pursuant to or in furtherance of a state or organizational policy to commit such attack.”<sup>141</sup> There is debate as to whether this additional requirement is specific only to the Rome Statute or may be a more generalized rule of customary international law.<sup>142</sup> This requirement is not included in

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135. *Id.*

136. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 644 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf> (emphasizing the attack is on a collective group of victims to show they are targeted attacks).

137. *Id.* ¶ 645.

138. Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT'L L. 43, 51 (1999).

139. William G. O'Neill, *A New Challenge for Peacekeepers: The Internally Displaced* 11 (Brookings Inst.-John Hopkins SAIS Project on Internal Displacement, Occasional Paper, 2004).

140. Robinson, *supra* note 138, at 51.

141. Rome Statute, *supra* note 7, art. 7(2)(a).

142. MATHIAS HOLVOET, THE STATE OR ORGANIZATIONAL POLICY REQUIREMENT WITHIN THE DEFINITION OF CRIMES AGAINST HUMANITY IN THE ROME STATUTE: AN APPRAISAL OF THE EMERGING JURISPRUDENCE AND THE IMPLEMENTATION PRACTICE BY ICC STATES PARTIES 4-5 (2013), <http://www.internationalcrimesdatabase.org/upload/documents/20131111t105507-icd%20brief%20%20%20-%20holvoet.pdf>.

the statutes of the ICTR, ICTY, or the Special Court of Sierra Leone.<sup>143</sup> The Appeals Chamber in *Kunarac* judgment found that the existence of a state policy was not necessary to prove a crime against humanity.<sup>144</sup> The ICTR followed the ICTY's jurisprudence.<sup>145</sup> However, the ICC in finding Katanga<sup>146</sup> and Bemba guilty of crimes against humanity, pursuant to the Rome Statute, found that a state or organizational policy to commit such crimes is a contextual element of crimes against humanity.<sup>147</sup>

In regards to the development of international humanitarian law within national courts, research undertaken by the International Crimes Database indicates that “[s]tates that have incorporated the [Rome] Statute crimes by reference [to the statute], have adopted the policy requirement, but those that have created their own offences have not.”<sup>148</sup> For example, the Canadian and French courts have relied on the definition of crimes against humanity adopted by the ICC, while in the Netherlands the courts found an individual guilty of crimes against humanity without requiring policy or state action as an essential element.<sup>149</sup> The relevance of the “state or organizational policy requirement” may therefore depend largely on the applicable

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143. International Criminal Tribunal for the Former Yugoslavia, Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, 6 (Sept. 2009), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); S.C. Res. 955, annex, art. 3 (Nov. 8, 1994); Statute for the Special Court of Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 137 (containing the text of the Statute for the Special Court of Sierra Leone).

144. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

145. ICTR adopted the *Kunarac* view that a policy or state actions are not necessary to establish crimes against humanity were committed. See *Gacumbitsi v. Prosecutor*, Case. No. ICTR-2001-64-A, Judgment, ¶ 84 (July 7, 2006), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-01-64/appeals-chamber-judgements/en/060707.pdf>; *Semanza v. Prosecutor*, Case. No. ICTR-97-20-T, Judgment and Sentence, ¶ 360 (May 15, 2003), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-97-20/trial-judgements/en/030515.pdf>.

146. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶ 1114 (Mar. 7, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF).

147. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment, ¶ 690 (Mar. 21, 2016), [https://www.icc-cpi.int/courtrecords/cr2016\\_02238.pdf](https://www.icc-cpi.int/courtrecords/cr2016_02238.pdf).

148. HOLVOET, *supra* note 142, at 11.

149. Charles Chernor Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity*, 28 AM. U. INT'L L. REV. 381, 403-05 (2013).

domestic law. However, it is strongly arguable in countries which do not simply domesticate the Rome Statute that SEA committed by peacekeepers may constitute a crime against humanity in specific circumstances.

### C. SEA AS RAPE AS A WAR CRIME

The Rome Statute defines war crimes as including both “serious violations of the laws and customs applicable in international armed conflict” and “serious violations of the laws and customs applicable in an armed conflict not of an international character.”<sup>150</sup> Crimes amounting to war crimes are enumerated in the Statute, as well as the Statutes of the ICTR, ICTY, Special Court of Sierra Leone, the Geneva Conventions, and international customary law, and include rape and sexual violence.<sup>151</sup> To amount to a war crime, the conduct must have a sufficient nexus with the armed conflict.<sup>152</sup>

For international armed conflicts, the first common article of the Geneva Conventions describes the nexus by requiring that the criminal conduct “[takes] place in the context of and [is] associated with an international armed conflict”, and “the perpetrator [is] aware of factual circumstances that established the existence of an armed conflict.”<sup>153</sup> The nexus requirement in relation to non-international armed conflicts has been further defined by the ad hoc tribunals and the ICC.<sup>154</sup> In the *Tadić* judgment, for example, the ICTY Trial Chamber held that “a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international

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150. Rome Statute, *supra* note 7, arts. 8(2)(b)-(e).

151. *Id.* at arts. 8(2)(b)(xxii), 8(2)(e)(vi); S.C. Res. 955, *supra* note 143, art 3(g); Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 143, at 6; *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 143, art. 2(g).

152. ELEMENTS OF CRIMES, *supra* note 23, art. 8.

153. *See, e.g., id.* at art. 8(2)(a)(i) (describing the elements of wilful killing which is a war crime).

154. *See, e.g.,* Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment, ¶ 142-44 (Mar. 21, 2016), [https://www.icc-cpi.int/courtrecords/cr2016\\_02238.pdf](https://www.icc-cpi.int/courtrecords/cr2016_02238.pdf); Prosecutor v. Rutaganda, ICTR-96-3-T, Judgment and Sentence, ¶¶ 104-05 (Dec. 6, 1999), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-3/trial-judgements/en/991206.pdf>; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

humanitarian law.”<sup>155</sup>

*Prima facie*, this test would almost always be satisfied where security forces commit SEA against IDP populations. The large number of people residing in camps or settlements, the peacekeepers and the heavy military presence are all factors that would not be present if not for the armed conflict. The jurisprudence supports the contention that the offence need only be related to the armed conflict, rather than caused by it: according to *Kunarac*, “the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”<sup>156</sup> It is not necessary that the crimes be committed in the specific geographical area that the armed conflict is taking place.<sup>157</sup> The nexus requirement will be satisfied where “the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”<sup>158</sup> SEA by security forces against IDPs is therefore even likely to be a war crime where the IDP camp is geographically removed from the fighting, so long as the existence of the camp is tied to the conflict.

The jurisprudence also lists relevant factors as including “the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; . . . and the fact that the crime is committed as a part of or in the context of the perpetrator’s official duties.”<sup>159</sup> In circumstances in which the alleged perpetrators are from a military or peacekeeping force and are committing SEA against IDPs in camps, each of these factors are present.

It is difficult to imagine circumstances in which SEA perpetrated by state security forces or peacekeepers against IDPs in camps would

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155. *Tadić*, IT-94-1-T, ¶ 572.

156. Prosecutor v. *Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 58 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

157. *Id.* ¶ 57.

158. Prosecutor v. *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

159. *Kunarac*, IT-96-23 & IT-96-23/1-A, ¶ 59.

not be considered a war crime, unless it could be proven that the circumstances in which the crime was committed were entirely unrelated to the conflict.<sup>160</sup> If SEA is widespread, proving that it constitutes a crime against humanity should also be relatively easy.<sup>161</sup> If it is not widespread, proving that it is committed systematically may be more difficult, particularly if a state policy is required, but would still be possible in many circumstances.<sup>162</sup>

## V. IMPACT OF RECLASSIFICATION

If there is international recognition that SEA committed by the security forces may constitute rape as a war crime or a crime against humanity, this could have an important impact on the way that national and international actors respond to allegations of such violations.<sup>163</sup> This impact may be measured in relation to three groups of stakeholders: (i) the individual perpetrators; (ii) the states responsible for national security forces; and (iii) the international organizations responsible for peacekeeping troops.<sup>164</sup>

At the level of individual perpetrators, research indicates that the potential of being prosecuted in an international court has a deterrent effect, in particular for non-heads of state, who are less likely to

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160. *Cf. Tadić*, IT-94-1-T, ¶¶ 572-73 (stating that international humanitarian law is applicable when alleged crimes are “closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”).

161. *See Rome Statute*, *supra* note 7, art. 7.

162. *See id.*

163. *Compare* ELEMENTS OF CRIMES, *supra* note 23, arts. 7(1)(g)-6, 8(2)(b)(xxii)-6 (requiring that a perpetrator, both for the crime against humanity of sexual violence and the war crime of sexual violence, to “engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent”), *with* U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ¶ 1, UN Doc. A/60/861 (May 24, 2006) (defining SEA as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes” and “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions”).

164. THE COMMONWEALTH, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL JUSTICE: AN INTRODUCTORY HANDBOOK, 53 (2014) [hereinafter IHL & ICJ HANDBOOK] (explaining that both individuals and states can be held responsible if they commit violations).

benefit from immunity or the full protection of the state apparatus.<sup>165</sup> In the context of the ICC, studies have shown both that as the state is threatened with ICC prosecution, violence against civilians decreases, and that once an ICC investigation starts, domestic prosecutions of lower-level officials are more likely.<sup>166</sup> Research has also indicated that the threat of prosecution for an international crime in domestic courts can have a powerful deterrent effect.<sup>167</sup>

Fear of legal action may also have behavior-changing effect on national governments. While international criminal law bestows individual criminal responsibility for war crimes, international humanitarian law places legal responsibility on the state.<sup>168</sup> Recognizing that SEA may constitute rape as a war crime increases the vulnerability of states to lawsuits claiming breaches of IHL.<sup>169</sup> Further, research indicates that even without cases being taken, developments in international law have in many countries had a norms-changing effect over time.<sup>170</sup> International recognition that SEA in conflict constitutes rape as a war crime in most circumstances and a crime against humanity in some is likely to prompt many countries to increase the attention given to this subject in police and military training and capacity building.<sup>171</sup>

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165. See generally Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443, 460 (2016); Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 716 (2017) (discussing the potential impact on neighbouring countries of ICC investigations on domestic prosecutions).

166. Dancy & Montal, *supra* note 165, at 715.

167. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 74 (2008).

168. IHL & ICJ HANDBOOK, *supra* note 164, at 54.

169. Cf. Jo & Simmons, *supra* note 165, at 452 (explaining how state ratification of the Rome Statute makes potential perpetrators of war crimes vulnerable to prosecution, which, possibly by extension, could also lead to state responsibility if SEA was accepted as a crime under IHL).

170. Cf. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY*, 333 (2d ed. 1979) (explaining how norms in international law have shifted over time due to state practice and that there is no reason to say future developments could incorporate SEA into customary IHL).

171. Cf. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 129 (2004) (discussing how changes in law enforcement guidelines cannot be

Finally, at the level of the UN, reclassifying SEA as rape as a war crime or crime against humanity would provide some much-needed impetus for overhauling the current system of responding to such offences—one that goes far beyond the “new approach” outlined in the Secretary-General’s 2017 report.<sup>172</sup> Retaining the immunity from suit for civilian perpetrators, for example, may become considered unacceptable if these crimes were recognized as war crimes and crimes against humanity. This re-classification would also have an impact on the way SEA by military perpetrators is investigated. At present, such allegations are investigated internally by the UN and referred to state prosecutors where considered necessary, whereas allegations of more explicit, violent, or public CRSV is often the subject of investigation by independent experts.<sup>173</sup> A recognition that SEA is also CRSV and may also be an international crime would be a strong basis for an argument to send any independent investigators any time such allegations are made. International pressure to ensure such investigations lead to prosecutions and convictions in practice would also be likely to increase.

## VI. CONCLUSION

SEA committed by security forces in conflict contributes to global insecurity. A community cannot be safe or stable if those charged with its protection are engaged in sexual violence against women, children and other populations vulnerable to such abuse. While there is consensus in the international legal community that public, explicit forms of sexual violence must be treated and prosecuted as grave international crimes, there is little recognition that the same arguments can be applied to acts of SEA.<sup>174</sup> The insistence on categorizing SEA as a crime other than rape, and the silence on the issue of whether it constitutes an international crime, is not supported by international

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fully implemented without adequate training).

172. See generally *A New Approach*, *supra* note 19 (outlining the UN’s already outdated “new” approach to SEA accountability).

173. *Id.* ¶ 26.

174. See, e.g., Rome Statute, *supra* note 7, art. 8(2)(b)(xxii), 8(2)(e)(vi) (explaining these forms of abuse, at least when they amount to rape, sexual slavery, etc., are considered crimes against humanity and war crimes, without any explicit mention of SEA).

law and jurisprudence.<sup>175</sup> Strong arguments can be made on the basis of case law from the ad hoc tribunals and the international customary law codified by the Rome Statute that SEA perpetrated by security forces during time of conflict constitutes rape as a war crime in most circumstances and rape as a crime against humanity in some. The practical consequence of this legal position for security forces operating in IDP camps in conflict environments is that entering into exploitative or transaction sexual relationship with camp residents will almost always constitute a serious international crime. Recognition of this legal argument at the international level may have a powerful impact on the way SEA is responded to and prosecuted, and a transformative effect on the lives of displaced people living under constant threat of sexual violence.

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175. LEGAL ACTION WORLDWIDE, ANNUAL REPORT 2017 6 (2017).