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John Cabot University

Department of Political Science and International Affairs

Bachelor of Arts in Political Science
Bachelor of Arts in International Business

Rape used as a weapon of war in conflict zones
Case Study: Kashmir

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Abstract

The use of sexual abuse and rape in wars and armed conflicts are as old as war itself. But the stigmatized and private nature of sexual assault means that these atrocities are often undocumented, left out of the historical accounts and concealed in news stories that primarily focus on casualties and means of warfare. In this discussion of arms and ammunitions, means and objectives and, soldiers and rebel groups, the violence against women in armed conflicts are often completely overlooked and underemphasized.

Consequently, this thesis aims at highlighting the prevalence of sexual violence in armed conflict and, more specifically, attempts to establish the use of sexual violence as a means of warfare. It relies on the theory of Thomas and Ralph on the tradition of impunity that effectively establishes the "intent and motive of rape as an agency to subjugate and inflict shame upon their victims, and by extension to their families and communities." (Thomas and Ralph, 1994, pp. 82) In doing so, it explores the 'honor' framework that surrounds the victims of sexual violence that effectively categorizes rape as a sexual act instead of a violent one. An act that fails to categorize violence against women as torture and rather as collateral damage in armed conflicts.

With the conflict in Kashmir as the case study, this thesis recognizes and analyzes the complex socio-cultural and political dynamics of the region concerning the use of sexual violence as a war tactic. Hence, to effectively examine the causes, effects, and consequences of such a tactic, the thesis is focused solely on the Indian administrated territories of Kashmir. In limiting the research, the thesis explores the shortcoming and loopholes in the existing national and international provisions on sexual violence. Finally, it emphasizes the need for command responsibility in the prosecution of the perpetrators alongside the trial of violation of human rights in civilian fast track courts as opposed to the military courts.

Dedication

Wholeheartedly dedicating this work to anyone and everyone that has inspired and empowered me to become an unapologetic version of myself.

Most importantly, To my Grandfather.

Here's to the man who kept a dictionary by his bedside table just because an insufferable six-year-old wanted to know the exact meaning of the words she could not pronounce. The man who spent hours trying to help an anxious kid perfect her arguments for the nerve-wracking debates. To the man that bought her endless novels when everyone expected her to only be concerned with school-related works.

The friend that always encouraged and inspired me to do what I wanted to, regardless of how unconventional and idiotic the plans were. He said, "Beta, there is nothing to lose, it'll either be a success or a lesson. If not, a funny story to look back at, if you get a sense of humor!" To the individual that annoyed me the most with his random teasing and arguments just because I always had anger on the tip of my nose.

To the best teacher that taught me to improve my arguments instead of raising my voice. The extraordinary kind that asked questions in response to my questions. And in doing so, taught me to find my answers. To the one who taught me to listen to understand and never to merely respond.

To the grandfather who made it to every school program, I ever participated in. And always clapped the loudest and the longest. The man who witnessed my journey from being a shy kid to a confident student to an over-confident and rebellious teenager that fell on her face. But, unlike the rest, loved me the same and looked at me the same; with pride and confidence.

The one who valued my opinions and never dismissed it just because I was a kid. And made me feel heard, seen and important.

To Jay Narayan Mandal. A respected official. An opinionated individual. And always a non-conformist. But also, my well-wisher, my support system and my confidante. That one person who will not be able to read this work but would most definitely be the proudest of them all anyway!

Things are not the same without you and it never will be. But I promise to work twice as hard in every step. I promise to constantly challenge myself. To have the courage to follow my heart and be there for myself irrespective of my doubts and fear. And I promise to stand up after every setback no matter how difficult it is and how defeated I feel. Because I know you would want me to! You'll be my first thought in happiness and sadness. Always.

Your Kali, who'll never have a better vocabulary than you

A constant work in progress

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List of Abbreviations

ICC	International Criminal Court
ICTR	International Criminal Tribunal Rwanda
ICTY	International Criminal Tribunal Yugoslavia
IHL	International Humanitarian Law
IoA	Instrument of Accession
IPC	Indian Penal Code
LOC	Line of Control
NIAC	Non-International Armed Conflict
MDR	Mouvement Democratique Republican
OHCHR	Office of the High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council
FIR	First Incident Report

1. Introduction

The use of sexual abuse and rape in wars and armed conflicts are as old as war itself. But the stigmatized and private nature of sexual assault means that these atrocities are often undocumented, left out of the historical accounts and concealed in news stories that primarily focus on casualties and means of warfare. In this discussion of arms and ammunitions, means and objectives and, soldiers and rebel groups, the violence against women in armed conflicts are often completely overlooked and underemphasized.

This is because, in our society, rape is seen as a sexual act instead of a violent one. Given that it always follows an honor framework, “violence against women has not been readily viewed as torture, or as being imputable to the State, because of its widespread commission by private actors within the private arena of the home.” (Chinkin, 1994, p.328) Consequently, women are often subjected to sexual violence perpetrated by rebel groups, military forces and members of the community. Furthermore, various literature and cases indicate that sexual violence often occurs in addition to other crimes including murder, torture, looting, pillaging or forced displacements.

Now, in the context of war, the “complex and combined emotions of hatred, superiority, vengeance for real or imagined past wrongs and national pride are engendered and deliberately manipulated.” (ICRC, 2001, pp. 12) Sexual violence, especially when conflict-related, is linked more with the notion of power, dominance, and abuse of authority as opposed to just sexual desire. Most of the literature related to conflict-related sexual violence agrees with the notion that sexual abuse is "neither incidental nor private but rather something that routinely serves as a strategic function of war." (Thomas, Ralph, 1994, p. 83) Conforming to the statement, Chinkin (1994) too, completely strays away from the common notion of rape as a sexual act. Rather she categorizes

rape as the “structure of power and control which is formed on the notion of a soldier’s masculine privilege, by the strength of the military’s line of command and by class and ethnic inequalities among women.” (Chinkin, 1994, p. 328) As for the motive of sexual violence, the UNHCR Special Rapporteur states that the intention is "to humiliate, shame, degrade and terrify the entire ethnic group". This statement is supported by the social construct of gender roles that stereotypically categorize women with the need for protection. Besides, the honor of the family and society is usually associated with the well-being and purity of the women in our society.

Hence, the intent and objective of rape as a weapon of war are "to subjugate and inflict shame upon their victims, by extension to their families and communities." (Thomas and Ralph, 1994, pp. 82) This theory is endorsed by Thomas and Ralph, scholars renowned for their impartial commentary on the tradition of impunity based on their analysis of the ICTY and ICTR. In their analysis, they have explicitly stated that there are reasonable grounds to believe that "soldiers can succeed in translating the attack upon an individual woman into an assault upon her community because of the emphasis placed on the women's purity and the fact that the societies define themselves in overt or less clear-cut fashions, relative to their ability to protect and control that purity." (Thomas, Ralph, 1994, p. 92) Therefore, it can be established that the ultimate objective of sexual violence as a weapon of war is to demoralize and destabilize the entire communities by the exertion of power. In doing so, the gender roles and, more specifically, the honor framework surrounding these norms and identities play an integral role in the execution of the intended crimes.

Hence, predominantly, this thesis aims at highlighting the prevalence of sexual violence in armed conflict and, more specifically, attempts to establish the use of sexual violence as a means of warfare. In doing so, it relies on the definition and development of rape and sexual violence in International Law. It also explicitly explores the ‘honor’ framework that surrounds the victims of

sexual violence that effectively categorizes rape as a sexual act instead of a violent one. An act that fails to categorize violence against women as torture and rather as collateral damage in armed conflicts. The thesis relies on the feminist theory of intersectionality to demonstrate the intricate yet prominent connection, in the use of sexual violence as a war tactic to either suppress, oppress or dominate a civilian population in the context of conflict.

In choosing Kashmir in particular as the case study, the thesis explores the provisions for a territory that serves as the exception to the rule, both in the national and international arena. First, India is neither a signatory nor a member of the International Criminal Court, according to the Rome Statute. Hence, the plausible solution of handing over the suspects to the court is not a possibility for the Indian administered Kashmir. Second, until recently, Jammu and Kashmir, under article 370 of the Indian Constitution, had special provisions in terms of laws and policies for the governance of the state. This excluded the possibility of military personnel deployed in Kashmir to be held in contempt under the same restrictions as defined by either the military or civil law on rape and sexual violence.

Furthermore, with the conflict in Kashmir, this thesis recognizes and analyzes the complex socio-cultural and political dynamics of the region with the use of sexual violence as a war tactic. Hence, to effectively examine the causes, effects, and consequences of such a tactic, the thesis is focused solely on the Indian administrated territories of Kashmir. In limiting the research, the thesis explores the shortcoming and loopholes in the existing national and international provisions on sexual violence. Finally, it emphasizes the need for command responsibility in the prosecution of the perpetrators alongside the trial of rape in civilian fast track courts as opposed to the military courts.

But most importantly, in choosing Kashmir, the thesis attempts to emphasize on the atrocities in the region that is overlooked and almost normalized in an international context. The conflict that has been going on for 70 years now and the international community, regardless of its resources and means, has proved to be incapable and unwilling to help resolve the issue. Therefore, if anything, this thesis attempts to shed light on the inhumanity and barbarity the Kashmiris are facing daily.

2. Kashmir as a Conflict Zone

Kashmir, a region once recognized for its *Kashmiriyat*, traditional harmony and religious tolerance alongside its spectacular beauty, is now known as the most densely militarized zone of the world. For the past 70 years, this 86,000-square-mile region¹ has served as the battlefield in the conflict between Pakistan and India.

However, this ongoing armed conflict in Kashmir extends beyond just a territorial dispute. It is a strategic conflict instigated and fueled by its rich historical background, uninformed decision making during the colonial era and a result of an inexhaustible power dynamic between the two neighboring nations in South Asia.

In attempts to understand the relevance and continuance of the conflict, this chapter reviews the background of the conflict. In particular, it explores the historical relevance in terms of the religious rule in Kashmir before the British Empire followed by the issues of Indian partition in 1947. Then, it identifies the reasons for the continuity of the conflict. In doing so, it explores the competitive nature of the neighboring nations and outlines the relevance of India and Pakistan's subsequent transformation into nuclear nations. Finally, it observes the role, significance and interests of the religious-nationalist governments in wanting to govern Kashmir.

¹ In terms of perspective and reference, roughly the same size as Idaho

Background of the conflict

Cultural relevance

In terms of historical background, Kashmir, as the land surrounded by mountains and the Siachen Glacier, was renowned as 'paradise on earth' towards the end of the medieval era. But more than just its natural beauty, Kashmir was eulogized as heaven because of the religious tolerance that existed in the historical Kashmir. Over time, Kashmir became the dwelling for the teaching of Hindu's Kashmiri Shaivism, Buddhist ideology and eventually the center for Sufi Islam.

The values and practice of religious tolerance initiated under the rule of Hindu King Lalitaditya. Known to prioritize peace and harmony, his reign facilitated the peaceful co-existence of Hinduism and Buddhism in Kashmir. This period marked the development and steady progress of the remarkable ancient architectures. (Brown, 2013) Like their ruler, Kashmiris too demonstrated religious tolerance and acceptance which facilitated the existence of numerous Buddhist monasteries and stupas alongside Hindu temples.

After the Hindus, Kashmir was ruled by the Persian Mughals that solidified the existence of Islam in the region. As a result, "for nearly 700 years, the Sufi tradition of Islam has entrenched itself at the center of the cultural and spiritual life of India-controlled Kashmir, combining the rich cultural influences of other ancient traditions with its eclectic emphasis on tolerance and peaceful coexistence." (Mir, 2011, p. 1) Aligned with their values, the tolerant people of Kashmir accommodated the diverse cultures and the three major religions made a significant impact on the lives and the history of the Kashmiris.

This co-existence signified Kashmir as the intersection of multiple communities synchronized in harmony for centuries. Also known as the valley of *Pirwaer* and *Rishiwaer*, the abode of Sufis and Rishis, Kashmir valley was known for its diversity and tolerance based on the

religious faiths, cultural significance: co-existence of numerous temples, monasteries, and mosques, and the symbolic value of the art and architecture.

Therefore, as of relevance, Kashmir holds cultural and religious values for both Hinduism and Islam. Given the influence of Kashmir in Shaivism, the Hindu ideology has been better known as 'Kashmiri Shaivism'. At the same time, with heavy contestation within Islam about Sufi Islam² not being the purest form of Islam, Kashmir is the place that still holds the structural, cultural and architectural value of Sufism.

Issues with Partition

In August 1947, the two-hundred-year-old, colonial rule ended in British India with the creation of two independent nations: India and Pakistan (Pakistan comprised of East Pakistan, present-day Bangladesh, and West Pakistan). While the ideals of national self-determination and the mutual sense of common identity, in terms of nationality, paved path for a successful Exit Movement in the Indian subcontinent, the ideological divide between the Muslims and Hindus in India remained.

Consequently, "the need for a partition of the new country came about as Hindus and Muslims in India were deeply divided and unwilling to coexist in the same nation. Specifically, the Muslim League did not want to accept Indian independence if it were to be governed by the Hindu-dominated Congress party." (Mackrell, 2018, p. 11) Therefore, as part of the agreement between the British and the Indian National Congress in the Lok Sabha, "it was agreed between British Prime Minister Clement Attlee and the Indian leaders that two nations should be created, one of Muslims and another for Hindus." (Mackrell, 2018, p. 12) Hence, after the second world

war, as part of the Mountbatten Plan for partition, a Radcliffe line was drawn on 17th August 1947, effectively creating two nations.

According to the Mountbatten Plan, the states predominantly were to be divided based on their majoritarian religion. In addition to the division, the plan also provided provisions for the transfer of the population based on religion. After the formal recognition of two nations, the people were allowed to choose, between Hindu India and Muslim Pakistan, and migrate accordingly. This plan aimed to effectively "succeed in creating two religiously homogeneous countries." (Davis, 1949, pp 257) To remain impartial, Earl Louis Mountbatten tasked Sir Cyril Radcliffe, a British lawyer, with the separation. While any partition in India would not have satisfied either party completely, the haste in decision-making and the ignorance of the partitioner complicated the issue.

Sir Radcliffe divided the Indian subcontinent, in five weeks, by drawing the “553 km long zigzag line that divided Punjab and the 4096 km line that halved the Bengal Presidency.” (Kapoor, 2019, p. 4) However, he had never been to India and was unfamiliar with the demographics, cultural background and the territorial arrangements of British India. Therefore, the decision was made without proper consideration and adequate information. Consequently, this resulted in a violent ethnic conflict on the borders of Punjab that displaced, killed and injured millions of migrants.

Nevertheless, besides religious ideologies, the princely states of India were given the option to choose between India and Pakistan independently. In doing so, Earl Mountbatten wanted to preserve his relations with the rulers of the States. This exception created a direct contradiction with the aim of partition based on religion. While the Hindu majoritarian state of Hyderabad and Muslim majoritarian state of Junagadh did not affect with this contradiction, the State of Kashmir was left in ruins.

Strategic Interest in Kashmir

Kashmir's strategic location was an immense advantage for both nations. "Kashmir border Tibet to the east, China to the northeast, Afghanistan to the northwest, and the Indian province of Punjab to the South. It also held pilgrimage sites of religious significance for both Hindus and Muslims. What further complicated Kashmir's situation was that its maharajah was a Hindu ruling over a Muslim majority population." (Illahi, 2003, pp. 79) Now, notwithstanding the exception of the princely state, based on the rule of partition, Kashmir as a Muslim-majority state belonged to Pakistan. However, given its special status, Maharajah Hari Singh had a choice. At the end of October 1947, he agreed on the accession of Kashmir to India upon Jawahar Lal Nehru's promise to grant Kashmir a greater degree of autonomy in India. This promise was maintained by Article 370 of the Indian Constitution.

Continuity of the Conflict

As a response to the accession to India, Pakistan infiltrated Kashmir. The Maharaja reached out to India for protection and immediately signed the Instrument of Accession (IoA), which effectively transferred power to India. The Indian troops then moved into Kashmir, initiating the armed conflict.

The UN tried to mediate a ceasefire between Indian and Pakistan in January 1949. However, no agreement was ever reached. This event was then followed by two other wars, the emergence of both India and Pakistan as nuclear power and the rise of religious Nationalist governments in both nations.

Furthermore, no further concrete actions have been taken by the International community despite numerous reports on violation of human rights and frequent armed attacks on the Line of Control (LOC) After the war in 1947, officially, two other Indo-Pakistani wars followed in 1965 and 1999. The war in 1999 was limited given the emergence of both nations as a nuclear state in 1989. Given the possibility of mutual destruction, a fragile ceasefire has been maintained since 2003, yet there are demonstrations and exchanges of fire in the LOC regularly.

Today, India controls approximated “55% of the land and 70% of the population, Pakistan controls about 30% of land and China controls the remaining 15%”. (Hobbs, 2008, p. 314) In terms of districts, India directly governs the “Kashmir valley, Jammu and Ladakh whereas Pakistan administers Azad Kashmir and Gilgit-Baltistan”. (Malik, 2010)

Based on the census reports of 2011, in terms of demographics, Jammu Kashmir remains a state with a Muslim majority in a Hindu majoritarian country. 68.31% of the total population are Muslims establishing Islam as the dominant religion. As for the religious minorities, Hindus constitute 28.3%, followed by Sikhs with 1.87% and Buddhist with 0.89%. The major ethnic groups are Baluchi, Pashtun, and Punjabis. As for the languages, Urdu is the official and widely spoken language alongside Hindi, Dogri, and Punjabi. (State of Jammu and Kashmir, 2012)



Figure 1: Current Political boundaries of Kashmir. (Hobbs, 2008, pp.314)

Despite the standing ceasefire, "both sides accuse the other of violating the cease-fire and claim to be shooting in response to the attacks. An uptick in border skirmishes that began in late 2016 and continued into 2018 killed dozens and displaced thousands of civilians on both sides of the Line of Control." (Global Conflict Tracker, 2019, p. 3) Moreover, the situation continues to rapidly worsen with the election of a Hindu-majoritarian government in India. With attempts to favor the Hindu population in India through political and economic policy changes such as demonetization, the secular status of India continues to be compromised. If things progress at the same pace, soon the motive of the conflict will yet again be reduced and limited to the differences based on religious ideologies.

3. Theory of Intersectionality

"For most women in India, even though the identity of being a secular citizen is available, it is the identity conferred upon them by their families and communities that is the most significant and abiding. This identity is controlled and created by putting together elements from culture, custom, and religion – elements that determine what it means to be a woman and what are the appropriate roles, activities, and aspirations for the woman so defined." (Priyam, Menon & Banerjee, 2009, pp. 118) Consequently, honor is established as the most cherished value irrespective of class, caste, and religious identities.

In the context of South Asia, honor "refers to good character, doing what is appropriate and moral for one's gender, age, kin relations, caste, and religion. It often centers on the family, male authority, and community linkage." (Charsley, 2013, pp 2) As a result, honor is a part of an intricate framework that predominantly combines gender roles concerning social constructs, such as class, caste, and religion.

Based on the view that "women experience oppression in varying configurations and varying degrees of intensity", Kimberlé Crenshaw coined the term 'intersectionality' in the wake of the Black feminist moment in the United States. (Crenshaw, 1989, pp. 135) Remarkably, she contradicted the typical single-axis discrimination and established that "cultural patterns of oppression are not only interrelated but are bound together and influenced by the intersectional system of society." (Crenshaw, 1989, pp. 139)

In the present era, intersectionality is increasingly being used as an analytical tool, in diverse fields ranging from sociology to law, for theorizing patterns linking identity to oppression.

The recurring reports of systematic, widespread and extreme attacks of sexual violence against women in armed conflict demonstrate a pattern that is often overlooked in the discussion on the consequences and effects of war. Hence, to understand the prevalence and relevance of the various factors related to gender, that make women a target in armed conflict, this chapter aims at exploring intersectionality as a tool for gender analysis of sexual violence.

Therefore, to effectively explore the relation of the honor framework with the use of rape as a means of warfare, this chapter, first, unpacks the relevance and significance of gender roles in the setting of family honor. In doing so, it attempts to demonstrate the layers of expectations that set rules of conduct a woman has to go through, daily, in the Indian sub-continent. Then, it analyzes the added adversity with each layer in the context of intersectionality. More specifically, it explores the relevance of intersectionality based on gender roles and caste within the honor framework. Finally, it outlines the relevance of intersectionality in law. This demonstrates the extent to which the honor framework is embedded in our society. With values so deeply rooted that the principally fair legal system turns out to disproportionately favor the perpetrators in crimes that demonstrate violence against women.

The Honor Framework

In the Indian sub-continent, given the traditional patriarchal setting of the society, there is a heavy emphasis on the notion of family honor. Essentially, this is because the family still is an essential part of the social structure in society. Honor, *i.e. izzat*³, quite simply and generally is projected and maintained by families through their money, status and the behavior of women.

³ Same word used in both Hindu and Urdu, two main languages are spoken in the region of Jammu Kashmir

Despite the direct association of honor with women, it “refers chiefly to the honor of males in the family. The maintenance of honor is the perpetuation of male control; an assault on the honor undermines that system of domination.” (Hasan, 2002, pp. 3)

First, this ideology of honor, undeniably, has a gendered notion in the Indian sub-continent. "A woman is the repository of the family honor as a daughter, wife, and mother while men regulate it." (Vishwanath, Palakonda, 2011, p. 386) Consequently, young girls in India have always been taught to be smaller than they physically are. From a very young age, they are expected to help their mother in the household chores. Allegedly, based on the traditional values, this is because the role of a woman is too, only, ensure the well-being of her 'true' family. The family that only consists of her in-laws, husband and their children. Hence, girls are educated to acquire relevant domestic skills. They are taught to be polite, encouraged to speak only when spoken to. They are taught to be humble; influenced to avoid eye contact while having a conversation. They are taught to be accommodating. And most importantly, all these attributes are put in place, given that “honor is presumed to be a female-linked commodity coupled with the male prerogative to ensure that she does not jeopardize its delicate balance at any cost.” (Vishwanath, Palakonda, 2011, p. 387) Hence, to uphold this rather delicate balance, men are taught to be the protector of the family.

Comparatively, referred to as the *Kuldeepak*, the light of the family, boys are always the priority. Potential old age security and guaranteed tradition bearers, the birth of a son signify the continuance of lineage for a family. Therefore, mere being a man is enough to propel the family to turn a blind eye on, to otherwise intolerable, misconducts and mischiefs, provided that it is done to uphold the family honor and prestige. The same concept is used and applied as the justification of gruesome honor killings that still take place in India. As the breadwinners and authority figure

in the family, it is not only their right but also their responsibility to ensure that women in the family are following the prescribed norms to keep up the family name.

Second, in addition to being strictly patriarchal, Indian society also happens to be strongly hierarchal. While the notion of power is usually an achieved status rather than a role that is dealt with at birth, the prevalence of caste system has changed the notion of status in Indian society. Social relations often understood and interpreted about caste, ethnic group, and rank of an individual in the society. Although castes are primarily associated with the ideals of Hinduism, the hierarchy still exists among other Indian religious groups. French anthropologists and specialists on the cultures and societies of India, Louis Dumont, reckoned that the "Islamic conquerors, *Mughals*, consciously adopted the Hindu caste system during their rule." (Parkin, 2003, pp. 5) However, regardless of the variation in caste and ethnicity, the honor framework remains intact for women in all communities. Rather the hierarchy conforms to the gendered ideology in the sense that men always outrank women of the same or similar age.

Hence, being the embodiment of the family and caste honor, a woman in India is portrayed as "an object of protection and violence at the same time." (Vishwanath and Palakonda, 2011, pp. 387) Therefore, the men in the community do not only rationalize or justify masculine aggression and violence against women to protect a woman's honor but rather in fear of losing the honor that is associated with the family and society; the honor that makes them vulnerable. Thus, this concept of honor that "operates at the cost of human sentiments and values" in addition to the traditional norms and structure of the society is what makes rape a viable weapon of war in the context of Jammu Kashmir. (Vishwanath and Palakonda, 2011, pp. 389)

Intersectionality and Law

While intersectionality is widely recognized as feminist theory, the concept was originally introduced as a legal theory. In terms of the law, intersectionality as a legal theory "proposes incorporating intersectional consideration in the realm of internal human rights law and international humanitarian law to better address the human rights violation that affects women whose identities fall within more than one minority group because of their ethnicity of race". (Davis, 2015, pp. 205) In applying this theory practically, in the court of law, lawyers and legal experts agree that intersectionality should be used to guarantee "effectiveness in the discourse, adjudication" and due process as "remedies for crimes against a civilian population should take all aspects of their identities that make them a target." (Davis, 2015, pp, 209) This is because the inseparability of the identities in an individual goes on to create a surrounding that disproportionately affects them. Thus, "intersectionality uncovers where the overlap of individual categories creates a negative space as opposed to enhanced protection. And within this negative space, the experiences of double (or more) minorities fall outside of legal precedents and are thus left without recognition and remedy under the law." (Crenshaw, 1989, supra note 10, pp. 150)

Therefore, intersectionality can be used both in terms of theoretical discussion of international law, that identifies the marginal population susceptible to violence, and practical implementation by applying the due process in prosecuting the perpetrators of human rights violations, including sexual violence.

4. Rape used a Weapon of War in Kashmir

On January 10, 2019, an eight-year-old Muslim girl, Asifa Bano from the “Bakerwal community was abducted from Rasana village in Jammu and Kashmir. It was later found that she had been drugged, tortured and raped while in captivity before being murdered.” (The Hindustan Times, 2018, p. 1) Based on a report by *Rising Kashmir*, the leading newspaper of the region, the timeline of the incident was as follows:

January 10, 2018: Asifa Bano was last seen at 3:30 pm by her family

January 12, 2018: The family filed a First Incident Report (FIR) at the Hiranagar Police Station. Even though it had been over 24 hours of disappearance, the police did not begin the search

January 14, 2018: The body was found with human bites and torture marks. They sent the body for autopsy. (Rising Kashmir, 2018)

Given the inhumane nature of the crime, there was a massive uproar. The locals blocked the Jammu-Pathankot highway and soon this news streamed on a national level. The entire nation came together to demand justice for Asifa. After the 2012, Nirbhaya gang-rape case, this was another incident that gained momentum and brought the entire nation together. Only this time, the outcome was not what the public expected.

Unlike the Nirbhaya case where the perpetrators were found within 5 days and sentenced to death, during this case, “the crime was followed by a destruction of evidence during initial investigations, the politicization of the issue by turning it into a communal issue, pressure from

right-wing legislators to hush up the case, and the overt harassment of the victim's community by parts of the Hindu majority in the Jammu region.” (Dir, 2018, p. 2) Asifa Bano is a Muslim girl, belonging to the Gujjar tribe in the Jammu region.

Based on intersectionality, three identities played an integral role in Bano being picked as the victim: her religion, her tribe, and her demographics. As a Muslim under a Hindu-nationalist government that openly advocates for ‘Hindutva’, Bano is already disproportionately affected. This is because the *Bharatiya Janata Party's* (BJP) doctrine of ‘Hindutva’ reframes the dimension of Hinduism and make it an integral part of an individual's identity as opposed to just being a religion. Hence, for the first time in India, the lower caste Hindus such as *Dalits* and *Karmis* are placed in a higher social advantage in comparison to an affluent Muslim in India.

Second, the Gujjar, Bakewell and Pahari are three marginalized ethnic communities in Jammu that “have had a significant contribution to the political struggle of demanding self-determination from India.” (Bir, 2018, p. 10) “As an established nation-state, India's objective has been to discipline and assimilate Kashmir into its territory.” (IPTK, 2008, pp. 9)⁴ Therefore, as part of the tribe that opposed the annexation of Kashmir into India, Bano checked another criterion of intersectionality.

Finally, as a young girl of the Gujjar, Muslim community, her abduction, torture, rape and then murder after four days of her disappearance signifies the inability of the community in protecting their children and girls in their neighborhood.

⁴ International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir

Systematic and Widespread Sexual Violence

In the 2013 Special Rapporteur on Violence Against Women, it was stated that "Women living in militarized regions, such as Jammu and Kashmir and the north-eastern states, live in a constant state of siege and surveillance, whether in their homes or public. Information received through both written and oral testimonies highlighted the use of mass rape, allegedly by members of the State security forces, as well as acts of enforced disappearances, killings and acts of torture and ill-treatment, which were used to intimidate and to counteract political opposition and insurgency." (Manjoo, 2014, p 23)

Given the lack of access and constant lockdown of the state, it is fairly difficult to gather adequate information on the exact number of the crimes, span of trials, factors of considerations in the proceedings that eventually add to establish the threshold for effectiveness in Kashmir. However, as per the report by OCHRC, about 143 cases of alleged sexual violence were reported and trailed between 1989 and 2017. The Indian government has repeatedly expressed its discontent in the allegation of human rights violations and inherently denied the use of rape as a means of warfare. In doing so, it refers to a legal provision that allows for military personnel to be adjudicated in civil court to ensure fairness and the low number of reported cases. While the number aligns with India's constant maintained remark of rape not being used as a weapon of war in Kashmir, the reality is quite different.

5. Applicability of International Law

While the effects of sexual violence have always been substantial, it has only recently been recognized as an international crime. Due to the criminal tribunals of the 1990s (ICTY and ICTR), and the establishment of the International Criminal Court (ICC), international criminal law has seen swift advancement. In 2002, the ICC explicitly identified and categorized rape and sexual violence as Crimes Against Humanity under Article 8 of the Rome Statute. Before this, under the Geneva Convention, according to Common Article 3 on the Non-International Armed Conflict (NIAC), rape was categorized and prohibited as "outrages upon personal dignity, in particular, humiliating and degrading treatment." (NIAC, Article 3) Moreover, alongside rape, the International Criminal Court also criminalizes "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity." (Gaggioli, 2015, pp. 508) Undoubtedly, this is a major milestone in de-stigmatizing rape and separating it from the honor framework, but the laws and provisions in place still face a lot of challenges and are filled with undeniable loopholes.

Hence, this chapter specifically explores the grounds on which the perpetrators can be prosecuted for sexual violence, beyond a reasonable doubt, under the jurisdiction of the ICC. In doing so, it relies on the practical implementation of intersectionality as a legal theory. In exploring the shift in the context of crime and human rights violations from an honor-framework to a form of torture, the chapter attempts to highlight the procedure of change in international law.

Therefore, first, it explores the definition and development of rape and sexual violence in International Law through the International Criminal Tribunal in Rwanda and International Criminal Tribunal in Former Yugoslavia. The chapter analyzes the landmark cases while exploring the relevance of indirect command responsibility and Joint Criminal Enterprise (JCE) in prosecuting the crimes related to sexual violence. In specifically looking at the provision of JCE and command responsibility, the chapter attempts to explore the precedence in holding authorities in contempt for either the commission, order or even the omission and negligence of a human rights violation. A phenomenon that is rare in the prosecution of perpetrators in sexual violence.

International Criminal Tribunal Rwanda (ICTR)

Rape, as an offense, was first explicitly defined in the Trial Chamber Judgement of *The Prosecutor v Jean-Paul Akayesu*⁵. In this case, Akayesu, as the President of a political party called Mouvement Democratique Republican (MDR), was charged with 15 counts of crime against humanity including rape, violation of Article 3 to the Geneva Convention and Additional Protocol II for the systematic and widespread crimes against 2000 Tutsis in Taba Commune during the conflict.⁶

This was essential in setting the precedence for three major reasons: defining and contextualizing rape as and sexual violence, the notion of consent in a conflict zone and the role of command responsibility in sexual violence.

⁵ *The Prosecutor v Akayesu* (Judgement) (International Criminal Tribunal for Rwanda, Judgement, Trial Chamber, Case No ICTR- 96-4-T, 2 September 1998)

⁶ MacKinnon, C. (2006) 'Defining Rape Internationally: A Comment on Akayesu'. *Columbia Journal for Transnational Law* 940, 942

First, the Trial Chamber defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁷ (Mackinnon, 2006, pp. 942) In defining it as such, the chamber recognized “that the central elements of rape could not be captured in the mechanical description of objects and body parts.”⁸ (Prosecutor v Akayesu, 1998, para. 687) Here, rape was established as the ultimate crime of aggression and the physical invasion of a sexual nature that violated the personal dignity of the victim. Similarly, in defining sexual violence, the court also elaborated that:

"Sexual violence is not limited to physical invasion of the human body and may include which do not involve penetration or even physical contact... coercive circumstances need not be evidenced by a show of physical forces. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence."⁹

Second, the biggest substantive accomplishment of the case was “the recognition that consent is meaningless for acts of sexual nature in the context of armed conflict, crimes against humanity and genocide.”¹⁰ (Simic and Collings, 2018, p. 67) This ruling is particularly remarkable because regardless of Rule 96 of the ICTR *Rules of Procedure and Evidence* that provides for consent to be used as a defense for rape, the Appeals Chamber leaned towards the argument that the notion and discussion of consent should not be applicable in the context of war and armed conflict. In

⁷ Ibid

⁸ The Prosecutor v Akayesu (para. 687)

⁹ IBID Para 688

¹⁰ Supported by Simić, O., & Collings, J. (2018) in *Defining Rape in War: Challenges and Dilemmas* and Anne-Marie L.M. De Brouwer in *Supranational Criminal Prosecution of Sexual Violence* <https://www.icc-cpi.int/NR/rdonlyres/AF3FA255-B1D9-4FA4-992F-56079A2DCC63/279736/ICCOTP20081027MacKinnon.pdf>

doing so, the court sets the precedence that "non-consent should be implied from the surrounding circumstances of the crime rather than being an element to be proven by the prosecution."¹¹

Finally, the Trial Chamber found that there was sufficient evidence to prove that, based on commission and omission, Akayesu was found guilty beyond a reasonable doubt. Not only did he “allow for rape, sexual violence, and other inhumane acts to take place in his commune but also facilitated the commission through his ‘words of encouragement’”. (Jean-Paul Akayesu Case, para 731) Besides, by the virtue of his authority, Akayesu, with his unwillingness to do anything to stop the crimes sent a clear message of official tolerance for sexual violence. For these reasons, the ICTR, under command responsibility held Jean-Paul Akayesu "criminally responsible for the aiding and abetting the crimes of rape and other inhumane acts that amounted to crimes against humanity."¹²

International Criminal Tribunal for Former Yugoslavia (ICTY)

Similarly, the armed conflict in former Yugoslavia included systematic sexual violence and gender-based assaults including gender-based assaults including rape, sexual slavery, castration, forced pregnancy, and sexual torture. As for the motive of sexual violence, the UNHCR Special Rapporteur states that the intention is often “to humiliate, shame, degrade and terrify the entire ethnic group”.

The *Celebici Case* was the first rape and sexual violence-based prosecution to occur in ICTY. While this particular case affirmed the definition of Akayesu, the subsequent trials

¹¹ Simic and Collings, p. 189

¹² Ibid para 694

developed an alternate definition and context of rape in armed conflict. In December 1998, the judgment for *Prosecutor v Anto Furundžija* not only widened the scope of rape but also emphasized on the role and significance of co-perpetrators under Joint Criminal Enterprise (JCE).

Primarily, recognizing the absence of a generally accepted definition of rape in international law, this case gathered “upon the general concepts and legal institutions common to all the major legal institutions of the world to arrive at an accurate definition of rape.”¹³ (*Prosecutor v Furundžija*, 1998, para 175, 178) It identified the elements of rape as:

- (i) “The sexual penetration, however slight:
 - a. Of the vagina or anus of the victim by penis of the perpetrator or any other object used by the perpetrator; or
 - b. Of the mouth of the victim by the penis of the perpetrator
- (ii) By coercion or force or threat of force against the victim or a third person¹⁴” (*Ibid*, para 185)

Under the definition, the Trial chamber settled on a definition that explicitly lists the physical mechanics of rape as penetration in combination with coercion or force as an element of the crime. “The Trial Chamber rationalized this particular definition through considering that without such specification, alleged perpetrators may not have sufficient *mens rea* to satisfy the crime.”¹⁵ Now, while the trial's definition goes beyond the traditional definition of rape in the context of including forced oral sex as sexual violence instead of mere sexual assault and acknowledging the context

¹³ *Prosecutor v Furundžija* (1998) International Criminal Tribunal for the Former Yugoslavia. Case No. IT 95-17/1-T, Trial Judgement, 43, 274 (para 175, 178)

¹⁴ *Ibid* (para 185)

¹⁵ Simic and Collings, p. 189 and Catharine MacKinnon, p. 946

of consent¹⁶, it defines rape in a more restrictive way than that of the Akayesu case. In the previous case, rape was more than just the sum of mechanical body parts and force as it was about the bodily invasion.

Secondarily, in assessing the criminal responsibility of the accused of torture and rapes, the trial chamber found that Furundžija was responsible given his commanding role. Furundžija was a local commander of a special unit of military police of the Croatian Defense Council known as the "Jokers". While it was clear that Furundžija personally was not responsible for either commanding or commissioning the crimes of sexual violence, based on his omission as the unit's commander, he was found guilty as a co-perpetrator.

This principle of co-perpetrator is covered under the doctrine of Joint Criminal Enterprise (JCE) and command responsibility¹⁷. Under Article 7 (3) and 6 (3) of the ICTY and ICTR respectively, the provisions for command responsibility "provide for another form of accessorial liability."¹⁸ Based on this, "a person holding command responsibility, whether as a civilian or military leader, may also be responsible for crimes committed by his subordinates, if the leader fails to prevent the crimes or fails to punish the crimes once they occur. Under this form of liability, an individual may be held responsible for all crimes committed according to the existence of a common plan or design which involves the commission of a crime provided for in the Statute."¹⁹ (Prosecutor v Vasiljević, Judgement) This also includes omission, choosing to do nothing as a

¹⁶ A woman may consent to sexual relations in response to a threat made against her child or her family.

¹⁷ Article 7(1) of the ICTY and Article 6 (1) of the ICTR statute describe five forms of "direct responsibility" Under this, an individual may be liable, under the provision of intend to plan, intend to commit or aware of substantial likelihood. An individual could also instigate, order or aid in the commission of a crime by another

¹⁸ Danner, Martinez, p. 102

¹⁹ Prosecutor v Vasiljević Judgement, ICTY Appeals Chamber

leader, even though the nature of the procedure of the crime is known. Based on this, the leader does not have to be directly involved in the decision-making process of the war strategy or be complicit of the act to be held liable, mere denial or negligence towards these acts of violence is enough to hold them accountable.

International Criminal Court (ICC)

Based on the Rome Statute, rape is prosecuted both as ‘war crime’ and as a ‘crime against humanity’. Moreover, ICC classifies the elements and criteria of the rape based on the common definition of:

1. “The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body
2. The 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, or the invasion was committed against a person incapable of giving genuine consent.”²⁰ (Rome Statute, 2002)

The ICC derived its definition of rape and sexual violence from the judgments of Akayesu and Furundžija. In terms of identifying loopholes and development, the definition under ICC has three fundamental changes.

²⁰ Assembly of Parties to the Rome Statute, supra note 85, art 7(1) (g)-1, 8(2) (b) (xxii)- 1, 8(2) (e) (vi) -1

First, the ICC extended the list on the prosecution of various forms of forced sexual activity that were not mentioned under traditional acts in the preceding cases. Specifically, the “reference to penetration by “any part of the body” allows for the prosecution of rape when the forced act is by the means of unconventional body parts in the context”. (Rome Statute, Article 8) Second, unlike the previous cases, the definition of ICC adopts a gender-neutral language that disintegrates the myth of perpetrators of sexual violence is predominantly men. Third, the ICC provides an extensive list of the treatment of consent. By emphasizing the notion of giving "genuine consent", the court recognizes the physical and mental incapacity to consent in addition to inability. "This feature of the ICC definition corresponds with a recent domestic legislative modification that protects individuals for the lack of capacity to consent."²¹

Furthermore, the doctrine of JCE and indirect command responsibility is transcribed in the Rome Statute under Article 28 on the 'Responsibility of commanders and other superiors. According to this:

- a. “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces
- b. Concerning superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates." (Rome Statute, 2002, Article 28)

²¹ Weiner, p. 1218

While the ICC only prosecutes sexual violence of certain gravity. But this does not mean that “forms of sexual violence which may not reach the gravity cannot be considered an international crime under other treaties or national legalization” (Gaggioli, 2015, pp. 513) Also, multiple parties can be at fault for war crimes and individual criminal responsibility is not always possible, relevant or even enough. Among civilians, military officials, paramilitaries, rebel groups and members of government, the key issue of who should be held responsible for these crimes has remained a problematic factor in International Law.

However, about the issue of command responsibility versus individual responsibility, Baaz, and Stern (2009) presented that the "demands for group conformity, hierarchal structure and the dictates of loyalty, which are integral to the ethos of the military as a globalized institution facilitates collective action for which individuals are seemingly not completely accountable." (Baaz and Stern, 2009, pp.501) This concept goes back to the principle of JCE where troop leaders, generals, and commanders-in-chief can and should be held liable for either the order, commission or omission of the crimes. This is because, usually, the cases related to the use of rape and sexual violence only hold individual or the direct group of involved individuals accountable for the crime. However, the dynamic changes when rape is being used as a weapon of war. Hence, subsequent changes in the law, policies, and adjudication have to be made to properly address the situation and ensure justice.

While the implementation of a provision that already exists in the rule of law is not an unrealistic recommendation to make but given the fact, India has neither signed nor ratified the Rome Statute complicates the issue. Unlike member nations, the perpetrators of the crimes in India

Administered Kashmir cannot be adjudicated in the International Criminal Court when the national courts fail to deliver justice.

6. Applicability of Indian National Law

As there is neither obligation nor provision for offenders from non-member states to be held accountable in the International Criminal Court, the perpetrators have to be adjudicated by the provisions of the Indian Penal Code. Given the special status of Kashmir as a conflict zone and the perpetrators being soldiers, in the context of rape and sexual violence being used as a war tactic, the military provision, and procedure of Indian law i.e. 'The Army Act, 1950' applies primarily.

This chapter, foremost, explores the general provisions guaranteed by 'The Army Act 1950' in terms of civil offenses. As per the amendment of the Code in 1975, crimes related to rape and sexual violence by military personnel are tried in civilian court. Therefore, upon defining the criteria and outlining the procedure, the chapter, then, explores the provisions of sexual violence and rape per the Indian Penal Code. Finally, the chapter explores the contradictions that exist in the practical implementation of the defined laws.

The Army Act, 1950

According to Section 70 on 'Civil offenses not triable by court-martial', under Article VI on offenses, rape is categorized as a civil offense. Section 70 states that:

"A person subject to this Act who commits an offense of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder

against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offense against this Act and shall not be tried by a court-martial unless he commits any of the said offenses ---

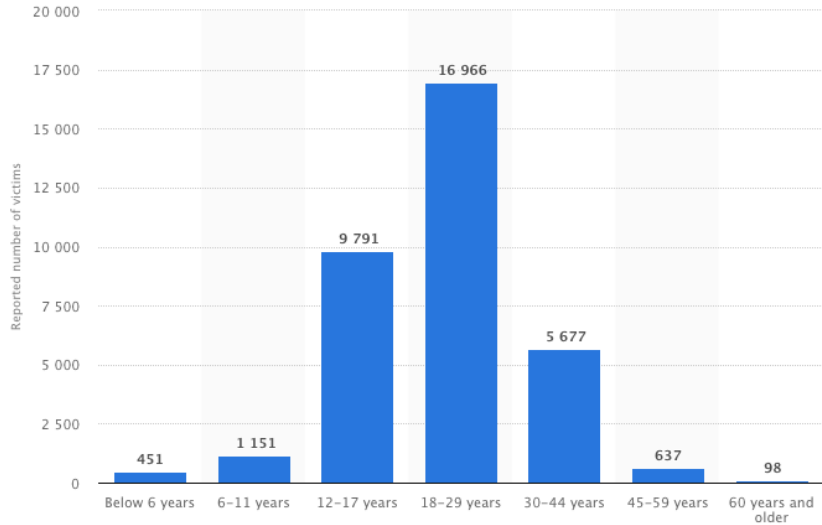
- a. While on active service, or
- b. At any place outside India, or
- c. At a frontier post specified by the Central Government by notification in this behalf.” (The Army Act, Section 70)

Based on this, a rape by an army officer is to be treated in the same manner as a civilian. In terms of procedure, this would imply that a standard First Information Report (FIR) has to be filed at the local police station. The complainant then undergoes medical examination for fact-checking and evidence, Then, upon the confirmation of the crime, an arrest warrant is issued. Given that the complaint based on rape is lodged, the police will be allowed to both arrests and hold an army official into custody until a court hearing is arranged.

Indian Penal Code

The Indian Penal Code is a comprehensive legal document that clearly defines, describes and includes repercussions for all substantive aspects of criminal law in India. The code was first enacted in 1860 under the British Colonial rule. During this period, the definition of rape was drafted based on the 'Doctrine of Coverture'. Based on this, "men and women were not recognized as equals; hence women were not allowed to own property. Hence, a married woman in India too, during the drafting of IPC, was not considered an independent legal entity.” (To have and to hold, 1986, p. 1255) While the code has been amended numerous times, the honor framework still stands.

Specifically, in terms of general laws, Section 354, Section 375 and Section 376 clearly defines the criteria against rape and sexual violence in India. These sections were recently amended in 2013, as a consequence of the brutal 2012 gang rape case in Delhi. The laws were strengthened by increasing the minimum punishment for each provision. While the general punishment for rape was sentenced to be from seven years to ten years, drastic measures were seen in other provisions. "Rape of a girl below the age of 16 years is punishable with imprisonment of twenty years or life imprisonment. As for the rape and gang rape below the age of 12 years, a minimum sentence of twenty years that is extendable to life imprisonment or death" was announced. However, with exception II of Section 375 at a place, India retained the status of being one in thirty-six countries that do not criminalize marital rape.



Additional Information: India; 2015

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Source: NCRB (India)

The severe punishments for rape against girls and no recognition of rape in marriage is a clear indication of the prevalence of honor framework in the country. Statistics show that the number of girls that get raped below the age of 12 is extremely low in comparison to the rape of women from

the age group of 18 and above. While the government justifies the death sentence as a punishment for rape of the age group below 12 as protection measures for children, things are more intricate than that.

First, the Amendment Act only increased the punishment for rape perpetrated against girls and women while the punishment for males getting rapes has not been changed yet. This is why the justification of 'increased protection measures for children' is not completely valid. Second, despite statistics showing an extreme number of reports for the age group of 18 above, the measure is not drastic. Imprisonment of seven to ten years with fine is a standard punishment for most crimes in the Indian Penal Code. Hence, the inconsistency and stark contrast in the range of punishment can be understood through the prevalent honor framework. While the age of marriage of women in India is set at 18 years, marriages happen as early as 14 years. This is based on the notion that a girl getting her period is the rite of passage that turns her into a woman, which makes her illegible for marriage. Therefore, in having an extreme measure for rape under the age of 12, the idea is to preserve the chastity and innocence of a girl. Aspects so important and integral in the Indian society that attempts to contravene them has extreme consequences.

In any case, Section 354 of the IPC that deals with sexual violence still uses honor-specific language for perpetrators to be held accountable. The section states that:

“Assault or criminal force to with intent to outrage her modesty: Whoever assaults or uses criminal force on any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” (Section 354, IPC)

The intent of sexual violence in the Indian Penal Code is defined and completely limited by the threat to a woman's modesty and not to her safety or to the mere virtue of being human. In any case, according to Section 354 A, IPC defines sexual harassment as:

“A man committing any of the following acts:

- i. Physical contact and advances involving unwelcome and explicit sexual overture;
or
- ii. A demand or request for sexual favors; or
- iii. Showing pornography against the will of a woman; or
- iv. Making sexually colored remarks.” (Section 354A, IPC)

The nature of the harassment can be either verbal or physical, or both, and is not restricted by location. Provisions for workplace harassment are addressed in a separate section. Moreover, the annexes of the Section recognizes crimes such as “assault with the intent to disrobe” (S. 354B), “voyeurism” (S. 354C) and “stalking” (S. 354D).

Furthermore, Section 375 of the Indian Penal Code defines rapes:

“To include any or all of the following acts, by a man against a woman:

- i. Penetration of a man’s sexual organ (penis) into a woman’s mouth, vagina, urethra or anus or making her do so with him or someone else; or
- ii. Inserting any object, not the penis, into a woman’s vagina, urethra or anus or making her do so with him or someone else; or
- iii. Manipulating any body part of the woman to cause penetration into her vagina, urethra, anus or any other body part or making her do so with him or someone else;
- iv. Applying his mouth to a woman’s vagina, urethra or anus or making her do so with him or someone else.

Under the following circumstances:

- i. Against her will
- ii. Without her consent
- iii. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt
- iv. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married
- v. With her consent, when, at the time of giving such consent, because of unsoundness of mind, or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent
- vi. With or without her consent, when she is under sixteen years of age.”

(Criminal Law (Amendment) Act, 2013)

Consent is defined as clear, voluntary communication and granted at the age of 18 years. The theoretical aspect of laws related to rape has been amended and advanced to include oral sex, penetration of foreign objects or the forced penetration of one's body parts besides the traditional penetration by the male sexual organ. While this is a progressive step forward for India, the absence of fast track courts, lack of medical kits and faulty chain of custody has complicated the implementation and delayed justice for many victims in India. Furthermore, while the recent Amendment Act of 2013 has effectively shifted the burden of proof towards the accused, the honor framework yet again complicates the scenario.

7. Analysis

In India, many rape cases do not make it to the courts given the stigma that is attached to rape. First, there is hesitation in the victim and the family in reporting the crime as they are concerned about losing the family's reputation and prestige in the society. Second, if they gather the courage to report the crime and register a First Incident Report (FIR), questions such as: 'what time was it? , who were you with? what were you wearing?' places the burden of proof on the victim way before the case reaches the court. The victims are harassed with an improper line of questioning and in most cases, charges are dropped even before the FIR is registered. Third, should the applicant choose to continue with her charges, most local police station lacks the required rape kit for the proper medical examination. Moreover, the stigmatized nature of crime causes a lack of awareness. Given the fact that rape is attributed to being impure, applicants usually want to take a shower and cleanse themselves. In doing so, they lose important traces of evidence that can be used to prove the crime. Besides, during the stage for evidence collection, the unclear chain of custody within the police department also contributes to the obstruction of justice.

Reporting rape in India is already complicated, to begin with. With added trauma, lack of resources and paranoia in conflict zones, the provisions of getting justice have added challenges. In exploring the loopholes that exist in the effective implementation of the legal provision, the chapter will first evaluate the provisions of military courts. In doing so, it will explore the contradictions and means of evasion that exist by 'the Army Act'. Second, the chapter will explore the role of political interference and bureaucracy in obstructing justice. Finally, the chapter will evaluate the strengths and weaknesses of the Indian legal provision in prosecuting the crimes of rape and sexual violence.

While 'The Army Act' allows for the prosecution of rape to happen in the civilian court, in reality, only a small number of cases are sent and adjudicated. This is because, wartime violations usually happen in addition to other crimes such as pillaging, mutilation, or murder. This effectively brings the case back into the military jurisdiction. Also, based on Section 155 of the Indian Evidence Act, the credit of a witness may be impeached. In particular, the sub-section of the mentioned act clearly states that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was generally immoral." (Section 155, 1872) Therefore, although the Amendment act shifts the burden of proof to the accused, the victim, according to Section 155(4) of the Indian Evidence Act is forced to defend her character.

Second, the bureaucratic process of trial in a civilian court is often a long one. To arrest military personnel on duty, the Home Ministry from the central government has to provide permission to prosecute the officer in a civil court. This is often a lengthy process that delays justice. And as the saying goes: 'Justice delayed is justice denied.' The length bureaucratic process is often linked to corruption in the case of India. Based on the Corruption Perception Index 2017, India's public sector ranked 78th out of 180th countries. Based on the same report, at least 50% of the citizens i.e. 54 million people reported that "at some point or another, they had paid a bribe to a public official to get a job done. (Corruption Perception Index, 2017) Consequently, issues such as repeated cases of lost FIRs, untimely transfer of station officers and multiple instances of discrediting medical reports suggest the inadequate political will of the Indian government to ensure accountability when it concerns the violation of human rights.

Moreover, the lack of political will in India can also be attributed to the political motive to coerce Muslims by the Hindu Nationalist government. One of the campaign's promises of India's ruling party was the resettlement of Hindu minorities in Kashmir. In revoking Article 370

overnight, the Modi government is "brazenly trying to change Kashmir's ethnic composition to disadvantage India's Muslim minority by encouraging more Hindus into the region. Furthermore, since the revocation of the Article, Indian Kashmiri leaders who vehemently opposed the decisions -including former chief ministers- have been sent to jail." (The Hindustan Times, 2019, p.7).

Third, in terms of the strengths of the legal provisions, shifting the burden of proof on the accused is an important step in moving away from the honor framework that surrounds the law. However, the lack of proper implementation and execution of existing policies is what disproportionately affects the situation in India. Hence, the legal provisions of the Indian legal system have more weakness in comparison to strengths. The culture of impunity, emphasis, and reliance on the honor framework and the bureaucratic provisions result in the delay in justice.

In a legal system like India where prosecuting an individual for the crime of rape and sexual violation seems complex, suggesting the use and implementation of command responsibility is unrealistic. However, the use of JCE and command responsibility in prosecuting the perpetrators is necessary to eventually end the use of rape as a weapon of war in armed conflicts.

8. Recommendation

India today is known as one of the most unsafe places for women. Recognized as the ‘rape capital’ of the world, India has to do better in terms of both strengthening its legal policies and effectively implementing them. But more than that, the government has to take a step back and ensure that its citizens are aware of the changes that are happening. To ensure justice for the victims, the entire process needs to work together to ensure efficiency and effectivity. But most importantly, the process of reporting the crime should not be more complicated and nerve-racking than the trial itself.

Moreover, in terms of practical recommendations related to rape being used as a weapon of war, there has to be an increased effort in finding out the extent of the problem and breaking the existing culture of impunity in India. Predominantly, citizens should be informed about the provisions of Section 70. Most civilians are unaware of the fact that military personnel can be trialed in civilian court. This reduces the fear, paranoia and the added stress that comes with reporting a crime against military personnel.

Second, the government of India should adopt a transparent approach to prosecuting the violation of human rights. In doing so, the provision of Section 70 should be extended to include all cases of alleged human rights violations committed by army officials. While this could be a long-term measure, as an immediate response, the home ministry should authorize the supreme court with access to all relevant case files and proceedings that take place in the military court. This not only ensures transparency but also allows for the establishment of checks and balances within the judiciary branch.

Third, the Indian legal system should actively work towards removing the framework and language regarding honor in crimes related to sexual violence and rape. The prevalent honor framework already adds struggles in victims wanting to report crimes. Also, all local police stations should have a lady constable on duty with knowledge and skills to effectively and efficiently handle the rape kit. Numerous cases in India have been discarded given the lack of proper evidence.

Fourth, there has to be a persistent and sincere international pressure on India to prosecute perpetrators of sexual violence. As a non-signatory of the Rome Statute, this is the only way to ensure that the justice and basic human rights are being guaranteed to the civilians in Kashmir, during the armed conflict. Also, there should be an emphasis on the post-violence rehabilitation programs for the victims and their families.

While these are the practical measures that can be implemented to improve the situation, the bigger problem remains. The 70-year-long armed conflict in Kashmir has to stop. Civilians are suffering daily and their basic human rights are constantly being compromised. The various reports by independent human rights groups and reports by UN bodies are shreds of evidence that demonstrate the extent of the problem. Therefore, the international community has to come together to end this conflict that is worsening every other today. Today, December 16th, 2019 marks the 128 days of lockdown and media blackout in India Administered Kashmir. And yet no actions have been taken to even address the issue let alone to solve them.

9. Limitation

While this thesis focuses on women as the victim of rape and sexual violence in the conflict zone, it is under no circumstances denying or making the claim that men are not affected by the crime. The sole reason for the emphasis on women as the victim of conflict-related sexual violence is because girls and women are more vulnerable to the long-term adverse consequences. Especially in the region like Kashmir with pronounced gender roles and undeniable prevalence of the honor framework. Besides the common psychological trauma in all victims of sexual violence and an increased chance of pregnancy, a woman in Kashmir also faces challenges in the social construct. In the case that a victim is a teenage or unmarried, the chances of her getting married is fairly low because of the honor framework that highly prioritizes chastity and purity.

Furthermore, given the constraints, the thesis was unable to explore the traits and relevance of toxic masculinity that exists in the Indian subcontinent. While toxic masculinity is a subset of the honor framework, the exploration of the topic with the lens of intersectionality would have enough content to produce another extraordinary thesis.

Finally, the thesis also recognizes that it has not been able to explore the possibility of civilians from the community being involved in crimes of rape and sexual violence. In the conflict zone, with the absence of law and order, it is a known phenomenon that the crimes and acts of violence increase. Besides, the elements of toxic masculinity contribute to the increased violation against women during conflict.

10. Conclusion

In conclusion, this thesis, foremost, establishes the fact that there is more to war than just political causes, strategic means, and differences in ideologies. Second, it demonstrates the intricate dynamic of sexual violence and rape about its setting and context. Third, and most importantly, it highlights the role and significance of culture, tradition, and norms in the context of conflict, law, and implementation of justice.

Also, this thesis extensively explored the prevalence of the existing honor framework in the legal and social provisions both nationally, in the context of Kashmir and internationally in terms of advancements in terms of international law. In doing so, it relied on the theory of intersectionality, both as feminist theory and as a legal theory, to demonstrate the intricate connection in the use of sexual violence as a war tactic to either suppress, oppress or dominate a civilian population in the context of the conflict.

Furthermore, in choosing Kashmir as the case study, the thesis explores the legal provisions of a territory that serves as an exception of the rule, both in the national and international arena. Also, it recognizes and analyzes the complex socio-economic and political dynamics of the region concerning the existing honor framework in the Indian subcontinent.

But most importantly, in choosing Kashmir, the thesis attempts to emphasize on the atrocities in the region that is overlooked and almost normalized in an international context. The conflict that has been going on for 70 years now and the international community, regardless of its resources and means, has proved to be incapable and unwilling to help resolve the issue. Therefore, if anything, this thesis attempts to shed light on the inhumanity and barbarity the Kashmiris are facing daily.

References

- Aranburu, X. A. (2010). Sexual violence beyond a reasonable doubt: Using pattern evidence and analysis for international cases. *Leiden Journal of International Law*, 23(3), 609-627.
- Askin, K. D. (2003). Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles. *Berkeley J. Int'l L.*, 21, 288.
- Barik, N., & Sahu, A. (2016). Intersectionality of Gender, Religion, and Culture: A Study of Women Rights in an Indian State.
- Beringola, A. M. (2017). Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC. *Amsterdam LF*, 9, 84.
- Brown, P. (2013). *Indian Architecture (Buddhist and Hindu Period)*. Read Books Ltd.
- Buss, D. (2010). Learning our lessons? The Rwanda Tribunal record on prosecuting rape. In *Rethinking Rape Law* (pp. 77-91). Routledge-Cavendish.
- Cahn, N., Aolain, F., Haynes, D. (2012). Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights (review). *Human Rights Quarterly*. 34. 682-688.

- Charsley, K. (2013). *Transnational Pakistani connections: Marrying 'back home'*. Routledge
- Chinkin, C. (1994). Rape and sexual abuse of women in international law. *European journal of international law*, 5(3), 326-341.
- Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics. *U. Chi. Legal f.*, 139
- Danner, A. M., & Martinez, J. S. (2005). Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law. *Calif. L. Rev.*, 93, 75.
- Davis, A.N. (2015). Intersectionality and international law: recognizing complex identities on the global stage. *Harvard Human Rights Journal* 28, 205- 242
- Davis, K. (1949). India and Pakistan: The Demography of Partition. *Pacific Affairs*, 22(3), 254-264.
DOI: 10.2307/2751797
- Denov, M. S. (2006). Wartime sexual violence: Assessing a human security response to war-affected girls in Sierra Leone. *Security Dialogue*, 37(3), 319-342.
- Haffajee, R. L. (2006). Prosecuting crimes of rape and sexual violence at the ICTR: The application of joint criminal enterprise theory. *Harv. JL & Gender*, 29, 201.

Gaggioli, G. (2015) Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross*, 503-538

Hassan, M. (2002). The politics of honor: patriarchy the state and the murder of women in the name of family honor. *The Journal of Israeli History*, 21:1-2, 1-37. DOI: 10.1080/13531040212331295842

Hobbs, J. (2008). Complex and Populous in South Asia. *World Regional Geography*. P. 314 ISBN 978-0495389507

Hoyle, L. (2014). Command responsibility-A legal obligation to deter sexual violence in the military. *BC Int'l & Comp. L. Rev.*, 37, 353.

Ilahi, S. (2003). The Radcliffe Boundary Commission and the Fate of Kashmir. *India review* 2:1, 77-102. DOI: 10.1080/714002326

Jammu & Kashmir Official State Portal. (2012). *Demographics*. Government of India. <https://jk.gov.in/jammukashmir/?q=demographics>

Jarvis, M. (2016). Prosecuting Conflict-Related Sexual Violence Crimes. In Stephens D. & Babie P. (Eds.), *Imagining Law: Essays in Conversation with Judith Gardam* (pp. 105-132). South Australia: University of Adelaide Press

- Lindsey, C. (2000). Women and war. *International Review of the Red Cross*, 82(839), 561-580.
- MacKinnon, C. (2006). 'Defining Rape Internationally: A Comment on Akayesu'. *Columbia Journal for Transnational Law* 940, 942
- Malik, V.P. (2010). *Kargil from Surprise to Victory*. Harper Collins Publishers India, p. 54. ISBN 9781135955595
- Mir, T. (2011). Kashmir: The Rise of a Hard Faith. *Pulitzer Center on Crisis Reporting*.
<https://pulitzercenter.org/projects/kashmir-india-pakistan-sufi-wahhabi-islam>
- Mitchell, A. D. (2000). Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes. *Sydney L. Rev.*, 22, 381.
- Mitra, N. (2012). Review, Islam, Women, and Violence in Kashmir: Between India and Pakistan. *Pakistaniaat: A Journal of Pakistan Studies*, 4(1), 91-94.
- Parkin, R. (2003). *Louis Dumont and hierarchical opposition* (Vol.9). Berghahn Books.
- Prosecutor v Furundžija* (1998) International Criminal Tribunal for the Former Yugoslavia. Case No. IT 95-17/1-T, Trial Judgement, 43, 274
- Priyam, M., Menon & Banerjee (2009). Human rights, gender, and environment. Pearson. Delhi

Pruthi, R. K. (Ed.). (2004). *The Indian caste system*. Discovery Publishing House.

Purkayastha, B., & Ratcliff, K. S. (2014). Routine violence: Intersectionality at the interstices. In *Gendered Perspectives on Conflict and Violence: Part B* (pp. 19-43). Emerald Group Publishing Limited.

SáCouto, S., & Cleary, K. (2009). The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court. *Am. UJ Gender Soc. Poly & L.*, 17, 337.

Schomburg, W., & Peterson, I. (2007). Genuine consent to sexual violence under international criminal law. *American Journal of International Law*, 101(1), 121-140.

Sharma, M. (2018). Conflict Situation and Displacement in Jammu and Kashmir State. *Anish Kumar Verma*, 33.

Simić, O., & Collings, J. (2018). Defining Rape in War: Challenges and Dilemmas. *Griffith Journal of Law & Human Dignity*, 6(1).

The Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Judgement, Trial Chamber, Case No ICTR- 96-4-T, 2 September 1998)

Thomas, D; Ralph, R. (1994). Rape in War: Challenging the Tradition of Impunity. *SAIS Review* 14(1), 81-99. John Hopkins University Press.

“To Have and to Hold: The marital rape exemption and Fourteenth Amendment” (1986) *Harvard Law Review* 99(6) Rev. 1255, 1256

Vepa, K. & Acharya, D. (2006). The South Asia Files. <http://www.indicethos.org/IRF1-PartI.pdf>

Vetter, G. R. (2000). Command responsibility of non-military superiors in the International Criminal Court (ICC). *Yale J. Int'l L.*, 25, 89.

Vishwanath, J., & Palakonda, S. C. (2011). The patriarchal ideology of honor and honor crimes in India. *International Journal of Criminal Justice Sciences*, 6(1/2), 386.

Watts, C., & Zimmerman, C. (2002). Violence against women: global scope and magnitude. *The Lancet*, 359(9313), 1232-1237

Weiner, P. (2013). The evolving jurisprudence of the crime of rape in international criminal law. *BCL Rev.* 54 1207.