

Behind Battle Lines: Analysing Commanders' Decisions around Conflict-Related Sexual Violence and Exploitation and Their Penal Consequences

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Abstract

This paper analyses the motivation behind military commanders' perpetration, facilitation and tolerance of conflict-related sexual violence (CRSV), and considers the decision making behind the imposing of punitive measures.

It begins by investigating macro-level criminological perspectives behind CRSV, focusing on understandings of gender, masculinities and power in conflict settings. Meso-level conflict dynamics are subsequently explored to navigate the strategic motives behind CRSV, relating to its deployment to meet military objectives, and its use in regulating and building cohesion among troops. Consideration is then given to micro-level psychological perspectives to elucidate individual decision-making that leads to commanders tolerating or encouraging CRSV. This includes an analysis of some of the most relevant theories within social psychology including social identity theory and moral disengagement. Finally, case law from the International Criminal Court is scrutinised to understand the current approaches towards punishing CRSV,

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before arguing that a lack of knowledge on when and how CRSV will be committed means that punishment should be influenced by a victim-centric approach.

The paper provides an original, multidisciplinary understanding of the state of the academic literature on military command and CRSV. It uniquely brings together criminological theory, conflict analysis and psychological understandings to provide a holistic overview, before investigating approaches towards punishment and prevention. In providing a rigorous review of current understandings and highlighting the limitations of extant knowledge, the paper holds value in paving the way for research to better understand and improve interventions regarding commanders committing CRSV.

I. Introduction

Conflict-related sexual violence (CRSV) has long been a troubling aspect of global conflicts. Historical instances, including the exploitation of ‘comfort women’ by the Japanese Imperial Army during World War II, underscore the institutionalisation of sexual violence in wartime, where women from occupied regions were forced into sexual slavery.¹ Likewise, the 1990s Rwandan Civil War saw the spread of gender-based hate propaganda, with inflammatory slogans in newspapers encouraging sexual violence against Tutsi women, exemplified by phrases like ‘Let us see what a Tutsi woman tastes like’.² In the contemporary context, Afghanistan’s deepening humanitarian and financial crises have led to the resurgence of forced and child marriages, while in Sudan, there are reports of the Rapid Support Forces committing sexual violence against women from indigenous African tribes.³⁴

CRSV has drawn the attention of both scholars and civil society organisations, and more recently, has become integrated into defence and international humanitarian law policies, for example NATO’s new human trafficking policy and a new policy on gender-based crimes by the Office of the Prosecutor of

1 E Stachow, ‘Conflict-Related Sexual Violence’ (2020) 166(3) British Medical Journal of Military Health 183.

2 UN, ‘Early-Warning Indicators of Conflict-Related Sexual Violence’ (United Nations, 2011) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/10/report/auto-draft/Matrix-Early-Warning-Indicators-of-CRSV-Online-Version.pdf>> accessed 2 April 2024.

3 UNSC, ‘Conflict-Related Sexual Violence Report of the Secretary-General’ (United Nations Security Council, 2023) <rb.gy/rpk2q5> accessed 2 April 2024.

4 S Al-Karib, ‘Violent Conflict in Sudan Impacted Nearly Every Aspect of Women’s Lives’ (IPS News, 2023) <https://www.ipsnews.net/2023/10/violent-conflict-sudan-impacted-nearly-every-aspect-womens-lives/?utm_source=rss&utm_medium=rss&utm_campaign=violent-conflict-sudan-impacted-nearly-every-aspect-womens-lives> accessed 2 April 2024.

the International Criminal Court (ICC) in 2023.⁵⁶ The latter underscores a focus on victims, advocating for the adoption of intersectional perspectives and expressing optimism that such an approach will influence preliminary examinations, sentencing, and reparations. This ethos is mirrored in this paper, recognising that while the reasons behind CRSV occurrences may not always be known, the severity of the crimes and their impact on victims can be known and should serve as a fundamental principle in punitive measures.

The aim of this paper is to provide an original, multidisciplinary understanding of the state of the academic literature on military command and CRSV. It uniquely brings together macro-level criminological theory, meso-level conflict analysis and micro-level psychological understandings to provide a holistic overview of academic knowledge. Subsequently, this paper investigates approaches towards punishment—a potential mechanism for prevention—while acknowledging the rarity of prosecuting such cases, a significant challenge in military justice and accountability. In providing a rigorous review of current understandings and highlighting the limitations of extant knowledge, the paper holds value in paving the way for research to better understand and improve interventions regarding CRSV. We focus on the under-researched role of military commanders, due to their part in instigating or encouraging CRSV. Much discussion focuses on peacekeepers committing or tolerating CRSV,⁷ the impact on victims,⁸ and feminist engagement with existing law⁹. There is comparatively little attention in the literature paid to commanders.

The paper is divided into four key sections to provide a comprehensive overview of macro, meso and micro level understandings of CRSV respectively, before moving into a more grounded and practical analysis of how punishment has been imposed for these crimes. Initially, criminological perspectives are investigated to outline theoretical approaches to gender, masculinities, war, and power to provide a macro-level overview of some of the reasons that sexual violence may be perpetrated. Next, conflict dynamics are considered to explore

5 NATO, 'NATO Policy on Combatting Trafficking in Human Beings' (NATO, 2023) <https://www.nato.int/cps/en/natohq/official_texts_71856.htm> accessed 10 May 2024.

6 International Criminal Court, 'Office of the Prosecutor of the International Criminal Court Publishes new Policy on Gender-based Crimes: Statement by ICC Prosecutor Karim A.A. Khan KC' (ICC, 2023) <<https://www.icc-cpi.int/news/office-prosecutor-international-criminal-court-publishes-new-policy-gender-based-crimes>> accessed 10 May 2024.

7 R Ranjan and P Khare, 'Evaluating the Conflicting Interests in the United Nations: Comparative Analysis of UN Resolutions Policy Output Regarding Conflict-Related Violence (CRSV)' in E Meteliadou (ed) *Handbook of Research on Exploring Gender Equity, Diversity, and Inclusion Through an Intersectional Lens* (IGI Global 2023) 211-235.

8 C Koos and R Traummüller, 'The Gendered Costs of Stigma: How Experiences of Conflict-Related Sexual Violence Affect Civic Engagement for Women and Men' (2024) *American Journal of Political Science*.

9 ML Bastick, *Conflict-Related Sexual Violence: Exploring Feminist Engagements with Law and Armed Forces* (PhD thesis, University of Edinburgh 2020) <<http://dx.doi.org/10.7488/era/1177>> accessed 10 May 2024.

the strategic motivations behind CRSV specifically, offering a meso-level insight. The paper then moves to consider psychological perspectives to explore the micro-level cognitive processes that individuals undergo to tolerate, participate in, encourage, and justify CRSV. The final section then builds on these sections to consider how punishment has been used to penalise perpetrators and deter future instances of CRSV.

First, however, it is important to provide definitions of key terms. Doing so is essential not only for clarifying the responsibilities and dynamics within military hierarchies and understanding the specific conditions of conflicts that facilitate CRSV but also to distinguish CRSV from other forms of sexual violence.

1.1. Conflict-Related Sexual Violence and Exploitation

The definition of CRSV as provided by the UN Secretary-General's report on conflict-related sexual violence refers to 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict'.¹⁰ The definition also makes reference to the identity of both perpetrators and victims of CRSV: 'That link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities; the profile of the victim, who is frequently an actual or perceived member of a political, ethnic or religious minority group or targeted on the basis of actual or perceived sexual orientation or gender identity; the climate of impunity, which is generally associated with State collapse, cross-border consequences such as displacement or trafficking, and/or violations of a ceasefire agreement'.¹¹ It ends with explicit reference to human trafficking: 'The term also encompasses trafficking in persons for the purpose of sexual violence and exploitation, when committed in situations of conflict'.¹² The Rome statute of the ICC considers forms of CRSV to fall under international crimes, including war crimes,¹³ crimes against humanity¹⁴ and genocide.¹⁵

10 United Nations Secretary-General, 'Conflict-Related Sexual Violence' (2019) United Nations 3 <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf>> accessed 15 May 2024.

11 United Nations Secretary-General (n 10) 3.

12 United Nations Secretary-General (n 10) 3.

13 International Criminal Court, 'Rome Statute of the International Criminal Court' (1998) Art 8(2)(b) (xxii), (e)(vi).

14 International Criminal Court, 'Rome Statute of the International Criminal Court' (1998) Art 7(1)(g).

15 International Criminal Court, 'Rome Statute of the International Criminal Court' (1998) Art 6(b, d).

Although the term CRSV is prevalent in academic discourse, the authors encourage an adjustment of the term to conflict-related sexual violence and exploitation (CRSVE). This enhances understanding by focusing not only on individual acts of violence but also on the systemic, structural, and economically-motivated exploitation underpinning these abuses. By incorporating ‘exploitation’, the emphasis shifts from isolated incidents of violence to incorporate any calculated decision-making processes and tolerance exhibited by military command, thereby highlighting their role in both perpetrating and preventing these crimes. Such a perspective not only reorients the narrative towards accountability at higher levels of command but also promotes a strategic approach to combating and preventing such exploitation, framing it as an integral component of warfare and military strategy rather than as isolated incidents. As such, while the term CRSV is used throughout the paper to ensure alignment with previous academic discourse, its use here is assumed to include exploitation.

1.2. Commanders

The International Committee of the Red Cross uses the term ‘commander’ to refer to military leaders, whether formally designated or de facto, who bear responsibility for the actions of their subordinates.¹⁶ This encompasses a broad spectrum of leadership roles, from top-tier strategic decision-makers to non-commissioned officers overseeing small units. Commanders also bear the responsibility that those under their command do not commit crimes.

International criminal law, including the Rome Statute, however refrain from providing detailed descriptions of what constitutes a military commander.¹⁷ This ensures that the law is able to encompass a wide range of individuals in positions of authority, ensuring that all responsible parties can be held accountable. This flexibility is crucial for addressing the diverse and complex structures of command found in different armed groups and situations of conflict.

1.3. Armed Forces

In international humanitarian law, Article 43(1) of Additional Protocol I states that “The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command respon-

¹⁶ Under IHL, the duty of commanders and their criminal responsibility are governed by: API, Arts 86(2), 87 and CIHL rules 152 and 153.

¹⁷ International Criminal Court, ‘Rome Statute of the International Criminal Court’ (1998) Art 28.

sible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.¹⁸

1.4. Conflict

The concept of ‘conflict’ itself is subject to broad interpretation and debate.¹⁹ Armed conflicts vary along several variables, including the composition of involved parties (for example state versus non-state actors), their operational strategy and scope, resource distribution, the impact on civilian populations as well as the broader socio-political and environmental context.²⁰ Broadly, these variables are clustered by the 1949 Geneva Convention under the umbrellas of international versus non-international armed conflict. International armed conflict is defined as being between the armed forces of two states or for national liberation while non-international armed conflict describes an internal conflict not necessarily involving governmental armed groups. As the most widely accepted convention for defining and governing war, this is the definition employed in this paper, with the acknowledgment that it does not account for intricate variations within each category.

2. Criminological Perspective

For decades there have been calls for criminological investigations into war; the role of gender and masculinities in war have emerged as a particularly important subject, particularly the ways that masculinity in war can result in the re-ordering of gender.²¹ The following section provides a brief overview of these criminological approaches to provide a grounding for recognising the link between gender and CRSV.

Gender has long been highlighted within criminology as a predictor of a person’s likelihood of criminal involvement, with ‘high levels of recorded and reported offending [which] reflect a real and pervasive social phenomenon of disproportionate male criminality’.²² Early positivist theories suggested that there was a natural basis of sex that determined that men would be ‘masculine’ and women ‘feminine’, thus assigning social expectations of gender to

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

19 A Heys, *From Conflict to Modern Slavery: The Drivers and Deterrents* (Oxford University Press 2023).

20 A Idler, ‘Change in Armed Conflict: An Introduction’ (2024) 45(1) *International Political Science Review* 3.

21 R Jamieson, ‘Towards a Criminology of War in Europe’ in V Ruggiero, N South, and I Taylor (eds), *The New European Criminology: Crime and Social Order in Europe* (Routledge 1998) 480–506.

22 JW Messerschmidt and S Tomsen, ‘Masculinities and Crime’ in WS DeKeseredy and M Dragiewicz (eds), *Routledge Handbook of Criminology* (2nd edn, Routledge, 2018) 83–95.

biological sex with the idea that men were naturally more prone to commit crime.²³ Contemporary research has moved beyond this initial explanation, turning instead to social aspects of masculinity, separating the notion from being biologically-defined to socially-reproduced, where there is no singular ‘masculinity’ but rather many, which are a product of—and replicated by—society rather than biology.²⁴

As such, the investigation into why military commanders engage in and promote CRSV begins with an examination of criminological theories that address (gendered) social conditions explaining how military commanders may consider sexual violence to be a tool at their disposal during times of war.

DeKeseredy and Schwartz’s work indicates that male physical and sexual violence against women is often undertaken with the intention of displaying an image of masculinity to the man himself, to his victim, and to his peer group.²⁵ This feeds into the work of Arendt, who claims that power should be understood as its own end rather than a means to an end.²⁶ She determines that violence is a means used by those without power to achieve strength over others, but that it cannot directly lead to power itself.

This notion of power ties into theories of hegemonic masculinity which legitimise the dominant position of men and the subordinate position of women.²⁷ This also links with structural violence, a concept associated with Johan Galtung to determine the cultural conditions that allow for the legitimisation of violence, and ‘Violence exists whenever the potential development of an individual or group is held back by the conditions of a relationship, and in particular by the uneven distribution of power and resources.’^{28,29} This applies clearly to gender relations which reflect male dominance where masculinity and maleness is associated with power.³⁰

It is important to understand that the impact of gender goes far beyond the likelihood of committing violence, and this is especially true in relation to conflict situations, where notions of masculinities are heightened exponentially. ‘War inevitably involves the collusion of groups considered “sub-cultural” to civic life (i.e. militias and militaries) engaging in gendered forms of (masculine) behaviour (i.e. deviance and violence)’ and where imbalanced power

23 A Albrecht, ‘Cesare Lombroso. A Glance at His Life work’ (1910) 1(2) *Journal of the American Institute of Criminal Law and Criminology* 71.

24 Messerschmidt and Tomsen (n 22).

25 W DeKeseredy and M Schwartz, ‘Masculinities and Interpersonal Violence’ in RW Connell, M Kimmel and J Hearn (eds), *Handbook of Studies on Men and Masculinities* (Sage 2005) 353-366.

26 H Arendt, *On Violence* (Harcourt Brace & Company 1969).

27 R Connell, *Gender and Power* (Allen and Unwin 1987).

28 J Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (Sage 1996).

29 C Cockburn, ‘The Continuum of Violence: A Gender Perspective on War and Peace’ in W Giles (ed), *Sites of Violence: Gender and Conflict Zones* (University of California Press 2004) 24-44.

30 Cockburn (n 29).

within gender relations often creates a structure of masculinity disposed to violence.^{31,32}

War is inherently tied up with concepts of masculinity; something that remains consistent regardless of culture or geography, and is used as a way of 'othering' the 'masculine-strong' from the 'feminine-weak'.^{33,34} Rafter and Walklate argue that the violence of war cannot be fully understood without being cognisant of gender and the gendered nature of victimhood.³⁵ Indeed, 'many versions of masculinity in the world's varied cultures are constituted in the practice of fighting; to be a 'real' man is to be ready to fight and ultimately to kill and to die.'³⁶ Linking war to its underlying gendered facets then renders its inherent violence as something utterly normal, perhaps even to be expected.³⁷

This section has outlined some of the central facets of how criminological theory approaches sexual violence and exploitation as an imbalanced and gendered relationship of power, and has illustrated how its use in war is impossible to separate from underlying gender relations.³⁸ However, what these theories fail to explain are the reasons for the differences in why CRSV is perpetrated in some conflicts and by some commanders, but not others. While power is a constant in war, Wood's in-depth analysis of war time sexual violence denotes that sexual violence is not a ubiquitous part of war, and in fact there are huge variations in when, and by whom, it is committed.³⁹

It is therefore important that we look beyond these broad theoretical generalisations to consider the more specific motivations behind the use of CRSV. This will help to explain the nuances between situations and between individuals, and will also provide a basis from which to consider what preventive and punitive measures are most likely to be effective.

31 R McGarry and S Walklate, 'Criminology, War and the Violence(s) of Militarism' in WS DeKeseredy and M Dragiewicz (eds), *Routledge Handbook of Criminology* (2nd edn, Routledge 2018) 201-213.

32 C Cockburn (n 29).

33 C Enloe, *The Morning After: Sexual Politics at the End of the Cold War* (University of California Press 1993).

34 McGarry and Walklate (n 31).

35 N Rafter and S Walklate, 'Genocide and the Dynamics of Victimization: Some Observations on Armenia' (2012) 9(5) *European Journal of Criminology* 514.

36 Cockburn (n 29).

37 McGarry and Walklate (n 31).

38 C Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* (University of California Press, 2000).

39 EJ Wood, 'Variation in Sexual Violence during War' (2006) 34(3) *Politics & Society* 307.

3. Conflict Dynamics Perspective

Exploring conflict dynamics allows for a categorisation of strategic motives for the perpetration of CRSV specific to individual conflicts, therefore allowing a better understanding of where CRSV may or may not be employed. These strategic motives can be broadly categorised into external and internal drivers within conflict dynamics analysis. Externally, CRSV may be strategically deployed for military objectives.⁴⁰ Internally, CRSV may be utilised to regulate and build cohesion among troops.⁴¹ Nevertheless, each conflict presents its own unique set of circumstances across different conflict scenarios, whereby CRSV varies according to specific resource availability and operational tactics. Despite the diversity of their application, motivations often overlap, reflecting the use of CRSV as both a tactical and psychological weapon in the context of conflict. The following sections explore these external and internal motives.

3.1. External Motives

Military commanders have been found to allow CRSV to covertly further war objectives, utilising it as a tool to sow fear in the civilian population or induce collaboration.⁴² Internationally, there have been numerous instances where state response to civilian dissent has involved excessive force, with sexual violence employed as a means of repression and political coercion.⁴³ The 2007 post-election violence in Kenya stands as a stark example, wherein civil unrest precipitated widespread violence, including multiple instances of CRSV perpetrated by law enforcement and security personnel, serving as a method for political actors to assert control, punish communities aligned with political opponents, and demonstrate power.⁴⁴ Moreover, the United Nations Security Council highlighted the utilisation of rape and gang rape to intimidate demonstrators and suppress public protests in nations including Sudan and Myanmar.^{45,46} This serves to compound the subjugation and

40 EJ Wood, 'Rape as a Practice of War: Toward a typology of Political Violence' (2018) 46(4) *Politics & Society* 513.

41 Wood, 'Rape as a Practice of War' (n 40).

42 SE Davies and J True, 'Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In' (2015) 46(6) *Security Dialogue* 495.

43 UNSC (n 3).

44 ACE Project, 'Gender-Based Discrimination and Violence' (ACE, 2024) <<https://aceproject.org/ace-en/topics/ev/factors-that-may-trigger-electoral-violence/external-factors/gender-based-discrimination-and-violence>> accessed 2 April 2024.

45 UNSC (n 3).

46 UN, 'Framework for the Prevention of Conflict-Related Sexual Violence' (UN, 2022) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/09/auto-draft/202209-CRSV-Prevention-Framework.pdf>> accessed 2 May 2024./

marginalisation of vulnerable populations, effectively using sexual violence as a method of warfare and control.⁴⁷

While state military commanders are more commonly represented among perpetrators of CRSV, the involvement of non-state actors during asymmetrical warfare is also significant.⁴⁸ Asymmetrical warfare is characterised by a power imbalance between the opposing forces, with non-state typically lacking the extensive capabilities of state militaries, compelling them to adopt unconventional strategies to leverage vulnerabilities in stronger opponents.⁴⁹ Within such conflicts, these actors have been documented utilising CRSV to compensate for their comparative lack of conventional military strength, exerting control through the cultivation of fear and humiliation. An illustrative case is the ongoing conflict in South Sudan, where reports from survivors and witnesses indicate that government forces and affiliated militias have perpetrated CRSV to terrorise local populations, using public rapes as a demonstration of power and punishment.⁵⁰ Additionally, in societies with strongly-held social beliefs as to a woman's honour, CRSV has been found to have a demoralising and humiliating effect on civilians.^{51,52} Indeed, in some cases, beliefs surrounding honour have been so strong that rape was utilised as a tool for recruitment in Iraq where women were coerced into becoming suicide bombers in order to mitigate the shame of being a victim of rape.⁵³

Relatedly, CRSV has been used as a mechanism to dissuade support for opposing forces or even as a form of retaliation against individuals and communities for perceived or actual affiliation with rival armed groups.⁵⁴ In Colombia, during the decades-long conflict between the government and the Revolutionary Armed Forces of Colombia, CRSV was used by non-state actors to instil terror among communities and subsequently punish and dissuade support for

47 UN, 'Framework for the Prevention of Conflict-Related Sexual Violence' (n 46).

48 L Olsson, AM Sellström, S Moncrief, EJ Wood, K Johansson, W Lotze, C Ruffa, A Hoover Green, AK Sjöberg and R Kishi, 'Peacekeeping Prevention: Strengthening Efforts to Preempt Conflict-related Sexual Violence' (2020) 27(4) *International Peacekeeping* 517.

49 T Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action' (2005) 87(857) *International Review of the Red Cross* 149.

50 UNMISS, 'South Sudan: UN Report Finds Nearly 600 Civilians Were Killed Amid Gross Human Rights Abuses and Serious Violations of International Humanitarian Law by Armed Groups in Greater Upper Nile in Late 2022' <<https://unmiss.unmissions.org/press-release-south-sudan-un-report-finds-nearly-600-civilians-were-killed-amid-gross-human-rights#:~:text=The%20UN%20Mission%20in%20South,August%20and%20December%202022%2C%20gross>> accessed 17 May 2024.

51 R Nordås and DK Cohen, 'Conflict-Related Sexual Violence' (2021) 24 *Annual Review of Political Science* 193.

52 C Faulkner and B Welsh, 'Rebel Child Soldiering and Conflict-Related Sexual Violence' (2022) 66(4) *International Studies Quarterly* 1-14.

53 M Bloom, 'Bombshells: Women and Terror' (2011) 28 *Gender Issues* 1.

54 UN (n 2).

opposing forces.⁵⁵ This employment of CRSV as a strategic tool in asymmetrical warfare exemplifies its role in demoralising and weakening adversaries and in perpetuating cycles of intimidation and violence.

In severe cases, conflict dynamics with ethnic tensions or even ethnic cleansing involve CRSV as a vehicle for asserting dominance and superiority over perceived adversaries, with the act of violating individuals from the opposition to widen divisions, inflicting suffering on 'the other' and resulting in intensified and more vicious forms of enmity.⁵⁶ Regionally, this is witnessed in instances such as the conflict between the Twa and Luba militias in Tanganyika Province of the Democratic Republic of Congo, where sexual violence against members of rival ethnic communities is rampant.⁵⁷ In Syria, ISIL has notoriously subjected Yazidi women and girls to sexual enslavement, believing them to be 'devil worshippers' and their enslavement and murder to be part of a purification ritual.⁵⁸

On a broader scale, CRSV may be deliberately incorporated into military strategies and organisational policies, particularly during campaigns of ethnic cleansing or genocide.⁵⁹ Military commanders affiliated with the state have used CRSV as a tool to shift the ethnic balance in a given area, or even to commit genocide against a particular ethnic group.^{60,61} In the genocide against the Tutsi in Rwanda in 1994 for instance, the Hutu-dominated government systematically perpetrated CRSV against the Tutsi minority to terrorise and decimate their community, forcibly altering the ethnic lineage of future generations.⁶² One such military commander, Jean-Paul Akayesu, was held responsible by the International Criminal Tribunal for Rwanda for his failure to prevent or punish subordinates who committed acts of sexual violence, thereby setting a legal precedent on the accountability of military commanders for CRSV committed under their command.⁶³

55 E Heffes, 'From Words to Deeds: A Research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms' (Geneva Academy, 2021) <rb.gy/ir9tnz> accessed 2 April 2024.

56 C Koos, 'Sexual Violence in Armed Conflicts: Research Progress and Remaining Gaps' (2017) 38 Third World Quarterly 1935.

57 UN, 'Conflict Related Sexual Violence. Report of the United Nations Secretary-General' (UN, 2019) <rb.gy/1sjyy7> accessed 2 April 2024.

58 A Smeulers, *Perpetrators of Mass Atrocities: Terribly and Terrifyingly Normal?* (Taylor & Francis 2023).

59 Olsson, Sellström, Moncrief, Wood, Johansson, Lotze, Ruffa, Hoover Green, Sjöberg and Kishi (n 48).

60 *ibid.*

61 EJ Wood, 'Conflict-Related Sexual Violence and the Policy Implications of Recent Research' (2014) 96(894) International Review of the Red Cross 457.

62 Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath' (Human Rights Watch 1996) <rb.gy/tynohc> accessed 2 April 2024.

63 *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998).

3.2. Internal Motives

In addition to these external motives, a second category of strategic reasons as to why military command permits or orders CRSV is internal. First, commanders have used CRSV as a form of troop motivation, particularly when they are unable to compensate their soldiers in other ways.⁶⁴ Non-state actors in particular, constrained by their limited resources, may employ CRSV as a method of sharing transgressions to foster cohesion within their ranks.⁶⁵ During the civil war in the 1990s in Sierra Leone for example, the Revolutionary United Front's forces were fragmented and practised gang-rape to enhance group bonding and cohesion.⁶⁶ CRSV has been found to be an effective tool to build intragroup as well as organisational cohesion.^{67,68,69,70}

CRSV may also be employed by commanders as a way to sustain their own command. Binningsbø and Nordås reason that commanders could be unwilling to restrain their soldiers from engaging in CRSV due to a fear of mutiny among their ranks.⁷¹ Relatedly, low-level commanders have been found to personally engage in CRSV as a mechanism to demonstrate leadership through fearlessness and ruthlessness to their troops, thereby consolidating their authority.⁷² However, Nagel and Doctor equally found that in the long term, CRSV can jeopardise a group's overall integrity and durability.⁷³

CRSV has also been utilised as a way in which to regulate the sexual (and reproductive) lives of soldiers.⁷⁴ A particularly notorious instance is the exploitation of over 200,000 primarily Korean women during the Asia and Pacific War of 1937-1945, who were forcibly detained in military brothels by the Japanese army and labelled as 'military comfort women'.⁷⁵ The Japanese military command rationalised the systematic sexual exploitation of these women as a means to safeguard Japanese women from sexual assault by military person-

64 Wood, 'Rape as a Practice of War' (n 40).

65 UN (n 46).

66 BW Reeder and R Dicke, 'Peacekeeping Deployments, Intragroup Cohesion, and the Use of Sexual Violence by Armed Non-State Groups' (2023) 30(2) *International Peacekeeping* 230.

67 DK Cohen, 'Explaining Rape During Civil War: Cross-National Evidence (1980-2009)' (2013) 107(3) *American Political Science Review* 461.

68 DK Cohen, *Rape During Civil War* (Cornell University Press 2018).

69 RU Nagel and AC Doctor, 'Conflict-Related Sexual Violence and Rebel Group Fragmentation' (2020) 64(7-8) *Journal of Conflict Resolution* 1226.

70 Nordås and Cohen (n 51).

71 HM Binningsbø and R Nordås, 'Conflict-Related Sexual Violence and the Perils of Impunity' (2022) 66(6) *Journal of Conflict Resolution* 1066.

72 Reeder and Dicke (n 66).

73 Nagel and Doctor (n 69).

74 Olsson, Sellström, Moncrief, Wood, Johansson, Lotze, Ruffa, Hoover Green, Sjöberg and Kishi (n 48).

75 PG Min, 'Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class' (2003) 17(6) *Gender & Society* 938.

nel and to protect Japanese soldiers from venereal diseases.⁷⁶ During World War II, the German Wehrmacht employed a comparable tactic, establishing brothels across occupied territories.⁷⁷ Women, often from these conquered areas, were coerced into serving the sexual needs of German soldiers. This practice was defended as a measure to prevent sexual assaults against civilians and to maintain the health of soldiers. The utilisation of CRSV by the German military not only underscored efforts to exert control over soldiers' sexual and reproductive behaviours but also demonstrated the gendered rationale employed by military commanders to legitimise such practices.⁷⁸

This gendered perspective is essential for understanding the perpetration of CRSV, especially when examining the justifications provided by German military leaders of the time. For instance, Himmler believed that a man's heterosexual desires were both inevitable and necessary for effective military performance, linking a soldier's sexual activity directly to his combat efficiency.⁷⁹ Von Brauchitsch echoed this sentiment, asserting that brothels would curb the spread of sexual diseases and deter acts of rape.⁸⁰ These examples highlight the complex and deeply ingrained justifications for CRSV within military strategies, underscoring the critical need for a gendered analysis in examinations of military conduct and command decisions.

3.3. Counter-Motives

An overarching rationale made in the academic literature is that CRSV is cheap, readily available and highly effective in achieving any of the aforementioned strategic motives.⁸¹ However, Nordås and Cohen argue that the academic literature makes an inadvertent assumption that because CRSV is framed as cheap and effective, its strategic benefits outweigh any counter-motivations.⁸² This does not tally with the findings that the majority of armed groups do not engage in widespread CRSV.⁸³ The Sexual Violence in Armed Conflict dataset reported that at the highest year of its recording (2002),

76 Y Ahn, 'Japan's "Comfort Women" And Historical Memory: The Neo-Nationalist Counter-Attack' in S Saaler and W Schwentker (eds), *The Power of Memory in Modern Japan* (Brill, 2008) 32-53.

77 R Mühlhäuser, 'Reframing Sexual Violence as a Weapon and Strategy of War: The Case of the German Wehrmacht During the War and Genocide in the Soviet Union, 1941-1944' (2017) 26(3) *Journal of the History of Sexuality* 366.

78 Mühlhäuser (n 77).

79 R Sommer, 'Camp Brothels: Forced Sex Labour in Nazi Concentration Camps' in D Herzog (ed), *Brutality and Desire: War and Sexuality in Europe's Twentieth Century* (Palgrave Macmillan 2009) 168-196.

80 HP Bleuel, *Sex and Society in Nazi Germany* (Lippincott 1973).

81 Nordås and Cohen (n 51).

82 Nordås and Cohen (n 51).

83 DK Cohen and R Nordås, 'Sexual Violence in Armed Conflict: Introducing the SVAC dataset, 1989-2009' (2014) 51(3) *Journal of Peace Research* 418.

42 of 353 conflicts monitored reported the presence of sexual violence.⁸⁴ It is therefore equally important that counter-motivations are considered: arguments as to why CRSV may not be tolerated or ordered by military command.

There appear to be two principle counter-arguments in the literature. The first is due to the possible negative effects on troops, including the emotional toll, the risk of disease as well as the considerable time CRSV takes to perpetrate.⁸⁵ The second is that the use of CRSV may turn the civilian population away from military command (thus having the opposite effect of the motivation mentioned above that CRSV could be used to win over civilian populations through fear) which can in turn substantially affect any long-term political goals an armed force may have. This tallies closely with findings that rebel organisations that elect their leaders are less likely to perpetrate CRSV, perhaps because military leaders do not want to alienate their civilian supporters.⁸⁶

Without a full understanding of the exact motivations behind CRSV in each instance, implementing effective punitive measures becomes extremely difficult as explored further later in this paper. The conflict dynamics perspective offers a nuanced analysis of the strategic motives driving CRSV, highlighting its abuse as a military tool. However, this approach falls short in fully explaining individual commanders' motivations, underscoring the necessity of exploring the psychological underpinnings to comprehensively address and mitigate CRSV.

4. Psychological Perspective

The academic literature surrounding mechanisms for the perpetration of CRSV by military commanders tends to focus on one of two scenarios. The first is that commanders order CRSV explicitly, also termed strategic rape theory.⁸⁷ In this scenario, CRSV is a top-down strategy that commanders engage in to further one of the strategic objectives set out in the previous section. In the second scenario, commanders do not explicitly order CRSV, but rather tolerate it, also termed sexual violence as a practice.⁸⁸ This understands CRSV as being perpetrated due to a failure by military commanders to punish it, or due to their tolerance thereof, which appears to occur more frequently than the first scenario.⁸⁹ For instance, American soldiers have

84 Cohen and Nordás (n 83).

85 Cohen, 'Rape During Civil War' (n 68).

86 K Sawyer, KD Bond, and KG Cunningham, 'Rebel Leader Ascension and Wartime Sexual Violence' (2021) 83(1) *Journal of Politics* 396.

87 Faulkner and Welsh (n 52).

88 Wood, 'Rape as a Practice of War' (n 40).

89 Wood, 'Variation in Sexual Violence during War' (n 39).

claimed that during the Vietnam war they were ordered and authorised to kill civilians, but equivalent claims were not made around CRSV. Nevertheless, CRSV was widespread and globally tolerated by American commanders.⁹⁰ This same scenario is reported to have occurred in the protracted conflict in the east of the Democratic Republic of Congo since the resurgence of violence in 2014, where rape was never directly ordered but tolerance was widespread, as was a belief that it was a soldier's right to perpetrate CRSV to fulfil their personal needs.⁹¹

The term 'tolerance', however, can be interpreted in several different ways. First, leaders may appear to be tolerant of CRSV when they are simply ignorant to its occurrence. This does, however, appear unlikely, with research such as Leiby's finding that of the CRSV incidents occurring in civil conflicts in Guatemala and Peru, one-third and one-half respectively 'occurred under circumstances that negate the possibility that state leaders had no knowledge of the violence'.⁹² In addition, Cohen found that in civil wars, the vast majority of reported state-perpetrated sexual violence occurred in places of detention, reducing the likelihood that military command did not know of its existence.⁹³

A second interpretation of tolerance is that leaders may simply be indifferent to CRSV, especially where it is considered acceptable due to pre-existing gender norms (relating back to the criminological perspectives outlined above).⁹⁴ In cases where this attitude exists among military leaders, there are more incidents of CRSV.⁹⁵

A third interpretation is that rather than indifference, military commanders may simply have other priorities. Under this explanation, military commanders consider punishing CRSV to be either too costly, damaging to the cohesion of the group, or relatively unimportant compared to other issues.⁹⁶

Finally, there is what Wood terms 'deliberate ambiguity', whereby military commanders engage in the practice of ordering CRSV, but make it appear that they are unaware of its occurrence.⁹⁷ This involves CRSV being implicitly

90 Olsson, Sellström, Moncrief, Wood, Johansson, Lotze, Ruffa, Hoover Green, Sjöberg and Kishi (n 48).

91 ME Baaz and M Stern, 'Why do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)' (2009) 53(2) *International Studies Quarterly* 495.

92 ML Leiby, 'Wartime Sexual Violence in Guatemala and Peru' (2009) 53(2) *International Studies Quarterly* 445.

93 E Cohen, 'From Arab Spring to Economic Winter—examination of the Relationship between Politics and Economics as Evident in the Syrian Civil War During 2011-2015' (2016) 9(1) *Journal of International Studies* 9.

94 Olsson, Sellström, Moncrief, Wood, Johansson, Lotze, Ruffa, Hoover Green, Sjöberg and Kishi (n 48).

95 AG Sadler, DR Lindsay, ST Hunter, and DV Day, 'The Impact of Leadership on Sexual Harassment and Sexual Assault in the Military' (2018) 30(3) *Military Psychology* 252.

96 Olsson, Sellström, Moncrief, Wood, Johansson, Lotze, Ruffa, Hoover Green, Sjöberg and Kishi (n 48).

97 Wood, 'Rape as a Practice of War' (n 40).

ordered, but the language of the orders being coded and/or deliberately vague so as to evade accountability in post-conflict settings.⁹⁸

The academic literature around the psychological factors that play into commanders' decision-making strategies around CRSV is limited. The closest fit is Henry et al's multifactorial model of wartime rape, which explains how soldiers may engage in CRSV as a result of individual, situational, military and cultural factors.⁹⁹ At an individual level, Henry et al argue that soldiers' personal predispositions for sexual violence (including personal histories of abuse and trauma, negative attitudes towards women and inclinations towards aggression) may be activated or exacerbated by the situational context of conflict. This context includes the breakdown of social norms and legal systems during conflict, as well as the anonymity and impunity (discussed below in relation to punishment) that conflict may create, the lack of which may have inhibited the perpetration of sexual violence during peacetime. The individual and situational contexts are subsequently worsened by cultural factors, including societal tolerance towards gender-based violence as well as a glorification of male aggression and dominance. Finally, the model argues that the military context, including hyper-masculinity among troops as well as commander tolerance or encouragement of sexual violence may further lower barriers to the perpetration of CRSV.

However, this model was designed specifically to explain individual soldiers' perpetration of sexual violence, as opposed to CRSV by military commanders. It may be that many of these factors also play a role in commanders' tolerance or ordering of CRSV. For instance, Abu Musab Al-Zarqawi, the founder of Al-Qaeda (later ISIS), whose group was implicated in numerous instances of systematic CRSV, himself had a history of committing sexual assault in peacetime, which may have contributed to his group's later perpetration of systematic sexual violence.^{100,101} However, the link between these factors has not yet been examined empirically.

Furthermore, the factors involved in personally perpetrating violence are known to be different from ordering, witnessing and tolerating violence. Following the brutality of military commanders' orders to commit genocide in Nazi concentration camps, psychologist Stanley Milgram initiated a series of experiments to examine people's decision-making processes in ordering and obeying orders to commit violence and found that in such scenarios, people

98 S Park and ZM Sim, 'Tolerance as Implicit Order: Militias and Sexual Violence as Practice in Indonesian Counterinsurgency Operations' (2022) 16(1) *Journal of Intervention and Statebuilding* 18.

99 N Henry, T Ward, and M Hirshberg, 'A Multifactorial Model of Wartime Rape' (2004) 9(5) *Aggression and Violent Behavior* 535.

100 Smeulers (n 58)

101 Al Ahram, 'Sexual Violence, Competitive State Building, and Islamic State in Iraq and Syria' (2019) 13 *Journal of Intervention and Statebuilding* 180.

distance themselves from their moral responsibilities in order to execute orders from people in positions of power.¹⁰²

It could therefore be argued that military commanders, particularly in hierarchical organisations like state-sponsored militaries, rationalise violence as part of their role in executing higher orders. Milgram's experiments also highlighted that repeated exposure to violent policies can lead to normalisation and desensitisation, which could explain why sexual violence may over time become more routinely ordered within conflict.¹⁰³

Other classic psychological theories may also be extrapolated to understand the decision-making process military commanders undergo in ordering CRSV. For instance, Tajfel and Turner's social identity theory explains that individuals derive aspects of their self-image from their belonging to certain social groups, creating categorisations between in-groups (us) and out-groups (them).¹⁰⁴ This identity-based distinction in the context of conflict explains how military commanders may come to see their side of the conflict (the in-group) as fundamentally different and separate from their enemy (the out-group). This psychological shift can lead to dehumanisation of the out-group, marking them as undeserving of moral consideration and empathy, making it easier to rationalise, justify and commit CRSV against them.

Finally, Bandura's theory of moral disengagement focuses more on the specific cognitive processes that individuals may undergo in order to participate in harmful behaviours.¹⁰⁵ The theory posits that individuals justify inhumane acts through a series of eight cognitive strategies, here extrapolated to apply to CRSV:

1. **Moral Justification:** Framing CRSV as an action that serves a noble cause, thereby making it more acceptable.
2. **Euphemistic Labelling:** Using sanitised language to make CRSV look less harmful (eg, 'special interrogation technique').
3. **Advantageous Comparison:** Comparing ordering CRSV to more serious acts committed by others, to comparatively minimise its harm.
4. **Displacement of Responsibility:** Attributing the responsibility for ordering CRSV to one's superiors, suggesting that the commander is simply following orders.
5. **Diffusion of Responsibility:** Diluting the commander's personal accountability by perceiving the actions as being carried out by the army/troop/

102 S Milgram, 'Behavioral Study of Obedience' (1963) 67(4) *The Journal of Abnormal and Social Psychology* 371.

103 Milgram (n 102).

104 H Tajfel and JC Turner, 'The Social Identity Theory of Intergroup Behavior' in JT Jost and J Sidanius (eds), *Political Psychology* (Psychology Press 2004) 276.

105 A Bandura, C Barbaranelli, GV Caprara, and C Pastorelli, 'Mechanisms of Moral Disengagement in the Exercise of Moral Agency' (1996) 71(2) *Journal of Personality and Social Psychology* 364.

battalion as a whole, and therefore spreading the responsibility across all members.

6. **Disregard or Distortion of Consequences:** Minimising or ignoring the harm caused by the commander's actions, by distorting or disputing the evidence.
7. **Dehumanisation:** Perceiving the victims of CRSV as less human in order to reduce the commander's guilt.
8. **Attribution of Blame:** Shifting the blame onto the victims of CRSV, suggesting that they deserved to be victimised or were responsible for it happening.

While the above theories offer insights into the possible social and individual psychological mechanisms that may underlie the ordering and tolerance of CRSV, they are each too simplistic to fully consider the complexities involved. For instance, while social identity theory is useful in explaining CRSV committed against an out-group, it does not explain the incidence of CRSV against one's in-group, as was for instance the case with the previously mentioned sanctioned military brothels used during WWII. In addition, while Milgram's theory is useful to explain how military commanders who receive orders to tolerate/order CRSV may process this psychologically, the theory falls short in explaining why and how military commanders may order CRSV of their own accord. This limitation is addressed by Bandura's theory, but this relies on the principles of rational choice which posits that all decisions are made by undertaking a cost/benefit analysis of the potential outcomes. This insufficiently accounts for spontaneous decision-making, or decision-making made without a full consideration of a cost-benefit analysis, which are likely to arise in the chaos of conflict. Finally, all three theories were developed on the basis of general violence and immoral behaviour, potentially negating specific psychological mechanisms underpinning sexual violence and exploitation in particular.

In conclusion, this section highlights the need for a theory-knitting approach to develop a better understanding of the underlying psychological mechanisms behind commanders' ordering and tolerance of CRSV.¹⁰⁶ While current theories offer insight into the rational and strategic underpinnings of such violence, they inadequately address the complex psychological factors influencing commanders' decisions to order, tolerate, or ignore CRSV. This gap highlights the need for empirical studies exploring the psychological dimensions of commanders' decision-making processes. Furthermore, the literature calls for a deeper investigation into the roles of moral disengagement, social identity theory, and the multifactorial model of wartime rape in understanding CRSV from a commander perspective. Addressing these gaps will not only en-

106 DA Kalmar and RJ Sternberg, 'Theory Knitting: An Integrative Approach to Theory Development' (1988) 1(2) *Philosophical Psychology* 153.

rich theoretical understanding but also contribute to more effective interventions and policies aimed at preventing CRSV in military contexts. Given the complexity and ethical constraints of replicating real-life battle circumstances under experimental conditions, longitudinal case studies may offer the most viable means to track military commanders' decision-making over time, providing a nuanced understanding of the interplay between individual, situational, military, and cultural factors influencing their actions on the battlefield.

5. Punishment

Having studied the theories put forward for why and when CRSV takes place, we gain an appreciation of where further research needs to focus. While the issue is perhaps too subjective for a definitive framework, there is one certainty in the field: the harm and impact on the victims of CRSV is significant. As highlighted by Houge and Khersti Lohne, the initial phase of academic discovery of CRSV primarily emphasised the suffering endured by victims, concentrating on the socio-psychological and medical requirements of survivors.¹⁰⁷ Current research and practice places greater emphasis on the diverse and intricate experiences and lifestyles of victims, incorporating critical examination of victims' roles as witnesses within criminal court proceedings.¹⁰⁸ Notwithstanding these disparities, victims' experiences have been more accessible than perpetrators' motivations, and are thus a key reference point in addressing the crime.

This section provides a discussion of how these crimes are currently being punished, with the aim of shedding light on the broader societal attitudes and responses towards CRSV. It shows that, uniquely for criminal law, at an international level CRSV is not always thought of through the prism of the perpetrator, but often through the lens of the crime itself and the impact it has on the victim. This stands in contrast to domestic criminal law, where the victim is often viewed as a mere witness.¹⁰⁹

5.1. Punishing in Theory

There are four primary motivations for punishment: retribution, incapacitation, rehabilitation, and deterrence. Retribution reflects societal condemnation of the crime committed and reinforces cultural values.

¹⁰⁷ AB Houge and K Lohne, 'End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law' (2017) 51(4). *Law & Society Review* 755.

¹⁰⁸ Houge and Lohne (n 107).

¹⁰⁹ J Muraszkievicz, 'Article 12 of the EU Human Trafficking Directive: Fulfilling Aspirations for Victim Participation in Criminal Trials?' (2016) 7(3) *New Journal of European Criminal Law* 331.

It is a theory which connects a certain offence to a certain punishment (with the consideration of the offender's culpability).¹¹⁰ The result of applying such a theory to punishment is that a penalty should 'restore' equilibrium; the debt is repaid through the ordeal of the punishment and a sanction must be commensurate with the crime and culpability, and confined to the offender alone.

Case law shows that in relation to war crimes, particularly instances of sexual violence, retribution stands as a potent framework for punishment. In these egregious violations of human rights, the suffering inflicted upon victims demands a response that places those individuals at the centre. In the aftermath of conflicts such as those in Bosnia or Rwanda, where sexual exploitation was systematically employed as a tool of war, retribution serves not only to acknowledge the victims' pain but to reaffirm the moral order and deter future transgressions. By holding perpetrators accountable through retributive justice theories, societies assert their commitment to upholding human dignity and ensuring that those who commit heinous acts face consequences commensurate with their crimes.

The other three leading theories are more consequentialist in nature, often to satisfy a society's moral ideal of the greatest amount of happiness for the greatest number of people. Incapacitation aims to safeguard the public by incarcerating offenders, preventing them from causing harm. Rehabilitation endeavours to protect society by motivating criminals to refrain from future offences.^{111,112} Deterrence encompasses two facets: 'special deterrence', dissuading specific criminals from reoffending, and 'general deterrence', deterring others from committing crimes by showcasing the consequences faced by an offender.¹¹³

Unlike retributive theories, the consequentialist perspective does not focus on the criminal act as the principal point in determining punishment, but directs attention towards the offenders and the potential threat they pose to the safety of society. This perspective emphasises the consequences of the perpetrator's actions rather than the nature of the crime. This is a key limitation when aligning punishment of CRSV with consequentialist theories. As was illustrated in the previous section, the assumption that individuals who commit CRSV conduct rational cost-benefit analyses is disputed. The reality is that instances of CRSV are so uniquely contextual and nuanced that it is hard to subscribe to a theory that heavily relies on deterrence and thus assumes that certain and severe punishment will cause the crime to stop. In conflict

110 GP Fletcher, *The Grammar of Criminal Law: American, Comparative, and International: Volume One: Foundations* (Oxford University Press 2007).

111 HW Lee, 'Consequentialist Theories of Punishment' in MC Altman (ed), *The Palgrave Handbook on the Philosophy of Punishment* (Springer International Publishing 2023) 149.

112 R Cryer, D Robinson, and S Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019).

113 Cryer, Robinson, and Vasiliev (n 112).

situations where corruption is rife and the rule of law is often broken down, the certainty of punishment being imposed in response to a crime is low and penalties are likely to be slow to be imposed, which indicates that deterrence may be ineffective. This lack of potential punishment may be even more evident for commanders in a conflict situation who may be in such a position of power that they are essentially able to act with impunity. In the context of conflicts, individuals have demonstrated a willingness to sacrifice their lives for their causes, suggesting that traditional deterrence mechanisms may prove ineffective.¹¹⁴ It is therefore suggested by this article that retribution as a theory of punishment might be more suited for CRSV committed by commanders. The following segment examines this from a practical perspective.

5.2. Punishing in Practice

The Rome Statute, which serves as the foundational legal document that defines the International Criminal Court's functions, jurisdiction, and structure, marks a significant advancement in the ability to prosecute and punish CRSV. The Statute explicitly enumerates various crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation as specific crimes against humanity and war crimes. Additionally, the provisions also account for a residual category that covers comparable acts of sexual violence that are not explicitly listed. On finding a defendant guilty the court can apply a punishment, and not just to those who commit the crime but those who commission it, as articulated in Article 25 of the Rome Statute^{115,116}. In addition, Article 28 of the Rome Statute specifically highlights the responsibility of commanders or persons effectively acting as a military commander, noting that they shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effec-

114 S Atran, 'Measures of Devotion to ISIS and Other Fighting and Radicalized Groups' (2020) 35 *Current Opinion in Psychology* 103.

115 In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.
- Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.
- For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.
- In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - Be made in the knowledge of the intention of the group to commit the crime.

116 For an overview of Art 25 see J Block, 'Ordering as an Alternative to Indirect Co-Perpetration: Observations on the Ntaganda Case' (2022) 20(3) *Journal of International Criminal Justice* 717.

tive command and control, or effective authority and control. It should also be highlighted that responsibility for ordering international crimes is part of customary international law.¹¹⁷

In terms of the ICC's view on the purpose and role of punishment, we may look to the preamble of the Rome Statute:

[t]he most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes [...]¹¹⁸

'To put an end to impunity' highlights the retributivist aims of rendering justice whilst 'the prevention of such crimes' distinctly promotes deterrence and thus consequentialism. Articles that follow the preamble do not explicitly cite any particular theory to justify punishment, however Article 78(1) of the Rome Statute stipulates that the assessment of the sentence should consider both the gravity of the crime and the individual circumstances. Through such wording, the Article is open to multiple interpretations, and grants judges the discretion to view punishment through the lens of retributive justice, focusing on proportionality, or through a consequentialist perspective, emphasising the characteristics of the perpetrator. Article 81(2)(a) however states that a sentence deemed disproportionate to the crime serves as a basis for appeal. Under Article 110(3-4) of the Rome Statute, there is 'review of sentence', occurring either after two-thirds of the sentence has been completed or after twenty-five years in cases of life imprisonment. While this might be read as a consequentialist rationale of the greatest amount of happiness for the greatest number of people, a key facet of retribution is that the punishment should be commensurate to the crime. The option of reviewing a sentence thus allows for change if it is felt that the sentence is not proportionate.

In summary, one way to perceive matters is that the Rome Statute grants judges the authority to impose punishment based on principles of retribution and consequentialism. On the other hand, authors like Coleman seem to suggest that the ambiguity could be due to a lack of interest: 'The drafters of the Rome Statute seemed relatively unconcerned about how the penalties would be assigned and what specific factors should be taken into account. There is no indication about what makes up the gravity requirement, what constitutes "ag-

117 G Werle and F Jessberger, *Principles of International Criminal Law* (5th edn, Oxford University Press 2020).

118 International Criminal Court, 'Rome Statute of the International Criminal Court' (1998) Preamble, 17 July 1998, 2187 U.N.T.S. 90.

gravating and mitigating circumstances”, and no commentary on whether cultural considerations could be taken into account when imposing a sentence.¹¹⁹

This article suggests that purposes of punishment as carried out by the ICC have not been adequately described in the Rome Statute or Rules. Thus, we must turn to case law for precedent. Nevertheless, it is important to note that the court has only closed a few cases where elements of CRSV constituted part of the charge. As is documented in literature there was a critical failure to prosecute CRSV in the cases of Lubanga and Mbarushimana.^{120,121} The trial of Germain Katanga was the first time the ICC explicitly addressed sexual crimes.¹²² The charges confirmed against him included rape and sexual slavery. Although Katanga was convicted on several charges, he was acquitted of all sexual crimes. The Trial Chamber concluded that while sexual violence was perpetrated by members of the militia, it was not part of the group’s collective intent as defined under Article 25(3)(d) of the ICC Statute.

In reality there are only three cases where CRSV was successfully prosecuted and where the court had an opportunity to approach the issue of punishment: the cases of Bemba-Gombo, Bosco Ntaganda, and Dominic Ongwen, the first of which was overturned on appeal.^{123,124,125} This low number of cases evidences that the issue of punishment, including the questions of how to punish and why as it relates to CRSV is not well established, giving further weight to the importance of this article.

Bemba-Gombo

In the Jean Pierre Bemba-Gombo case, the defendant was convicted of murder, rape, and pillaging for his role as a military commander during the civil war in the Central African Republic. He was sentenced to 18 years imprisonment for rape as a war crime and 18 years for rape as a crime against humanity (amongst other sentences for other heinous crimes), to run concurrently. While this case warrants cautious consideration as the initial guilty verdict was overturned upon a subsequent appeal, the rationale behind sentencing remains of note. Judge Sylvia Steiner asserted in her verdict that the ex-militia leader had not effectively exercised authority over his private mil-

119 M Coleman, “‘Culture’ and Sentencing at the International Criminal Court” in J Fraser and B McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar 2020) 268-287.

120 T Altunjan, ‘The International Criminal Court and Sexual Violence: Between Aspirations and Reality’ (2021) 22(5) *German Law Journal*, 878.

121 *Prosecutor v Thomas Dyilo Lubanga* ICC-01/04-01/06; *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10 (16 December 2011).

122 *Prosecutor v Katanga and Chui* ICC-01/04-01/07.

123 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

124 *Prosecutor v Ntaganda* ICC-01/04-02/06.

125 *Prosecutor v Dominic Ongwen* ICC-02/04-01/15.

itary.¹²⁶ For the purposes of sentencing, ICC Trial Chamber III divided its discussion of the crimes into discrete sections. In relation to the sexual violence offences, the court conducted an extensive examination of the harms suffered by victims and identified that victims were defenceless and that the rapes were perpetrated with ‘particular cruelty’ as aggravating factors. By scrutinising the consequences of Bemba’s actions, the judges sought to underscore the gravity of his offences and the enduring suffering inflicted upon those affected. This approach aligns with theories of punishment, particularly of retribution, which posit that punishment should be proportionate to the severity of the crime and serve as a means of recompense for the harm inflicted on victims and society at large. However, the fact that the sentences (five in total) were set to run concurrently rather than consecutively somewhat undermines this concept of proportionality. As Harmon and Gaynor argue:

Greater consideration should be given to imposing consecutive sentences as opposed to concurrent sentences for crimes based on separate factual circumstances. Ultimately, international tribunals, as one of humankind’s only tools to deter mass crimes and diminish impunity, bear a weighty burden: they must send out an unambiguous message to those who demonstrate gross contempt for human dignity that they will be held accountable and will pay a heavy price for their crimes.¹²⁷

Punishment in the Bemba case was rooted not just in criminal law but also, by placing the victim at the forefront, in victimology. Adhering to the ethos of victimology is in line with rising international practice, as for instance exemplified by the General Assembly Resolution 60/147, a soft law document that provides a detailed set of standards for the right to effective remedies and reparations for victims of gross violations of human rights and serious violations of international humanitarian law.¹²⁸ The Resolution in its opening two paragraphs references victims. ‘Affirming the importance of addressing the question of remedies and reparation for victims’ and ‘recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field’.¹²⁹ Victims according to, at least, soft law should remain the central focus.

126 *Prosecutor v Jean-Pierre Bemba Gombo* (n 123) decision on Sentence pursuant to Article 76 of the Statute ICC-01/05-01/08.

127 M B Harmon and F Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’ (2007) 5(3) *Journal of International Criminal Justice* 683.

128 General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

129 General Assembly Resolution 60/147 (n 128).

Bosco Ntaganda

Rwanda-born Ntaganda was found guilty on five counts of crimes against humanity and 13 counts of war crimes, encompassing charges such as murder, sexual slavery, rape, and the recruitment of child soldiers. Notably, Ntaganda was the first individual to be convicted by the ICC for sexual slavery. Additionally, many charges were connected to the slaughter of villagers. Ntaganda received a sentence of thirty years' imprisonment. The sentence passed in this case as it relates to the CRSV aspects was as follows: the rape of civilians, classified both as a crime against humanity and as a war crime, resulted in a sentence of 28 years' imprisonment. For the rape of children under the age of 15 who were incorporated into the Union of Congolese Patriots/Patriotic Force for the Liberation of Congo (UPC/FPLC), classified as a war crime, the sentence was 17 years' imprisonment. Additionally, the court imposed a sentence of 12 years' imprisonment for the sexual slavery of civilians, recognised as both a crime against humanity and a war crime. Lastly, for the sexual slavery of children under the age of 15 incorporated into the UPC/FPLC, also classified as a war crime, the imposed sentence was 14 years' imprisonment.

In sentencing, the court recognised the significance of the victims' enduring physical, psychological, psychiatric, and social consequences when assessing the severity of the crimes.¹³⁰ The court emphasised that some victims were very young, and therefore particularly defenceless, and that some endured repeated victimisation through rape. The court also considered the defence's submissions as to the Ntaganda's circumstances, however unlike in the case of Ongwen (discussed below), many of the defence's submissions were rejected (age, financial position, status as a family man etc.).

The sentencing comments in the ICC's case against Ntaganda are notably victim-centred. Specifically, the discussion on aggravating factors acknowledges various victim categories that extend beyond those directly impacted by Ntaganda's actions, which is applaudable. Most significantly, this case underscores crucial aspects of aggravation concerning the specific vulnerabilities of victims identified as 'defenceless'. These include detainees, pregnant women, babies, very young children, as well as sick and disabled individuals, emphasising the heightened need for their protection under international law. The sentencing remarks in the Ntaganda case also appear to support retributive theories of punishment, emphasising that those who commit grave breaches of international law should face consequences commensurate with their crimes. This alignment with retributive justice is clear in the way the court meticulously detailed the severity and impact of Ntaganda's actions on vulnerable victims, underscoring a moral condemnation of his acts. Such an approach seeks not

¹³⁰ *Prosecutor v Bosco Ntaganda* (Sentencing Judgment) ICC-01/04-02/06 T Ch VI (7 November 2019) paras 105-107.

only to punish the perpetrator but also to affirm the dignity of the victims and uphold societal values against such violations, reinforcing the principle that justice should be proportionate to the atrocity. This, however, is not necessarily a consistent theoretical approach as the next case shows.

Dominic Ongwen

Dominic Ongwen was a former commander in the Lord's Resistance Army, a rebel group in Uganda.¹³¹ In the ICC case of *The Prosecutor v Dominic Ongwen*, Ongwen faced charges of war crimes and crimes against humanity committed between 2002 and 2005 including rape, sexual slavery, and forced pregnancy (thus CRSV). The case was hailed as significant in being the first time a former child soldier had been tried by the ICC for crimes allegedly committed as an adult. Ongwen's defence argued that he was abducted as a child and forced to become a child soldier, which raised complex legal and moral questions about culpability and victimhood. This case is unique for the fact that it is the first conviction of forced pregnancy as a crime against humanity and war crime.

Ongwen was found guilty of 61 counts of war crimes and crimes against humanity in February 2021, sentencing him to 25 years in prison. The judges concluded that given Ongwen's abduction and early experiences in the LRA, a reduction of a one-third in sentence would 'generally be fitting and reasonable' depending on the particulars of each crime.¹³² Judges Bertram Schmitt and Peter Kovacs, forming the majority, chose to lessen what they indicated could have been a life sentence or one as long as 30 years, to 25 years, taking into account Ongwen's specific circumstances.¹³³

The judges in this case approached punishment from all angles: retribution and consequentialism. This is clear in the comments made during sentencing. The court noted:

The Chamber fully understands, and is wholeheartedly sympathetic to the legitimate desire of the victims to receive justice, and comprehends that justice indeed demands that an adequate punishment be imposed on Dominic Ongwen. The Chamber is, however, called to determine a sentence which – while suitable to express in full the condemnation of the international community and the necessary acknowledgment of the harm to the victims – does not constitute a means for revenge as such.¹³⁴

¹³¹ *Prosecutor v Dominic Ongwen* (n 125).

¹³² *Prosecutor v Dominic Ongwen* (n 125) Sentence (Trial Chamber), 6 May 2021.

¹³³ *Prosecutor v Dominic Ongwen* (n 125) para 386.

¹³⁴ *Prosecutor v Dominic Ongwen* (n 125) para 389.

The court then went onto to say ‘Envisaging a concrete prospect for Dominic Ongwen to eventually re-build his life – while adequately punished for the crimes committed – in a new, more healthy environment than the extremely violent one of the LRA in which he grew up and operated at length is one of the conflicting driving forces for the Chamber’s ultimate consideration on the appropriate sentence in the present case.’¹³⁵ The court also reasoned that the sentence was not reduced further due to the tremendous impact the crimes had on the victims.¹³⁶ The court concluded sentencing by noting that the sentence ‘reflects the strongest condemnation by the international community of the crimes committed by Dominic Ongwen and acknowledges the great harm and suffering caused to the victims, as well as deterring others from committing similar crimes in the future and discouraging Ongwen’s own recidivism. At the same time, such a sentence safeguards the prospect of a successful social rehabilitation and, consequently, the concrete possibility of future reintegration into society which, as explained above, is a relevant consideration in a peculiar case like the present one.’¹³⁷

These statements by the ICC in the sentencing of Dominic Ongwen can be seen as a true balancing act. The ICC acknowledged both the victims’ deep need for justice and the necessity of imposing a punishment that reflects the severity of Ongwen’s crimes. This recognition is crucial as it underscores the ICC’s commitment to validating the suffering of victims and the need for their harm to be formally recognised in the international legal arena. At the same time, the Court also emphasises its role in ensuring that punishment serves more than a vengeful purpose. This is significant for this article because it highlights the court avoided being purely punitive, and thus rooted its punishment not only in retribution.

An important question arises in whether such an approach can be seen as a way to promote healing and closure for victims and acknowledging their suffering, and indeed whether the duration of consideration given to Ongwen’s personal recidivism by the judges can truly be said to make the ICC a ‘victim’s court’.

In examining the operations of the ICC, it becomes apparent that the institution is to an extent influenced by the experiences of victims when considering the implementation of punishment, seeking to address their suffering and provide a sense of justice. However, it also leans—at times quite heavily—on consequentialism, which as stated in the preceding sub-section might make less sense in theory.

¹³⁵ *Prosecutor v Dominic Ongwen* (n 125) para 390.

¹³⁶ *Prosecutor v Dominic Ongwen* (n 12) para 393.

¹³⁷ *Prosecutor v Dominic Ongwen* (n 125) para 396.

6. Conclusion

This paper has provided an original, multidisciplinary investigation into the motivations behind commanders' use of conflict-related sexual violence. To overcome the current approaches to such understandings which tend to be siloed within individual academic disciplines, this paper merges macro-level criminological approaches around gender and power, with meso-level understandings of the strategic motivations behind CRSV, and with psychological theories which interrogate micro-level motivations.

It has outlined some of the central facets of how criminological theory approaches sexual violence as an imbalanced and gendered relationship of power, and has illustrated how the use of sexual violence in war is impossible to separate from underlying gender relations.¹³⁸ However, these approaches fall short in explaining the reasons that CRSV is perpetrated at strategic and individual levels of military command. This is where the merging of approaches to gender with an exploration of conflict dynamics and psychological theory builds upon extant literature which has a current tendency of considering only one of these aspects. As such this paper offers something new to understandings in this field.

The paper shows that there are numerous motivations behind using CRSV which extend beyond strategic implementation. While the authors have highlighted the deliberate deployment or tolerance of CRSV by state and non-state actors, and in ethnic and communal conflicts, it is important to recognise that not all entities engaged in conflict utilise CRSV as part of their operational tactics. Moreover, motivations for CRSV can be multifaceted and overlapping, transcending the types and dynamics of conflict examined herein.

This complexity is further amplified by the interplay between individual, situational, and structural factors which can lead to acts of CRSV that are not solely the by-product of strategic intent but also emerge from the chaos of war, breakdowns in military discipline, or the personal predilections of combatants and commanders.

While existing psychological models offer valuable insights into individual motives for the perpetration of CRSV, they fall short in their consideration of the roles, responsibilities and motives of military leadership. Military leaders play a pivotal role in conflict, not just in achieving military objectives but also in shaping the behaviour, norms, and practices of their troops.¹³⁹ In instances of CRSV committed by soldiers, the responsibility borne by commanders is substantial as they must ensure that their soldiers' actions are conducted in accordance with the rules of armed conflict.

¹³⁸ Enloe (n 38).

¹³⁹ Sadler, Lindsay, Hunter, and Day (n 95).

The lack of psychological models in this area can partly be attributed to the relatively recent accountability of military commanders for war crimes by bodies like the ICC. Additionally, the global recognition of sexual and gender-based violence as war crimes, crimes against humanity, and forms of genocide has only recently gained prominence.¹⁴⁰ This is compounded by the secretive nature of armed operations and military and international courts, the ongoing impunity enjoyed by many perpetrators, and thus the low likelihood of their availability and willingness to participate in research.

Merging the criminology and psychology sections with that on punishment shows that whilst in theory, consequentialist justification for punishment may not have much impact, as commanders commit CRSV not only because it is a low-risk crime, in practice the ICC punishes to achieve both retributive and consequentialist aims. However, there appears to be some inconsistency as to the weight it places on different factors when it considers the appropriate sentence. Noting that in this domain one thing is certain, the impact that CRSV has on victims. This article argues that this should be a leading philosophy when considering punishment.

The gaps in understanding highlighted in this paper emphasise the need for empirical studies which explore the psychological dimensions of commanders' decision-making processes, including how individual, situational, military, and cultural factors interplay to influence their actions. Furthermore, the paper calls for a deeper investigation into the roles of moral disengagement, social identity theory, and the multifactorial model of wartime rape in understanding CRSV from a commander perspective. Addressing these gaps will not only enrich theoretical understanding but also contribute to more effective interventions and policies aimed at punishing and preventing CRSV within military hierarchies and command structures.

¹⁴⁰ International Criminal Court, 'Rome Statute of the International Criminal Court' (1998) A/CONF.183/9.

