Crimes of sexual and gender-based violence in times of peace and effective victim's redress under international law

Abstract

Domestic and international legal order for sexual and gender-based violence (SGBV) has advanced. However, criminal accountability inadequacy to address SGBV and the extent to which civil liability of the state for the breach of international obligations constitutes an alternative route for addressing SGBV crimes have not been adequately explored. The paper uses a doctrinal research method of data collection to explore states' obligations for sexual and gender-based violence occurring in times of peace. It analyses judicial precedents, journal articles, and international humanitarian and human rights instruments. The paper concludes by suggesting that states' liability is more appealing because it is more likely to increase the potential for states to take their international legal obligations toward victims' rights to reparation more seriously.

Keywords: **International law, sexual, violence, victims, state responsibility**.

Introduction

Sexual and gender-related violence (SGBV) crimes continue to occur "on a cosmological scale". What happened during WWII (Bunch & Niamh,1994) continues to happen today eighty years ago within the borders of many countries even in times of peace. This is illustrated by the most recently publicised cases of systematic and widespread sexual and gender-based violence perpetrated in many countries (Rockowitz, et al. 2022; Smis, 2011). Hoefler &Fearon (2014) note that "physical violence in societies is a much larger and more pervasive phenomenon than just civil war violence". What is astonishing is that violence against women (VAW) and gender-based violence (GBV) have a long history under international law (Chinkin,1994). Their current prevalence stands in contrast to increased international recognition that intimate partner violence (IPV) or non-partner (NSV) including rape, domestic violence, sexual slavery, and other forms of sexual violence whether in peacetimes and during armed conflict; in private or public domain violates fundamental principles of international human rights and humanitarian law (Vienna Declaration and Programme of Action, 1993). The growing number of reports also constitutes a plea to ascertain progress toward United Nations Sustainable Development Goals 5, 11, and 16 and there is no doubt that SGBV is a major obstacle to achieving Sustainable Development Goals (SDG). Likewise, the prevalence of SGBV is an indicator to assess the effectiveness of existing national and international accountability mechanisms for the victims of gender-based violence (S/RES/1820, 2008). The question is whether the international pronouncements on violence against women and gender-based violence in times of peace have been exuberant and praiseworthy, particularly when considering sexual and gender-based violence as a violation of international humanitarian and human rights laws. Gender-based violence (GBV) refers to harmful acts which emotional, psychological, and physical abuse, as well as sexual violence (SV) directed against a person based on their gender (UNHCR, 2021b). These harmful acts are perpetrated primarily by men

against women and girls (UNHCR, 2021a, 2021b; WHO, 2021b). All these acts are wisely ascribed to the norms embodied in international humanitarian and conventional laws whether as a crime against humanity, a war crime, or genocide (Mark, 2006). Consequently, the norm prohibiting these crimes is part of the highest norm of jus cogens for which the violation is not permitted (Meron, 1994). Despite the strides made through criminal accountability and the adoption of human rights instruments (Aoláin- Ní & et.al. 2011). Criticisms for the tragic failure of the international legal order to adequately address VAW and GBV continue to rise (Bunch & Reilly, 1994). These criticisms range from the presence of strong procedural and evidentiary protection of accused or perpetrators-oriented nature, lack of or insufficient gendered approaches to the limited ability to protect victims' identity, physical security, and psychological health (Jordan, et al. 2010; Dixon, 2002). Even more alarming than the structural and procedural limits, is the limited capacity of the international accountability mechanisms to address the vast majority of sexual and gender-based violence both in times of peace and during conflicts (Altunjan, 2021). Consequently, national prosecutions are in a position to take a bulk of cases as international mechanisms can only take a handful fraction of them (McDougall, 2000). The extent to which rules on the enforcement of customary international and conventional laws constitute an alternative route for victims' redress has not been sufficiently explored. This research suggests an effective victim's redress mechanism under international law requires both criminal accountabilities of the perpetrator and state liability. However, the latter is more promising because it is more likely to increase the potential for states to take their international legal obligations toward victims' rights to reparation more seriously. A state is directly responsible for the acts of sexual and gender-based violence carried out publicly or privately by individuals, because the state failed to comply with one or more of its obligations, including the obligation to enact legislation, if not yet done so, the duty to investigate, if sufficient evidence exists, the duty to extradite or to submit to prosecution, and if found guilty,

the duty to punish (UNGA A/RES/60/147). States' responsibility in this context arises because of the breach of international obligations (GA10 /A/56/10). Therefore, states' liability ascending from non-compliance with rules of international humanitarian law and treaties' obligations provides an incentive in terms of victims' redress under international law. Thus, the question of how and to what extent the rule of customary international and conventional laws constitutes an alternative route to redress victims of sexual and gender-based crimes hastened the need for this paper. In support of this case, the paper offers two overlapping arguments which make such a conclusion foreseeable. Firstly, international laws enjoin states to respect, ensure respect, and promote the provision of international treaties they have willingly accepted. Non-compliance with these obligations means that a state must incur its international responsibility. This responsibility arises because of the omission or failure by the government or officials to prevent sexual and gender-based violence or failure to exercise due diligence, to ensure respect for women's dignity or honor and physical integrity. The government must refrain from interfering directly with women's rights or indirectly by preventing private individuals from interfering with the enjoyment of women's rights. Full compliance with international obligations by states means that states must take appropriate and effective measures, including enacting and enforcing laws to prohibit all forms of violence against women. States must adopt legislation, and administrative, social, and economic measures to ensure the punishment and eradication of all forms of violence against women. It also means that states must punish the perpetrators of violence and implement programs for the rehabilitation of women victims. The second argument is, therefore, the legal consequence of states' internationally wrongful acts. The breach of an international obligation implies states' obligations to cease wrongful conduct and to make full reparation for the damages caused. More exasperating is that the rules on the enforcement of sexual and gender-based violence are part of peremptory norms of customary and conventional international law for which the breach

by the State entails aggravated consequences. As Ago (1970) correctly put it: '… It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.' The paper seeks not to determine whether states' obligations to enact and enforce legislative, administrative, social, and economic measures, to prohibit, prevent, and punish all forms of violence against women, and to establish mechanisms for the rehabilitation of women have been violated and what are the consequences, but rather to define international law sources that place obligations on states, the violation of which may give rise to the obligation to make reparation. The paper, therefore, proceeds in two parts. After the introduction, part one will review the international law (human rights) framework for protecting victims of SGBV and define the state's obligations. The paper will then assess current and proposed international rules and regulations that provide for effective victim redress in cases of SGBV. The focus of the paper will be on the status of SGBV and the role of international law in providing a safe and secure environment for the victims of SGBV. Part two deals with the legal consequences for states' failure or non-compliance with their international obligation.

Method

A doctrinal research method of data collection, also known as the desktop or non-empirical research method, is used to explore states' obligations for sexual and gender-based violence occurring in times of peace. Therefore, the research assesses judicial precedents, journal articles, and international humanitarian and human rights instruments. The main focus of the research was to scrutinise the legal protection against SGBV and state obligations under the Geneva Conventions and its Additional Protocols, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (Art 6, 1979), the

Convention on the Rights of the Child (Art. 16&19, 1989) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol,2003). The assessment of these instruments provided the basis for conceptualising state international obligations and responsibility in case of violations. These instruments also helped in identifying the research question, and relevant case studies (Levac et al., 2010).

Research questions

The main research question is how and to what extent state liability constitutes an alternative route to redress victims of SGBV. Alternatively, the research answers the question of how and to what extent the rule of customary international and conventional laws constitutes an alternative route to redress victims of sexual and gender-based crimes. In support of these questions, the paper asks various sub-questions, including:

What is the international protection of SGBV?

What are the international obligations of states on SGBV?

How private actions can be attributed to states in a time of peace?

Results

The study finds that sexual and gender-based violence is not a new phenomenon (Fader, 2020). Unfortunately, it has existed since the dawn of human civilization and its recognition as an infringement of international human rights law has gained international pronouncement. (Hasselbacher, 2010). Despite the normative character of the existing human rights instruments, sexual and gender-based violence in times of peace or violence toward women still occurs. Customary and conventional international laws impose obligations upon states including the obligation to enact legislation, if not yet done so, the duty to investigate or search, if sufficient evidence exists, the duty to extradite or to submit to prosecution, and if found

guilty, the duty to punish (Article 49 of the GC I). States' obligations in this context extend from the obligation to respect and ensure respect for and implement international laws (UN GA Resolution 60/147 A/RES/60/147). In other words, states are under obligation to enact appropriate national legislative, administrative, and other appropriate measures to prevent violence against women, the obligation to investigate effectively, promptly, thoroughly, and impartially, and, where appropriate, the duty to take action against those allegedly responsible in accordance with domestic and international law and the duty to provide effective access to justice and effective remedies to victims, including reparation. Non-compliance with these obligations means that a state must incur its international responsibility. This responsibility arises because of the omission or failure of the government or the officials to respect and ensure respect for women's rights, protect women and girls against violence, and prevent sexual and gender-based violence. Thus, the failure to exercise due diligence, to ensure respect for women's dignity or honor and physical integrity constitutes the basis to conceptualise victims' redress under international law.

Conceptual framework on sexual and gender-based violence in a time of peace

Sexual and gender-based violence (SGBV) is a crime of various types of violent behavior perpetrated without the consent of the victims based on their gender (UNHCR, 2021). These harmful acts include emotional, psychological, and physical abuse, as well as serious physical or bodily harm that can lead even to death (ICRC, 2022). SGBV can be perpetrated by and against anyone but generally, perpetrators are primarily men, and victims are largely women and girls (WHO, 2021). The social construction of gender and the power dynamics of gender roles in society are among the key structural drivers of gender-based violence and femicide (Skrla, 2000). Social, cultural, economic, political structures and legal factors have also compounded SGBV (Wies, et al. 2018). SGBV has an assortment of various forms of harmful acts including Rape, Partner Violence (IPV), Sexual Assault, Sexual and Gender-Based

Violence, Gender-Based Violence, Violence Against Women and Interpersonal Violence, Domestic Violence, and Collective Sexual Violence. All these acts are understood differently and may occur in different circumstances. Unlike IPV, which can have differing definitions depending on the source, rape as one of the most studied forms of SGBV is generally defined as "An act done which causes penetration of one person's genital organs with the genital organs of another without their consent or where the consent is obtained by force, threats or intimidation of any kind". The IPV is variously defined, such as "a form of interpersonal violence by a spouse or life partner" (Shumba et al, 2017) or "violence committed against a woman by her current or former spouse or boyfriend" (Horn, 2010), "violence committed in a present or past relationship." (Manuel et al., 2019). Sexual assault (SA) is defined as "any genital, oral, or anal penetration by a part of the accused's body or by an object using force or without the victim's consent" (Ononge et al., 2005). Sexual assault is also defined as "rape, attempted rape, sexual abuse and sexual exploitation," or as "all non-consenting sexual activity from fondling to penetration" (Amenu & Hiko, 2014; Krolikowski & Koyfman, 2012). Sexual and gender-based violence also include Sexual Violence. This is generally referred to as "a serious societal problem that creates significant challenges to local communities." Gatuguta et al., (2018) define sexual violence as "a serious global health problem with significant physical, psychological, and social consequences." Unlike all other forms of violence, Violence against women is generally viewed in conflict settings, chiefly due to the fact that it is an all-encompassing term that can cover many other types of violence, including rape, forced prostitution, and sexual slavery. Sexual violence is also more commonly associated with humanitarian efforts than other terms, such as SV or IPV (Liebling et al., 2020). Due to this context, VAW was often not explicitly defined but rather was explained as a "weapon of war" and "a growing problem during armed conflict (Liebling et al., 2020). A more comprehensive and encompassing definition of violence against women is found in the Protocol to the African

Charter on the Rights of Women in Africa, also known as Maputo Protocol. The Protocol defines Violence against Women as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war." Most of the harmful acts mentioned in the Maputo Protocol occur whether in armed conflict or in the time of peace. The definition also encompasses violent acts committed in public life or in private life. Such private acts include Interpersonal Violence, Domestic Violence, and Collective Sexual Violence. Collective Sexual Violence refers to nonconsensual sexual activity by a group of individuals or a single individual that is driven by social movement goals (Ten Bensel & Sample, 2017; Zraly et al., 2011), while domestic and interpersonal violence is used as an umbrella term to include community violence, IPV, SV, and more (Decker et al., 2018). In times of peace sexual and gender-based violence is always perpetrated in private and public places (WHO,2021). Victims are subjected to physical and/or sexual intimate partner violence (IPV) or to non-partner sexual violence. It is therefore clear that violence against women is an encompassing concept that includes sexual and gender-based violence that may occur during a conflict or in time of peace. At the heart of this analysis is the need to ascertain how sexual and gender-based violence perpetrated in times of peace can be attributed to states and call for the states' international responsibility for the violation of international obligations. The Maputo Protocol covers SGBV to an extent it includes female genital mutilation (FGM) and underage marriage as well as stigma and bias against SGBV victims (African Union, 2003).

International laws and state obligations for sexual and gender-based violence

Sexual and gender-based violence is a universal phenomenon that transcends borders in social, cultural, religious, and geographical terms (Fader, 2020). Unfortunately, it has existed since

the dawn of human civilization. The prohibition of sexual and gender-based violence has a long history under international law (Jallow, 2008). The Control Council Law 10 (1945) expressly referred to rape while the London and Tokyo Charters (1946) refer to 'other inhumane acts. The codification of rules of customary law in the 1949 Geneva Conventions and their 1977 Additional Protocols have also armoured the protection of women against sexual violence. Article 27 of Geneva Convention IV and Article 76 of the Additional Protocol I prohibit "any attack of women" honour, in particular against rape, enforced prostitution, or any form of indecent assault". Article 75 of AP I require parties to the conflict to treat every person humanely in all circumstances and affords protection to everyone without distinction or regardless of their sex, birth, origin, or other statuses. More importantly is the requirement to the Parties (…) to respect the person, honour, convictions, and religious practices of all such persons (…). Parties are also required to protect family unity and provide special treatment to women. Of more relevance, article 75 of AP I provide not only the basis for the protection of the rights of women against sexual abuse but also determines the temporal and the sphere of the protection's requirements. "Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution, and any form of indecent assault, are prohibited at all times and in all places".

Although, the objectives of international humanitarian law and human rights are different. In that, the former is concerned and limited in times of war while the latter objectives and protection are extended at all times. The normative character of international humanitarian laws has generated rights and obligations that are enshrined in binding international treaties forming part of international human rights and criminal laws for the prevention of sexual and gender-based violence. Therefore, conventional international law has taken a more progressive step in dealing with sexual and gender-based violence. The legal prohibitions on sexual and gender-based violence have been solidified in criminal and human rights laws. Particularly, the

Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (Art 6, 1979), the Convention on the Rights of the Child (Art. 16&19, 1989) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol,2003). Article 6 of the CEDAW enjoins states parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women. While article 5 (b) of the International Convention on the Elimination of All Forms of Racial Discrimination enjoins states to guarantee the "…. right to the security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution…" More interestingly, the Maputo Protocol, not only defines but also establishes a mechanism to address sexual violence. Article 4 states that: "Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman, or degrading punishment and treatment shall be prohibited." Sexual and gender-based violence is a broad category of harm, including physical, mental, psychological, emotional, and economic harm. The recognition of sexual violence under international criminal laws as a crime against humanity, a war crime, and genocide has also armoured the protection of women. The Rome Statute (Art.7, 2002) lists sexual violence as an element of the crime against humanity: " … (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity….' This definition is substantiated by the International Criminal Court (ICC) Elements of Crimes (ICC- ASP/1/3 and Corr.1, 2002), which recognise rape as the most common form of sexual violence. The International Criminal Tribunal for the Former Yugoslavia and Rwanda (S.C. Res. 827, U.N. SCOR, 1993) has an unprecedented jurisprudence that recognised sexual violence and its related acts, including

rape, when perpetrated in a systematic manner in peacetime or during an armed conflict, whether as an act of genocide or crime against humanity. In the Akayesu case (ICTR-96-4-T, 1998), the ICTR established that: "Acts of rape and sexual violence, as other acts of serious bodily and mental harm, committed ….reflected ……the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process. In this way, those acts constituted genocide." Such a deduction is unprecedented and historically praiseworthy in the legal evolution of the crime of sexual violence under international law. Providing a broad interpretation of the crime of genocide by linking sexual violence committed in times of peace to the elements of genocide was not the only merit of Akayesu's case. Ultimately, Akayesu was not charged personally for having committed sexual violence but rather for the failure to prevent or exercise due diligence to prevent the commission of such acts. The court wisely exercised the notion of due diligence in order to assert the individual responsibility of the state's officials. Thus, the concept of violence against women in Akayesu's case transcends conventional considerations. Rape (VAW) is not only a crime of physical cohesion or sexual penetration but also any other acts that may include the expression of power under conditions of coercion (ICTR-96-4-T, 1998. Para.41). Therefore, it cannot be contested that there is an international law pronouncement on the crime of sexual and gender-based violence (Mark, 2006). However, despite the international pronouncements on sexual and gender-based violence as a serious violation of international law, gender-based crimes, remain the most vulnerable type of crime addressed by international criminal accountability mechanisms. The crime has been plagued by the failure of state parties to enact appropriate legislation, to adequately investigate, charge, prosecute perpetrators, and provide appropriate remedies to victims (Women's Initiatives for Gender Justice, 2011). The need for the proper conceptualization of the adjudication of the crimes of sexual and gender-based violence under international law is, therefore, necessary to remedy these deficiencies. The enforcement of

international law provisions imposing obligations upon states constitutes an effective route or remedy for victims of violent crimes.

States' international obligation and protection of sexual and gender-based violence

The state's international obligations in this context consist of enacting and enforcing national legislative, administrative, social, and economic measures to prohibit all forms of sexual and gender-based violence against women, preventing and punishing and eradicating all forms of violence against women, punishing the perpetrators and implementing programmes for the rehabilitation of women victims. It also requires mechanisms and services to be available for effective information, rehabilitation, and reparations for victims of sexual and gender-based violence. These obligations flow from states' duty to protect, ensure respect, promote, and fulfil the rights of individuals (GC I, 1949 Art 49-51). More prominently, Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR,1966) enjoins the state party "…where it is not already provided for by existing legislation or other measures, … shall undertake to take necessary steps, in accordance with its constitutional process … to adopt such legislation … to give effect to the rights ….". This requirement implies the prohibitions of all forms of sexual and gender-based violence must be effectively implemented. There must be laws prohibiting physical, sexual, psychological, and economic harm. Such laws must also deal with other aspect of violence including the threat to take such acts or when the perpetrator undertake the imposition of arbitrary restrictions on a woman. Of more relevance, states must create or maintain an atmosphere for an effective interplay of laws and regulations (Case 55/96, ACHPR, 2001). Legislative confirmation is not enough to effectively prevent all forms of sexual and gender-based violence and address the harms suffered by women. International law requires states to investigate the violations of the rights whether by government officials or individuals (Art 12, CAT,1984). Jordan (2000) referred to this as the obligation to "search". The obligation to search or to investigate implies affirmative actions or activities including

arresting and detaining the alleged persons for trial or extradition to another state. International law enjoins state parties to establish competent judicial, administrative, or legislative authorities, to develop the possibilities of judicial remedy (Commentary of article 49, CAT,1984) and ensure that any of these remedies, including court decisions, are enforced (Art. 2 (3) (b) (c) ICCPR, 1966). State parties must establish impartial and independent organs with the ability to carry out prompt and impartial investigations. More relevant, member states must establish and financially support extensive non-legislative measures such as special investigative units, and specialised training courses for law enforcement and health workers (Chandra, 2005). Likewise, state parties are enjoined to establish competent and impartial tribunals (Art. 6 ECHR,1950). This is to challenge arbitrary and extra-judicial decisions. International law also makes provision for a state to hand a person over for trial to another state. It means that sex offenders may face trial anywhere else outside their states. However, a decision to extradite is subsidiary to the obligation to prosecute and extradition is always subject to special conditions (Art.3 CAT,1984). Apart from legislative measures, international law enjoins states' parties to provide effective sanctions (Art. 49 GC I). Penal and civil sanctions must be codified due regard to the gravity of the offence. Incorporating the punishment into national law presents several benefits. One is for the deterrence of potential criminals. Another is for enhancing the ability of competent judicial organs to deal with the crime and enabling the public to challenge state actions and inactions in case of violations. Likewise, there can be no law without sanctions. This is a general principle of criminal law *nullum crimen sine lege nulla poena sine lege* (Art 22 & 23 ICC, 2002; Art. 15 ICCPR, 1966). State obligations to enact legislation, investigate, prosecute, or extradite and punish the perpetrators of sexual and gender-based violence provide the basis for the conceptualisation of state international responsibility for the breach of international obligations. It also provides for the operationalisation of victims' rights to effective remedies.

State responsibility and remedies under international law for sexual and gender-based violence

The gap between criminal prosecutions and victims' redress can be addressed through the application of rules on state responsibility for internationally wrongful acts. A breach of international law by a State entails its international responsibility (ILC, 2022). This is a basic principle of international law which is established as a norm of customary international law (ILC,2022). The general or basic rules of international law concerning the responsibility of States for their internationally wrongful acts are set in the Draft Code Articles on State Responsibility. The Draft Code establishes primary and secondary rules on state responsibility. The difference between general or secondary rules and primary rules is that the former defines general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences that flow thereafter (ILC,2022). Unlike secondary rules, primary rules on state responsibility define the content of the international obligations for which the violation gives rise to state responsibility. Basically, whether there is a breach of international law depends on two requirements, namely the legal framework prohibiting such an act and the obligation that is said to have been breached under international law (ILC, 2022). These rules are codified in customary and conventional international laws. State responsibility for acts of sexual and gender-based violence, therefore, arises because of the failure to comply with treaty obligations on the protection and promotion of the rights of women. In the context of a breach of an international obligation, the state incurs its international responsibility regardless of the legal connection between the perpetrator and the state (A/RES/60/147, 2001). With few exceptions, the prosecutorial records of states' responsibility for sexual and gender-based violence both in peacetimes and during armed conflict indicate an under-enforcement of international law. State responsibility can be used as an effective remedy to national and international accountability mechanisms. After the matter

of WWII, the Japanese government was held responsible for Japan's system of military sexual slavery during WWII (Chinkin, 2001). The responsibility of the Japanese government arises because of the failure of most legal actions in both national and international forums. Particularly, the failure by the Japanese legislature to enact appropriate legislation or the failure by the Japanese government to acknowledge crimes under international law committed against women including crimes of "sexual slavery, rape and other forms of sexual violence, failure to prosecute those responsible for the "comfort system," and failure to establish an official grant of monetary or other reparations. The Women's Tribunal had jurisdiction over individuals involved in planning, committing, or concealing violations either directly or via command. It also exercised its jurisdiction over state responsibility to find that the individual crimes against humanity were attributable to the government of Japan because they were committed by government agents and because of the government's failure to prevent or punish their commission. The state of Japan was also found responsible because of the continued violations of victims' rights arising from its concealment of documents regarding the crimes of sexual slavery; failure to issue a genuine apology, and failure to punish those responsible, or provide official compensation. The state was also responsible for the continued opposition to efforts to obtain reparations in its national courts; and failure to counteract revisionist claims that "comfort women" were voluntary prostitutes (Women's International War Crimes Tribunal, 2001). As provided above, although international humanitarian laws' objectives differ from the protection afforded by international human rights law, the normative character of state obligations to enact effective legislation, investigate, prosecute, and punish emanating from customary international laws have been armoured in many international human rights treaties applicable in times of peace. Therefore, the application of states' obligations arising from whether rules of international humanitarian or human rights found no boundaries. This understanding flows directly from the impact of contemporary rules and the normative

character of customary international law. Contemporary human rights rules have transcended the principle of sovereignty and recognise individuals as rights-holders under international law while also imposing certain obligations directly on the states. Such a view may not be accepted by all but a simplistic analysis of Article 75 (2b) of the Protocol Additional (AP) I to Geneva Conventions and Article 1(j) of the Maputo Protocol means that the protection afforded by International Humanitarian Law extends at all times and to all women, no matter their status whether prisoners of war or free in the hand of the government. Likewise, it cannot be disputed that the harm felt by women assaulted in a private space is not different from the harm felt by those assaulted during an International or Non-international armed conflict or that there is no difference between the harm suffered by women in the times of peace and that of women in wartime. More prominently, is the recognition by the tribunal of individual rights of action to seek compensation for violations of international humanitarian and treaty law and lack of recognition of the status of limitation of the crimes of sexual and gender-based violence. Even peace treaties concluded at the end of WWII could not exhaust the legal rights of victims of sexual slavery because of the *erga omnes* nature of crimes against humanity. As discussed previously, state responsibility arises because of the violation of a legal framework and the obligation arises thereafter. Sexual and gender-based violence is prohibited under humanitarian and conventional laws. In the context of the Japanese responsibility for acts of sexual slavery during WWII, the judges opined that rape was a violation of the laws and customs of war and that sexual slavery was prohibited under customary international law, including the 1907 Hague Convention and the 1926 Slavery Convention (Art. 46 Hague Convention IV,1907). The tribunal also adopted a broad definition of sexual slavery to include "the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy." This definition features the Maputo protocol on the rights of women in Africa and the ICTR which considers sexual and

gender-based violence as an imposition of arbitrary restrictions. Sexual and gender-based violence is not only a crime of physical cohesion but also other acts, including the expression of power under the condition of coercion (Maputo Protocol, 2003). This definition also featured the World Health Organization (WHO) definition of sexual violence as "a pattern of coercive behavior designed to exert power and control over a person in an intimate relationship through the use of intimidating, threatening, harmful or harassing behavior." More relevant, as a matter of general international law a state is *inter alia* responsible for failure to issue a genuine apology, failure to punish those responsible or provide official compensation, and for the continued opposition to efforts to obtain reparations in its national courts. These trends suggest that in international law protection against sexual and gender-based violence, whether perpetrated in public or private life (domestic violence) or whether a crime of violence (war crime, crime against humanity, or genocide) or a crime of dignity and honour is ensuring that states incur their international responsibility for the act or omission of states officials and failure by the states to exercise due diligence (Kushalani, 1982 ; Askin, 1997; Bassiouni, 1999). This responsibility will be born out not only from the rules of customary international law as evidenced above but also from the rules of conventional international laws (Human Rights Committee General Comment no 31, 80). In other words, while rules of customary international laws recognise states' responsibility for the actions and omissions of their officials. Rules of conventional laws attribute states' responsibility for the actions of individual or private actors because of states' failure to act or prevent such actions. The question of the state's responsibility for the violation of treaty laws is a straightforward issue. Paragraph 2 of article 4 of the Maputo protocol armoured the theory of state responsibility for acts of private individuals. It requests States Parties to take appropriate and effective measures to: "Enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public…"

States' responsibility for sexual violence occurring in private spheres arises because of the failure to comply with its international obligations including enacting and enforcing laws, investigating, prosecuting, or even preventing the occurrence of such acts.

Legal remedies for victims of acts of sexual and gender-based violence

A victim is defined as a: "Person who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate…. victims also include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation" (UNSCR 1325, 2000). International laws guarantee the rights to a remedy for a victim of international human rights violations (Art. 8 UDHR,1948; Art 2 ICCPR, 1966; Art 6, ICEAFRD, 1989; Art14 CAT 1987; Art 39 CRC, 1989; Art 3, 1907 Hague Convention; Art 91 AP I, 1977; Art 68 & 75 ICC; Art 7 ACHPR, 1998; Art 25, ACHR; Art 13 EU-CPHR). These rights extend from the right to justice to the right to adequate reparation or satisfaction for any damage suffered because of such violations. In the same vein, Joinet's (1996) studies on the question of impunity identified the right to know, the right to justice, and the right to reparation as the three main legal rights of a victim of gross violation of human rights. Victims' rights to justice and reparation are just but the legal consequences of the state's responsibility for the violation of international obligations (GA Res. 60/ 147). However, the international law protection of human rights should not be confused with criminal accountability. The former's objective is not to punish criminals who are guilty of violations as the latter does but rather to protect the victims and provide for reparation in case of violations of their rights whether by states or individuals. Rules on the enforcement of treaties and customary law constitute a non-criminal law mechanism through which victims can obtain remedies against states that failed

to promote and protect human rights (ILC,2001). The imposition of liability on the state for the failure to protect or prevent human rights violations is not new under international law (ILC, 2001). State practice has established this rule as a norm of customary international law and a principle of international law. Any breach of an engagement involves an obligation to make reparation. Reparation is an indispensable attribute or consequence of any responsibility (Eichmann case, 1961; Germany's Federal Supreme Court, 1963; Netherlands, District Court of Hague, 1949 ICTY Furundzija, 1998; TADIC, 1999). This is a basic rule of international law that reparation is compulsory for any violations of international law and there is no need for such a requirement to be incorporated into any treaty. A state responsible for the violation is under an obligation to make full reparation for the injury caused by the internationally wrongful act" (Art. 31, ILC 2001). The Draft Articles on State Responsibility provide various forms of reparation, including restitution, compensation, or satisfaction (Art.34, ILC 2001). Whether single or in combination, reparation measures need to be determined on the basis of individual cases. Likewise, international law provides that state responsibility exists or may exist in addition to the requirements to prosecute individuals for gross violations (Art.2 ICCPR, 1966). This is armored in Article 40 of the Draft Articles on State Responsibility. "… a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation." In the context of sexual and gender-based violence a state's failure to deploy its machinery to ensure the non-occurrence of such acts also constitutes a serious violation (General comment Art 2 CAT, 2008). Sexual and gender-based violence as a crime under international law enjoins states to enact legislation, if not already done so, the duty to investigate, and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violation and, or extradite and if, found guilty, the duty to punish the perpetrator and the provides remedies such as reparation, free access to justice, free services including shelters and medical care. Despite this pronouncement, the position of

victims of gross human rights violations remains largely unexplored in terms of legal remedies under international law. Not only does international law require that appropriate measures should be taken to protect victims but also it requires that victims be provided with 'equal and effective access to justice; 'adequate, effective, and prompt reparation for the harm suffered, and 'access to relevant information concerning the violation and reparation mechanism'. Adequate, effective, and prompt reparation is intended to promote justice for victims of sexual and gender-based violence. The dictum on reparation implies that such redress must be proportional to the gravity of the violations. The reparation systems may take various forms, including restitution, compensation, or satisfaction, and must be made in full (Art.34 ILC,2001). Without prejudice to the appropriateness of some of these reparation forms for the crime of sexual violence, it is suggested that a single or a combination of the reparation forms is possible. The international law of reparation prioritises restitution among the forms of reparation. It is only when it is not materially possible and does not put an additional burden on the victim that the state may consider other forms of reparation, including compensation. However, some scholars viewed restitution as inappropriate in the context of sexual and gender-based violence and prioritised compensation and satisfaction. Thus, whether single or in combination, reparation measures need to be determined based on individual cases.

Conclusion

The extent to which victims of sexual and gender-based violence may bring cases against states for the failure to comply with rules on the enforcement of customary and conventional international laws is now obvious under international law. A victim of sexual and gender-based violence has a right to claim reparation, whether in the form of compensation, restitution, satisfaction, or rehabilitation for any damages, whether caused by private actors or state organs. Such a redress can be addressed through both international criminal law for individual criminal responsibility and rules on the enforcement of customary international and human rights law

which impose obligations upon a state and for which the violation incurs state liability for internationally wrongful acts. Both routes (individual criminal responsibility and state responsibility) are appealing although the latter is more promising than the former because it is more likely to increase the potential for states to take their international legal obligations toward victims' rights to reparation more seriously. The state's responsibility arises because of the failure to exercise due diligence or failure to comply with treaty obligations.

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Declaration

Funding This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Conflicts of interest/Competing interests: Unless otherwise, I declare no conflict of interest as the research used primary and secondary sources of information.