The collective responsibility of organised armed groups for sexual and gender-based violence during a non-international armed conflict

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Abstract

This contribution considers a possible legal framework for holding organised armed groups ("OAGs") collectively responsible for acts of sexual and gender-based violence ("SGBV") during non-international armed conflicts. It argues that a framework providing for collective as opposed to individual criminal responsibility of OAGs is essential. Certain sections of the Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility" or "ASR") are used as a blueprint for achieving such a framework. In this regard, the concepts of international legal responsibility of OAGs, internationally wrongful acts and attribution are analysed in the context of crimes committed by OAGs. In conclusion, the article proposes future research in order to advance the prospect of collective claims and collective compensation for victims of SGBV.

Keywords: Collective responsibility; organised armed groups; the law of non-international armed conflict; state responsibility; attribution; sexual and gender-based violence

1. Introduction

Today, the vast majority of armed conflicts are of an internal nature. [1] These conflicts are classified as non-international armed conflicts ("NIACs") that are fought between a state and an armed opposition group or between two armed opposition groups within the boundaries of a single state. It is

estimated that by mid-2020 there were more than 50 NIACs in at least 22 different countries. [2]

Often, sexual and gender-based crimes are committed during armed conflicts. [3] These crimes are especially prevalent during NIACs. According to reports by the United Nations ("UN") more than 200 000 women have suffered sexual violence in the Democratic Republic of the Congo ("DRC") since the start of the armed conflict; between 250 000 and 500 000 women were raped during the 1994 genocide in Rwanda; and between 20 000 and 50 000 in the armed conflict in Bosnia in the early 1990s. [4] In a joint UN-Red Cross appeal to end the increasing use of sexual violence as a weapon of war, the head of a coalition of organisations in the DRC that help victims of sexual violence seek justice, Ms Lusenga, has pointed out that the coalition continuously encounter women who have been used as sex slaves by various organised armed groups ("OAGs"). [5] The OAGs subject these women to inhumane and degrading treatment, including sexual slavery, forced marriage, forced labour, physical violence and economic exploitation. [6] In light of these indicators it can be concluded that many internal armed conflicts involve human rights abuses where armed opposition groups play an important role in such abuses. Furthermore, the international community regards both the protection of human rights and the community's need for effective legal

regulation of OAGs as important. OAGs, therefore, should be held responsible for human rights abuses under international law. [7]

While the law has developed to allow for individual criminal liability in respect of violations of international humanitarian law by non-state actors such as OAGs, there is currently no legal framework providing for the collective responsibility of OAGs as entities. [8] Such a framework would enhance the possibility of obtaining reparations or compensation for victims of OAGs. [9]

Kleffner argues that if an armed group is organised in a way that allows for individual members (superiors) to be in command and to exert authority over other individual members (subordinates), the implication is that the violence is of a collective nature. [10] Further, an OAG may be viewed as a system and this establishes the possibility of holding OAGs responsible as entities. [11] The connectedness and organisation of an OAG underscores that these groups are more than "collections of isolated individuals". [12] Kleffner supports his observation by remarking on the group spirit and loyalty of the OAG; he describes this factor as the "existential precondition" of an OAG which it shares with state armed forces in order to overcome the innate aversion to kill another human being. [13] A further requirement is a unified war aim comparable to that of formal military organisations. [14]

These factors constitute the contextual environment allowing for the commission of what Kleffner refers to as "system crimes". [15] The norms underpinning "system crimes" in the context of war crimes are found in international humanitarian law ("IHL"). Kleffner explains that this "system" (the OAG) fights in a NIAC setting which in itself is conducive, tolerant and perhaps even favourable to criminal behaviour and displays a disregard for the law of non-international armed conflict ("LoNIAC"). [16] The "system" indeed then commits "system crimes". As serious violations of the law of armed conflict ("LoAC") may constitute war crimes by state armed forces (which can be seen as systems) and can be attributed to the state itself under the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility"

or "ASR"), [17] the possibility is to be considered that violations of the LoNIAC by OAGs could trigger collective responsibility on the part of OAGs.

A legal framework providing for the collective responsibility of OAGs is more suitable than one of individual responsibility. The International Criminal Tribunal for the former Yugoslavia ("ICTY"), with reference to Adolf Eichmann, points out that most crimes of mass violence do not result from the criminal propensity of a single individual but constitute manifestations of collective criminality. [18] Together with collective responsibility arises the possibility of insisting on collective reparation to address the collective harm caused more effectively than through individual reparation. When a single commander is held responsible, as in the case of *ICC Prosecutor v Jean-Pierre Bemba Gombo* ("*Bemba*"), [19] many members of the OAG can escape responsibility. This can happen because a state chooses not to prosecute those members or when it

does not have the means to do so due to the number of perpetrators involved and the difficulty of ascertaining the identity of each perpetrator. [20] If an individual commander is charged (including on the basis of command responsibility under article 28 of the Rome Statute) and then acquitted, as in the case of *Bemba*, [21] the victims gain nothing. Further, crimes of sexual violence often are committed against a certain group based on ethnicity or cultural characteristics. If the OAG is held responsible as an entity, the message sent to its members is stronger. Collective responsibility holds the entity accountable and, by extrapolation, all members of the entity. [22]

This article examines whether certain provisions of the ASR could serve to inform a collective responsibility framework. In order to establish international responsibility, certain concepts need to be addressed: an internationally wrongful act needs to exist; the act needs to be attributable to the relevant category of OAGs; and there must be no legal justification to excuse the wrongful act. [23] The article addresses each of these requirements and examines how sections of or underlying legal principles derived from

the articles of the ASR (that is, *lex lata*) can inform the process of creating a blueprint to achieve collective responsibility of OAGs for the commission of war crimes of a sexual and gender-based nature during a NIAC. The authors also offer suggestions for future research regarding reparations.

2. The Articles on State Responsibility as a blueprint for the proposed framework

This part of the article examines how certain sections of the ASR, or underlying legal principles derived from such articles, can inform a blueprint that may be used to achieve collective responsibility of OAGs for the commission of war crimes of a sexual and gender-based nature during a NIAC. Specifically, it considers and explores the constructs relating to internationally wrongful acts, attribution, and circumstances precluding wrongfulness that could serve as a starting point in establishing a collective responsibility framework.

2.1 Internationally wrongful acts

The basic rules of international law concerning the responsibility of states for internationally wrongful acts are set out in the ASR. [24] Article 1 reflects the fundamental principle at the core of the ASR, namely, that "every internationally wrongful act of a State entails the international responsibility of the State"; that is, that a breach of international law triggers the international responsibility of the state. Terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are used to refer to a breach of international law. [25] The principle reflected in Article 1 may be used as a guideline and can be transplanted into a collective responsibility framework for OAGs to read that "every internationally wrongful act of an OAG entails the international responsibility of the OAG". [26] Although the ASR do not specify the content of internationally wrongful acts, [27] as set out below, Article 12 clearly indicates that international obligations may be established by a customary rule of international law, by a treaty, or by a general principle applicable within the international legal order. [28]

Article 2 specifies the conditions required for establishing the existence of an internationally wrongful act, namely, that the conduct in question must be attributable to the state under international law and that the conduct must constitute a breach of an international legal obligation that is in force in that state at that time. [29] Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". The term "regardless of its origin" refers to all possible sources of international obligations. [30] Furthermore, a breach of an obligation is equated with conduct contrary to the rights of others, [31] or is viewed as a violation of a duty imposed by an international juridical standard. [32] Establishing whether there has been a breach of an obligation depends on various factors. These include the precise terms of the obligation, and the interpretation and application of the obligation by taking into account the facts of the case and the object and purpose of the obligation. [33] Conduct proscribed by an international obligation may involve an act or an omission, or a combination of acts and omissions. [34] The general rule is that the only type of conduct attributed to the state at the international level is that which is carried out by its organs of government or by others who act under the direction, instigation or control of those organs, that is, as agents of the state. [35] Essentially, Article 2 of the ASR determines that a breach of an international norm constitutes an internationally wrongful act. [36] The text of Article 2 of the ASR, as is the case with Article 1 of the ASR, can also be used as a blueprint and it is proposed that this is to be read in a way that replaces the term "state" with "OAG". [37]

While Article 10 of the ASR has been considered for this purpose, it is an insufficient foundation for establishing a framework dealing with the collective responsibility of OAGs and is contentious as regards its theoretical

foundation, application and scope. [38] Article 10 deals only with the attribution of the conduct of a successful insurrectional movement (such as an OAG) to a state. [39] The conduct of the OAG is attributable to the state where such a movement becomes the new government of the state or succeeds in establishing a new state, and arguably the same entity would in effect be held responsible, but it does not assign responsibility directly to all OAGs. [40]

Using the general principles under chapter 1 of the ASR as a blueprint offers great potential for establishing a collective responsibility framework as a means to hold OAGs responsible for sexual and gender-based crimes committed during a NIAC. The requirement of a wrongful act in the proposed framework would equate to a violation of a sexual and gender-based nature of the LoNIAC, committed by a member or members of the OAG during a NIAC. This, in turn, triggers the international responsibility of the collective (the OAG).

2.2 Sexual or gender-based violence

As discussed above, Article 12 of the ASR states that there is a breach of an international obligation when the act in question is not in conformity with that which is required by that obligation "regardless of its origin". [41] The international obligation in question can thus be based on customary international law as a source. [42] In this regard Common Article 3 of the Geneva Conventions [43] has achieved customary status under IHL and applies to all NIACs, [44] and consequently to all OAGs. [45] Even though the wording of Common Article 3 does not explicitly proscribe rape, enforced prostitution, and other forms of sexual and gender-based violence ("SGBV"), it does prohibit "violence to life

and person", a term which encompasses cruel treatment, torture and "outrages upon personal dignity". [46] SGBV falls under the scope of "violence to life and person" [47] and constitutes a severe violation of human dignity. [48]

The International Committee of the Red Cross's ("ICRC") 2020 Updated Commentary to the Geneva Convention [49] ("the Commentaries") offers case law drawn from international tribunals as well as the constitutive treaties of such international tribunals as a means to illustrate that sexual violation is prohibited under Common Article 3. [50] The Commentaries specifically cite *The Prosecutor v Bagosora* ("Bagosora") [51] in which the International Criminal Tribunal for Rwanda ("ICTR") Trial Chamber found the accused, who had been charged with rape, guilty of outrages upon personal dignity, which constitutes a violation of Common Article 3. [52] The Commentaries further employ the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* to demonstrate that sexual violence constitutes a form of torture. The International Criminal Tribunal for the former Yugoslavia ("ICTY") held that "[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its

characterisation as an act of torture". [54] The Commentaries further underline that the Statute of the ICTR [55] and the Statute of the Special Court for Sierra Leone ("SCSL") [56] both list rape and enforced prostitution, as well as any form of indecent assault, as outrages upon personal

dignity under Common Article 3. [57] Moreover, the commission of rape, sexual slavery, enforced prostitution, forced pregnancy as well as other forms of sexual violence committed in the context of a NIAC are specifically codified as violations of Common Article 3 in the war crime provisions of the Rome Statute. [58]

The primary norms of customary LoNIAC thus prohibit the commission of acts of violence that are sexual or gender-based in nature as they are internationally wrongful acts. This prohibition is supported in the Commentaries to Common Article 3 of the ICRC and by various cases before international criminal law tribunals. [59] The international criminal law and justice system, furthermore, support the international humanitarian law regime by providing for enforcement mechanisms. [60] In summary, there is a breach of an international obligation when the act in question does not conform to what is required by that obligation, which obligation may be established by a customary rule of international law. Common Article 3 is

customary international law, and this article argues that all OAGs are bound by such customary international law not to commit wrongful acts of a sexual and gender-based nature during a NIAC. [61] The next part explores attribution of these acts to OAGs as collective entities.

3. Attribution

This part illustrates the conditions under which a breach of the rules of the LoNIAC prohibiting SGBV during a NIAC is attributable to the OAG as being collectively responsible for the breach. It demonstrates that it may be possible to attribute the commission of such internationally wrongful acts to OAGs if two minimum conditions are fulfilled: first, the armed group must meet the minimum organisational criteria under Common Article 3 to fulfil the notional characteristics of the term "OAG" and, second, the OAG must possess international legal personality.

3.1 The organisational requirement

The qualification of being a *party* to an armed conflict implies that such a group must possess a certain degree of organisation. [62] The organisational requirement serves to exclude random criminals, mere looters, gang members, random rioters, and so forth. [63] However, the exact nature and scope of the level of organisation that will serve as a minimum benchmark in this regard have not yet been settled in law. [64] Factors indicating whether the

organisational requirement has been met include: the existence of a command structure; the military capacity of the armed group; the logistical capacity of the armed group; the existence of an internal disciplinary system; the ability to implement IHL; and the armed group's ability to speak with one voice on its behalf. [65] The existence of a command structure includes, among other indicators, a headquarters and general staff of a high command. [66] Military operational capacity includes control over a certain territory, and logistical capacity includes the ability to recruit and train personnel. [67] The ability of an armed group to be sufficiently organised to launch military operations that are sufficiently intense to constitute protracted armed violence against its enemy has been contended to be another constitutive requirement. [68] Also, it has been argued that the minimum criterion for organisation is a three-prong test: The OAG must, first, be a collective entity; second, have the ability to ensure respect for fundamental humanitarian norms; and, finally, have the capacity to engage in sufficiently intense violence. [69] This three-pronged test is underpinned by the possession of a command structure as an overarching requirement. [70]

Certain factors have been highlighted by international criminal tribunals in support of the determination of whether or not an armed group is sufficiently organised to constitute an OAG under Common Article 3. [71] Whether the factors highlighted by the international criminal tribunals in determining whether or not an armed group is sufficiently organised merely are indicative of that fact, as suggested by the ICTY in the *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj*, [72] or whether some of these factors, in fact, should be viewed as determinative, have been considered by scholarly opinion. [73] Regarding the existence of a command structure, Kleffner proposes that an OAG is sufficiently organised only if at its core the OAG has a command structure that, at the very least, is able to impose disciplinary rules and mechanisms in the OAG. [74] In other words, at the very least, the ability of the leadership of an OAG to exercise authority over its fighters is a manifestation

of it possessing an inherently hierarchical structure. [75] Kleffner, furthermore, argues that the recognition of a command structure as a determinative factor inherent in the notion of an OAG also acknowledges that a command structure is a necessary precondition for an OAG having the ability to ensure compliance with the LoNIAC. [76] In the absence of a command structure, an OAG is unable to issue orders and, consequently, has lost the capacity to exercise control over its fighting forces. [77] Further, in the absence of a command structure, the leadership of the OAG is unable to launch concerted military attacks as it will not be in command of its fighters at tactical, operational or strategic levels. [78] Without a command structure an OAG also is unable to engage in a level of fighting that satisfies the notion of intensity under Common Article 3. [79] This argument is supported by scholars who contend that an OAG, at least, should be organised sufficiently to engage in a level of military operations that produces protracted violence. [80] This level of fighting can be achieved only if a command structure exists that is capable of "controlling" or disciplining the members or fighters of the OAG. [81]

We contend that a minimum of three determinative elements must be satisfied for a non-state fighting unit to qualify as an OAG under Common Article 3. The first is that an OAG must have a command structure that is sufficiently organised to enable it to launch military attacks and engage in a level of fighting that matches the notion of intensity needed to establish a NIAC namely, that of protracted armed violence. Second, the OAG must have the ability to ensure respect for fundamental humanitarian norms. This element ties in with Common Article 3 which requires that parties to the conflict be *bound* to apply the provisions set out in Common Article 3(1) and, therefore, the command structure of the OAG must be in a position at least to *apply* Common Article 3. Finally, the OAG must have the capacity to engage in sufficiently intense violence. Based on this analysis, at least, if all three these determinative factors are met, then an OAG has been established under Common Article 3. These criteria serve to establish whether an armed group

qualifies as being sufficiently organised to constitute an OAG in the context of a collective responsibility framework.

3.2 Legal personality

This part considers whether an entity that qualifies as an OAG, as discussed above, obtains legal personality. The traditional understanding of legal personality in public international law is that only subjects of international law incur rights and obligations. [82] Traditionally, states possess legal personality as subjects of international law and as a consequence have the capacity to acquire both rights and obligations. [83] States, however, no longer are the sole subjects of international law; there is recognition that "other" international subjects, because of demonstrating specific characteristics, possess "limited legal capacity" in respect of international rights and obligations. [84] This would include certain "groups of persons", such as OAGs. [85] Included among the subjects of international law are insurgents, national liberation movements and certain *sui generis* or state-like entities that, it is argued, possess at least some form of legal personality. [86] This recognition is important as without having international legal personality, OAGs cannot be held responsible as a collective for the commission of SGBV. [87] It is argued that OAGS are subject to international law as they are bound by the LoNIAC and specifically Common Article 3.

Despite consensus that OAGs have a limited degree of legal personality, views vary as to how or why OAGs are bound by the LoNIAC. [88] The variety of explanatory theories include the doctrine of legislative jurisdiction; binding

force via the individual; the exercise of *de facto* governmental functions; customary LoNIAC; or consent by an OAG itself. [89] Kleffner notes as

follows:

> "Whether it is an advisable choice to rely on any one, or indeed more than one, of the explanations why and how IHL is applicable to organized armed groups will very much depend on the context in which the issue of that applicability arises." [90]

In this instance, this article seeks to hold OAGs collectively responsible as entities for violations of primary norms of international law namely, the commission of SGBV which constitutes a breach of Common Article 3. [91] We recognise that the principle of legislative jurisdiction could be a basis for subjecting OAGs to IHL as the Geneva Conventions enjoy near-universal ratification by states and that OAGs operative in the territories of states which are bound by IHL treaties are also held bound thereto on the basis of legislative jurisdiction. In this article, however, we rely on the international legal personality of an OAG (based on the rights and obligations it incurs under Common Article 3) as a basis for it being bound by the LoNIAC. [92]

The point of departure for determining whether an OAG that fulfils the organisational criteria as discussed in part 2 1 has legal personality is whether or not such an OAG qualifies as a "party to the conflict". Common Article 3 applies to a NIAC in the territory of *one of* the High Contracting Parties to the Geneva Conventions. [93] It is therefore possible that only one party to the NIAC is a High Contracting Party or the *de jure* government of the relevant party. [94] Accordingly, "other" parties might engage in a NIAC where the only link to the High Contracting Party is that the conflict takes place in the territory of the High Contracting Party. [95] The drafting history of Common Article 3 reveals that the negotiating states in referring to these "other" parties used the

terms "rebels", [96] "insurgents" [97] and "belligerents" [98] interchangeably, pointing to a group of people who are collectively party to a NIAC. [99]

Historically, rebellion was defined as an "insurrection of large extent" and usually it is a war between the legitimate government of a country and portions or provinces where the rebels seek to set up a government of their own. [100] Rebellions generally are short-lived. [101] Insurgency is defined as an uprising by an OAG against its governing authority [102] and differs from a rebellion in that it continues for a longer period of time. [103] While a state may recognise that it is engaged in a NIAC against insurgents, this recognition neither grants insurgents any special rights nor affects their legal status. [104] Certain requirements need to be satisfied to transform a situation of insurgency into one of belligerency: [105] There must be an armed conflict; the OAG must control a part of the territory in which it operates; it must administer the territory which it controls (thus exercising *de facto* authority); and it must exercise effective command and control over its military wing and conduct military operations in compliance with the LoNIAC. [106] Importantly, the recognition of an act of belligerency or insurgency by the affected government does

grant the belligerents or insurgents the same rights and duties as a party to an international war. [107]

The drafting committee of Common Article 3's replacement of the term "belligerent" with the term "party" [108] is significant as it means that Common Article 3 can include other types of OAGs that do not meet the criteria for classification as belligerents. In some cases, non-state parties consist of both fighting forces and "supportive segments" (members of the civilian population), [109] and in such cases the term "OAG" refers only to the military unit of the non-state party which in a functional sense is its armed forces. [110] In cases where the OAG is confined to the military wing of the non-state actor, the OAG indirectly is bound as an entity through the non-state party incurring obligations by the same logic that binds the armed forces of the High Contracting Party to the provisions of Common Article 3. [111] We contend that an OAG that is characterised as such a military wing can incur rights and obligations and therefore it can acquire a limited legal personality. In other cases where non-state actors are made up merely of military units, it is suggested that the collective exists only as an OAG. In such a case the terms "party" and "OAG" in Common Article 3 refer to the same entity, namely, the "OAG". Considering the aforesaid, it is argued that the analysis of the relationship between the terms "parties to the conflict" and "OAG" supports the suggestion that the word "party" also refers to an "OAG". In this case, the OAG is the direct recipient of rights and obligations under Common Article 3 and therefore it would acquire limited legal personality.

However, it also has been contended that Common Article 3 precludes an OAG from acquiring legal personality and, even though parties to the conflict incur obligations under this provision, the legal status of the parties is not affected. [112] One scholar emphasises that the main motivation underpinning this argument was to avoid legitimising OAGs and their political claims in particular

as a result of the recognition of belligerency. [113] A comprehensive reading of the relevant parts of the drafting history, however, reveals that the majority of the members of the drafting committee concerned with Common Article 3 (in general) and Common Article 3(4) (in particular) supported the conclusion that the term "legal status" is a reference to the status of belligerency and *not* to legal personality. [114] Interpreted in light of the object and purpose of the treaty itself, we, however, are of the view that the purpose of Common Article 3 is to delineate basic humanitarian obligations that are binding on state and non-state parties to a NIAC. [115] The term "legal status", therefore, should be interpreted in the context of the LoNIAC and the meaning does not depend on the general understanding of "legal status" in public international law. [116]

Further, the drafting history of Common Article 3 refers to the recognition of the *status* of belligerency, suggesting that it is not a reference to legal personality. [117] The element of legal personality, therefore, is not "removed" or "barred" by Common Article 3(4), since Common Article 3(4) relates to the recognition of belligerency and not legal personality. An OAG therefore has limited legal personality and may incur international legal responsibility as a collective for the commission of SGBV constituting a breach of Common Article 3.

This part has illustrated that an OAG that meets relevant organisational criteria can be bound to the LoNIAC and incur rights and obligations on the

basis of international legal personality. The next part considers whether the legal responsibility for the actions of OAGs under discussion – crimes of sexual violence – can be excluded by circumstances precluding wrongfulness. [118]

4. Circumstances precluding wrongfulness

The ASR currently list the following circumstances that preclude wrongfulness: consent; [119] self-defence; [120] countermeasures in respect of an internationally wrongful act; [121] *force majeure*; [122] distress; [123] necessity; [124] and compliance with peremptory norms. [125] At the outset, it should be noted that Article 26 of the ASR provides that circumstances precluding wrongfulness do not apply to *jus cogens*. In addition to this, the manner in which the ASR define these circumstances means that the majority of them cannot be applied to exclude responsibility by an OAG.

Force majeure and distress [127] are possibly obvious examples of grounds precluding wrongfulness that cannot apply in principle. *Force majeure* refutes an attribution of free choice as it relates to a natural or physical event which is unforeseen and irresistible. [128] "Distress" refers to situations in which the author of an internationally wrongful act relies on an eventuality where there is no reasonable possibility of an alternative means to save his or her own life or the lives of persons entrusted to his or her care. [129] Also, the threshold for relying on the grounds of distress is high as it demands that no reasonable

alternative exists. [130] A violation of Common Article 3 is not designed to assist in saving lives and is automatically excluded.

The grounds of "self-defence" [131] and "countermeasures" [132] similarly are automatically excluded from being relied upon as excusing violations of the LoNIAC during a NIAC. Self-defence relates to the *jus ad bellum* and not to the *jus in bello* and is consequently excluded in this

context as this article deals only with the possibility of holding OAGs responsible for violations of the LoNIAC in the context of NIACs and therefore is concerned only with the *jus in bello*. [133] With reference to countermeasures, Article 50(1)(c) of the ASR determines that countermeasures as a ground excluding wrongfulness shall not affect "obligations of a humanitarian character prohibiting reprisals". [134] Furthermore, Article 50(1)(d) bars countermeasures from excusing obligations under peremptory norms of general international law (*jus cogens*) – norms that are accepted and recognised by the international community of states as norms from which no derogation is permitted. [135]

It may further be argued that violations of Common Article 3 are tantamount to a violation of the prohibition of torture that are *jus cogens.* Common Article 3 prohibits violence to life and person, cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment, in respect of persons taking no active part in the hostilities. Rape has been held

to constitute a form of torture. [136] The prohibition of torture is widely held to constitute *jus cogens*. [137] It is argued that, similarly, no derogation is allowed from the prohibition of rape as a form of torture, and thus no circumstance excluding wrongfulness applies.

The ground of "consent" included in Article 20 of the ASR is also subject to Article 26 of the ASR [138] and as a result consent "granted" in respect of actions that are not in compliance with peremptory norms is invalid. [139] The ILC Commentaries to Article 20 of the ASR indicate that in certain cases consent may not validly be given at all. [140] There cannot be "true" consent in the context of acts of a sexual nature between the perpetrator as a member of an OAG (in the context of this framework) and the victim, owing to the unique circumstances that exist during a NIAC [141] in a violence-dominated arena in which victims fear for their lives and are vulnerable, or are completely dependent on members of an OAG for food and "protection", or are held against their will. [142] Therefore, in our view consent is excluded as a ground precluding wrongfulness and an OAG cannot rely on that as an exemption.

"Necessity" is a ground denoting exceptional cases where a breach of an international obligation is the only means by which a state can safeguard an essential interest threatened by a grave and imminent peril. [143] "Necessity",

however, is subject to strict limitations in order to prevent abuse. [144] "While it has been successfully invoked on limited occasions such as to safeguard the environment or as a means to sustain the survival or existence of a state and its people in a time of emergency", [145] necessity clearly is not available to an OAG wishing to evade responsibility for the commission of sexual and gender-based crimes.

The above interrogation of the nature and definitions of the circumstances established in the ASR as precluding wrongfulness leads to the conclusion that these grounds cannot be relied upon to evade responsibility. In conformity with the *lex lata*, it is our contention that there are no grounds that preclude wrongfulness in the context of a responsibility framework that holds OAGs collectively responsible. The next part considers the issues of collective claimants and collective reparations, in respect of which future research would be useful to further strengthen a collective responsibility framework.

5. Reparations

Reparations are a consequence of international responsibility. However, an aspect that remains problematic is whether claimants can claim reparations from OAGs as collectives and not merely from individual members of these groups. While a state is obliged to pay reparations to victims of NIACs, no definite obligation is placed on any opposing non-state party to the conflict. [146] Article 31 of the ASR, which has achieved the status of customary international law, [147] acknowledges that a state responsible for the commission of an internationally wrongful act that results in an injury under international law is obliged to make full reparation. [148] The right to claim reparations, or the obligation to make reparation under customary IHL, applies only to states and/or groups acting under state control or to *de facto* regimes fulfilling the criteria set out in Article 10 of the ASR. [149] Rule 149 of the ICRC Study on Customary International Law ("CIHL Study") limits responsibility for a violation of the LoAC to states alone and there is no similar customary international humanitarian law rule that is applicable to OAGs. [150] The ICRC commentary to this rule, however, reflects on a possibility of holding OAGs

responsible for violations of the LoNIAC. [151] It contemplates that Rule 139, which determines that OAGs must respect the LoNIAC, may be construed in such a way as to support the argument that OAGs can incur responsibility as a collective for violations of the LoNIAC committed by persons forming part of these groups. But the consequences of enforcing responsibility remain unclear. [152] Also, Rule 150 of the CIHL Study holds that a state responsible for violations of the LoAC is required to make full reparations for loss or injury caused by such a violation. [153] This rule applies equally to violations committed in international armed conflicts and in NIACs. [154] However, the rule is restricted in application to states that violate the LoAC and does not apply to OAGs. [155] Further, treaty law provides for reparations in the context of IACs only and there is no similar treaty obligation in regard to NIACs. [156]

The commentaries underline that there are limited examples in practice of reparations being sought from OAGs owing to violations of the LoNIAC. [157] This practice is exceptional and not reflective of the *lex lata*. [158] However, certain instruments have attempted to provide for the liability of not only state actors but also of non-state actors for gross violations of international law. [159] The aim of the UN Principles and Guidelines on a Right to a Remedy ("UN Principles") is to ensure effective justice irrespective of which subject of international law is responsible for the gross violation of IHL. [160] During the drafting of the UN Principles the liability and responsibility of non-state actors for gross violations of human rights law and humanitarian law were considered, specifically the responsibility for committing such acts by non-state groups (*de facto* regimes) exercising effective control over a territory and the population residing in that territory. [161] In this regard, the UN Principles allow for liability and reparation in the event that gross violations of humanitarian law have been committed by a person, a legal personality or an entity. [162] Principle 22 of the UN Principles determines that compensation should be provided to victims by the responsible entity for any economically-assessable injury resulting from serious violations of IHL. [163] Although the UN Principles is a non-binding instrument, they progressively advance the law related to reparations for victims of grave breaches of international law and gross violations of international human rights law.

Further, the International Law Association ("ILA") adopted Resolution 2/2010 on the Reparation for Victims of Armed Conflict as a non-binding instrument which provides for the Declaration of International Law Principles on Reparation for Victims of Armed Conflict. [164] In Article 5(2) of this Declaration the ILA follows an approach, similar to the UN Principles, which aims to include the responsibility of non-state actors. [165] The initial content of Article 5(2) determines that "[r]esponsible parties may also include non-state actors other than international organisations responsible for a violation of rules of international law applicable to armed conflict". [166] The UN Principles further provide that where the state or government under whose authority the violation occurred no longer exists, its successor state should provide reparations to victims. [167] Our reading of this provision is that it provides that a *de facto* regime which later becomes the *de jure* government is to be held liable. According to Principle 12 of the UN Principles, remedies should be provided by the state in the domestic or international arena and should include access to justice to obtain reparations. [168] IHL, however, does not provide an enforcement mechanism for victims to claim reparations from OAGs. [169]

Furthermore, in our view, the concepts of collective victims and collective reparations may be best suited to address collective harm, which is often the harm caused by SGBV during a NIAC. [170] Collective harm is attributable where victims share certain connections such as common cultural or religious customs or having tribal or ethnic roots. [171] In this case reparation may be defined as the benefits conferred on a collective in order to undo the collective harm that has been caused as a consequence of a violation of international law. [172]

Furthermore, the concept of "victim" is not limited in application to the actions of states but includes individuals or groups of individuals. [173] A

"victim" is defined as an individual person or a group of persons who have incurred injury owing to an act or omission which caused a breach of an international humanitarian or human rights law norm. [174] Certain human rights conventions implicitly recognise the existence of victims as a collective. Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women provides a communication procedure which allows either individuals or groups of individuals to submit individual complaints to the Committee established under Article 17 of this Convention. [175] It is left unclear, however, whether groups can only assert a violation of primary norms or whether they also can claim collective reparations. In addition, truth commissions have pointed out that victims include persons who are harmed "collectively", referencing them as being "together with one or more persons" or "as part of a collective". [176]

Although reference is made to victims as a collective, the right to collective as opposed to individual reparation has received little scholarly attention [177] and it is unclear whether groups have a right to collective reparation under international law *de lege lata*. [178] Collective reparation, however, is best suited to addressing collective harm. It has a remedial function [179] – awarding collective reparations to a collective that has suffered harm undoes some of the harm caused as it constitutes a form of acknowledgment that the collective indeed was harmed by those responsible. [180] This form of reparation is better suited as a remedy in instances of group-based violence where the violence is linked to persons belonging to certain groups or collectives (along the lines of gender, sexual orientation, race, ethnicity, religious beliefs, language spoken, and so forth) and to gender-specific forms of violence committed in times of conflict against women because they are women. It has been argued that to redress the harm to the identity and social status of the targeted individuals

as well as the harm to the entire group can have long-term effects and help to build peaceful post-conflict societies. [181] Collective remedies encompass a wide range of benefits, including public apologies, educational programmes, [182] the construction of schools or hospitals, the establishment of memorials and the renaming of streets. [183]

Further, collective remedies are beneficial in that they reach every victim who has suffered harm during an armed conflict and avoid the negative side-effects of individual reparation where certain victims might not receive any as they may not have the necessary funds to lodge a claim or where the quantity of compensatory awards may be restricted due to limited resources. Accordingly, the possibility of collective victims claiming collective reparations could be explored in greater detail in future research; particularly, in relation to the advantages of collective reparations for a community or society severely harmed as a result of SGBV committed during a NIAC. [184]

6. Conclusion

The purpose of this article was to illustrate the potential as well as the shortcomings of using certain parts of the ASR as a blueprint in the attribution of the collective responsibility of OAGs for the commission of war crimes of a sexual and gender-based nature during NIACs. Specifically, it explored the organisational criteria necessitated to qualify as an OAG, the basis on which OAGs are bound by international law and whether circumstances precluding wrongfulness apply. Articles 1 and 2 read with Article 12 of the ASR can be used as a blueprint to provide for a collective responsibility framework for OAGs in that, in a manner similar to the application to states, "every internationally wrongful act of an OAG entails the international responsibility of the OAG". The primary norms of customary LoNIAC prohibit the commission of acts that are sexual or gender-based in nature, a prohibition that is supported also in the Commentaries of the ICRC to Common Article 3 and by various cases before international criminal law tribunals. In the context of a NIAC, we argue that these acts constitute internationally wrongful acts as contemplated by the ASR which, when committed by an OAG, should trigger international responsibility by the OAG.

This article illustrated that the first possible barrier to realising a collective responsibility of OAGs relates to the debate around the status of OAGs

and whether they are bound by IHL. It argued that OAGs need to have an organisational structure and that they can be held responsible based on both the principles of legislative jurisdiction and international legal personality. The article incorporated a brief discussion of the circumstances precluding wrongfulness, but the authors concluded that this factor should be excluded from further research owing to the nature of the internationally wrongful acts.

Finally, the authors offered suggestions for future research regarding collective victims and collective reparations. We contend that collective claims and collective compensation are more constructive as a means of remedying sexual crimes during NIACs and will serve to address the collective harm suffered. We trust that this contribution will stimulate further debate on holding OAGs responsible for SGBV during NIACs and realising the right to reparations for victims of OAGs.

1 See UNSG "Report of the High-Level Panel on Threats, Challenge and Change, A More Secure World: Our Shared Responsibility" (2004) A59/565 11 *UN* (accessed 21-04-2021).

2 A Bellal (ed) "The War Report: Armed Conflict in 2018" (2019) *Geneva Academy* (accessed 22-01-2020). For a summary of situations that were continuing in 2018, see also, A Bellal (ed) "The War Report: Armed Conflict in 2017" (2018) *Geneva Academy* (accessed 23-01-2020); A Bellal (ed) "The War Report: Armed Conflict in 2016" (2017) *Geneva Academy* (accessed 20-08-2020). These situations include the violent situations in Afghanistan (51); Egypt (64); Mali (80); South Sudan (87); Ukraine (94); Yemen (104). See also Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ("Geneva Protocol II"); RULAC: Geneva Academy "Conflicts" *RULAC: Geneva Academy* (accessed 22-06-2020).

3 See also International Committee of the Red Cross "Q&A: Sexual Violence in Armed Conflict" (19-08-2016) *International Committee of the Red Cross* (accessed 12-11-2019). The International Committee of the Red Cross comments:
"Throughout history, sexual violence has been widespread in armed conflict, and often viewed as an unavoidable consequence of warfare. Sexual violence persists as a devastating phenomenon with damaging consequences for victims – women, men, boys and girls – as well as their families and whole communities. Additionally, such violations remain vastly under-reported, and underestimated in terms of prevalence and consequences. The humanitarian response to the diverse needs of victims remains insufficient."
See also ICC: The Office of the Prosecutor "Policy Paper on Sexual and Gender-Based Crimes" (2014) para 35 *ICC* (accessed 12-11- 2019).

4 See UN Resources for Speakers on Global Issues "Ending Violence Against Women and Girls" *United Nations* as cited by G Gaggioli "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law" (2015) 96 *International Review of the Red Cross* 503-538.

5 A Graham "Joint UN-Red Cross Appeal to End Rising Sexual Violence as a Weapon of War" *UN News* (25-02-2019) (accessed 09-02-2020).

6 Graham "Joint UN-Red Cross Appeal to End Rising Sexual Violence as a Weapon of War" *UN News*.

7 See S Sivakumaran *The Law of Non-International Armed Conflict* (2012) 373.

8 JK Kleffner "The Collective Accountability of Organised Armed Groups for System Crimes" in A Nollkaemper & H van der Wilt (eds) *System Criminality in International Law* (2009) 257; A Cassese "Current Challenges to International Humanitarian Law" in A Clapham & P Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (2014) 7 13; M Sassòli "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law" (2010) 1 *Journal of International Humanitarian Legal Studies* 5 13.

9 Kleffner "Collective Accountability" in *System Criminality in International Law* 257-269.

10 242.

11 242.

12 242.

13 242.

14 242.

15 247.

16 242-247.

17 ICL Draft Articles on Responsibility of States for Internationally Wrongful Acts Supplement No 10 (A/56/10) (2001) ("ASR") Art 4 which determines that the actions of state organs can be attributed to the state. The state armed forces qualify as organs of the state.

18 G Werle "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5 *Journal of International Criminal Justice* 954.

19 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/0501/08 T (21-03-2016).

20 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 ("Rome Statute") Art 28. Only the individual commander is held responsible and if the perpetrators under his command are not charged individually under Art 25 of the Rome Statute, they escape being held responsible for their actions.

21 *Prosecutor v Jean-Pierre Bemba Gombo*, appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" ICC-01/05-01/08 A (08-06-2018).

22 Notwithstanding the above, international criminal law has not arrived at a universally accepted doctrine or approach to collective criminal acts. This article does not discuss the various other modalities of liability but notes that under liability in the form of joint common purpose under Art 25(3)(d) of the Rome Statute, conviction ultimately rests on a lowered *mens rea* – a type of recklessness (*dolus eventualis*) – and not on a demonstration of a clear intent that the crimes were to be committed or an awareness that those crimes were about to be committed. The intention in this contribution is to explore the possibility of holding an OAG as an entity responsible.

23 For a discussion of circumstances precluding wrongfulness, see J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 427; A Nollkaemper & I Plakokefalos *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 169.

24 ASR Art 1.

25 Art 35 para 7.

26 Of course, further research may be conducted to determine whether only serious violations should trigger the responsibility of OAGs, but an amendment might allow for abuse of the term "serious". In our view a single act of rape during a NIAC is a serious breach of the LoNIAC.

27 ASR Art 2.

28 In terms of Art 12 of the ASR "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*" (emphasis added). See also Crawford *The International Law Commission's Articles on State Responsibility* 126-127. In the *Rainbow Warrior (New Zealand v France)* 1990 82 ILR 500 arbitration, the tribunal ruled: "Any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation." In the *Gabicíkovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 3 (Order of 5 February), the ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".

29 Crawford *The International Law Commission's Articles on State Responsibility* 81-85.

30 81-85

31 81-85

32 *Dickson Car Wheel Company (United States v Mexico)* 1931 4 RIAA 669.

33 ASR Art 54 para 1.

34 Art 55 para 2.

35 Art 388 para 2. See for example, I Brownlie *System of the Law of Nations: State Responsibility, Part I* (1983) 132-166; DD Caron "The Basis of Responsibility: Attribution and Other Trans-Substantive Rules" in RB Lillich & DB Magraw (eds) *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 109; L Condorelli "L'imputation à l'état d'un fait internationalement illicite: Solutions classiques et nouvelles tendances" (1988) 189 *Recueil des Cours* 1984-VI 9; H Dipla *La responsabilité de l'état pour violation des droits de l'homme: Problemes d'imputation* (1994); AV Freeman "Responsibility of States for Unlawful Acts of Their Armed Forces" (1955) 88 *Recueil des Cours* 1955-II 261; F Przetacznik "The International Responsibility of States for the Unauthorized Acts of Their Organs" (1989) 1 *Sri Lanka Journal of International Law* 151.

36 ASR Art 2. This article determines the elements of an internationally wrongful act of a state. It reads:
"There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

37 It could read:
"There is an internationally wrongful act of an OAG when conduct consisting of an action or omission (a) is attributable to the OAG under international law; and (b) constitutes a breach of an international obligation of the OAG."

38 K Greenman "The Secret History of Successful Rebellions in the Law of State Responsibility" (2017) 6(9) *ESIL Reflection* (accessed 25/04/2021); J D'Aspremont "Rebellion And State Responsibility: Wrongdoing By Democratically Elected Insurgents" (2009) 58 *International and Comparative Law Quarterly* 427; E Heffes and B Frenkel "The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules" (2017) 8 *Goettingen Journal of International Law* 59; ASR Art 10.

39 For a better understanding of the scope and content of Art 10, see Crawford *The International Law Commission's Articles* 116-120.

40 116-120.

41 See discussion in text accompanying nn 30-32.

42 See Crawford *The International Law Commission's Articles on State Responsibility* 126.

43 Common Article 3 to all four Geneva Conventions: Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ("First Geneva Convention"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ("Second Geneva Convention"); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ("Third Geneva Convention"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ("Fourth Geneva Convention").

44 As has generally been accepted and, furthermore, confirmed by the ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States*) Merits (Judgment of 27 June 1986) 1986 ICJ Rep 14, 103 para 218, Common Article 3 of the Geneva Conventions has acquired customary status. Common Article 3 thus applies to High Contracting Parties and non-state parties alike.

45 Common Article 3 is the minimum legal framework applicable to all NIACs. For a discussion of the contents of Common Article 3, see L Moir *The Law of Internal Armed Conflicts* (2002) 30-87, 133-192; L Zegveld *Accountability of Armed Opposition Groups in International Law* (2009) 9-61. See also T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) 3.

46 This view is shared by the International Committee of the Red Cross ("ICRC"). Compare the ICRC's interpretation of Rule 93 of the ICRC's Customary IHL study "Rule 93: Rape and Other forms of Sexual Violence" *IHL Database* (accessed 09-11-2019). For a historic overview of the prosecution of rape as a war crime, see RJ Goldstone "Prosecuting Rape as a War Crime" (2002) 34 *Case Western Reserve Journal of International Law* 277-285; R Dixon "Rape as a Crime in International Humanitarian Law: Where to From Here?" (2002) 13 *European Journal of International Law* 697-719; C Chinkin "Rape and Sexual Abuse of Women in International Law" (1994) 5 *European Journal of International Law* 326-341.

47 Common Article 3 to the Geneva Conventions. See also the Updated Commentaries on the Geneva Conventions which underline the Statute of the ICTR (UNSC "Statute of the International Criminal Tribunal for Rwanda" ("ICTR Statute") (08-11-1994, as last amended on 13-10-2006) *Refworld* (accessed 20-04-2021). See further, Art 4(3) of the ICTR Statute which criminalises rape and other forms of sexual violence committed in the context of a NIAC as a war crime and a violation of Common Article 3(e), referring to "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" and the Statute of the Special Court for Sierra Leone ("SCSL") which lists rape and enforced prostitution, as well as any form of indecent assault, as outrages upon personal dignity under Common Article 3 UNSC "Statute of the Special Court for Sierra Leone" ("SCSL Statute") (16-01-2002) *Refworld* (accessed 20-04-2021)). Art 3(e) of the SCSL Statute also refers to "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". See also the 2017 Commentary to the Second Geneva Convention ("2017 Commentary") para 727 *IHL Databases* (accessed 20-04-2021).

48 *The Prosecutor v Bagosora* ICTR-98-41-T (18-12-2008) para 2266 *Refworld* (accessed 20-04-2021).

49 The ICRC Commentaries have value as an analytical tool and constitute a valuable resource in that,
"[a] teaching that explores the meaning of the provision – looking at its object and purpose, situating it in context, considering its drafting history, analysing subsequent practice, and canvassing relevant literature – can prove influential".
S Sivakumaran "The Influence of Teachings of Publicists on the Development of International Law" (2017) 66 *ICLQ* 1 15. The ICRC Commentaries fill the role of publicist in the ambit of Art 38(1)(d). See Sivakumaran for an insightful review of the value of the ICRC's scholarly work in general, and its commentaries in particular. Sivakumaran (2017) *ICLQ* 3-5, 15-16.

50 Commentaries paras *IHL Databases* 737-743.

51 ICTR-98-41-T para 2266.

52 Commentaries para 742 *IHL Databases*.

53 IT-96-23 & IT-96-23/1-A International Criminal Tribunal for the Former Yugoslavia ("ICTY") (12-06-2002) para 150 *Refworld* (accessed 04-03-2019).

54 IT-96-23 & IT-96-23/1-A ICTY para 150. The prohibition on torture is a peremptory norm of general international law (*jus cogens*). See further *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-T ICTY (16-11-1998) para 495:
"Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."
See also Prosecutor v Radoslav Brdjanin IT-99-36-T ICTY (01-09-2004) para 485; Prosecutor v Stanišiæ and Župljanin IT-08-91-T ICTY (27-03-2013) para 48; Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic IT-96-23-T & IT-96-23/1-T ICTY (22-02-2001) para 151; The Prosecutor v Jean-Paul

Akayesu ICTR-96-4-A ICTR (01-06-2001) para 682.

55 Art 4(e) of UNSC Statute of the ICTR criminalises rape and other forms of sexual violence committed in the context of a NIAC as a war crime and a violation of Common Article 3(e):
"Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

56 Art 3(e) of UNSC of the SCSL Statute reads:
"Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

57 Commentaries para 741 *IHL Databases* n 46.

58 Art 8(2)(e)(vi) of the Rome Statute criminalises the breach of the following rules of customary international humanitarian law: rape in the context of an armed conflict not of an international character and where the perpetrator is aware of the existence of such a conflict (see ICC *Elements of Crimes* (2013) 25, an official publication of the ICC where the elements of rape are spelled out); a person may not be sold, lent or bartered to the extent that he or she is deprived of their liberty and such a person is then forced to engage in one or more acts of a sexual nature (see ICC *Elements of Crimes* 26 which encapsulate the elements of the war crime of sexual slavery); a person may not be forced to engage in acts of prostitution against such an individual's will (see ICC *Elements of Crimes* 26 which cover the elements of the war crime of enforced prostitution); a person may not be sterilised without medical justification and the giving of genuine consent (see ICC *Elements of Crimes* 26-27 which cover the elements of the war crime of forced pregnancy); and an act of sexual violence committed against a person who does not consent or does not have the capacity to give genuine consent (see ICC *Elements of Crimes* 27, which essentially is the war crime of sexual violence).

59 See discussion in text accompanying nn 49-58.

60 M Sassòli *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019) para 9.5.4

61 Common Article 3 has achieved customary international law status. Moir *The Law of Internal Armed Conflicts* 160-183. As has generally been accepted and furthermore confirmed by the ICJ in "Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) Jurisdiction and Admissibility" 1984 *ICJ Reports* 98 para 218, Common Article 3 of the Geneva Conventions has acquired customary law status.

62 For a general discussion of the organisational requirement, see Moir *The Law of Internal Armed Conflicts* 36; MM Bradley "Revisiting the Notion of 'Organised Armed Group' in accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements" (2018) *African Yearbook of International Humanitarian Law* 50-79; S Sivakumaran "Identifying an Armed Conflict Not of an International Character" in S Stahn & G Sluiter G (eds) *The Emerging Practice of the International Criminal Court* (2009) ch 20; T Demir "The Organisational Requirements for the Threshold of Non-International Armed Conflict" (2013) 3 *Human Rights Review* 127; D Murray *Human Rights Obligations of Non-State Armed Groups* (2016) 61-67; JK Kleffner "The Legal Fog of an Illusion: Three Reflections on 'Organization' and 'Intensity' as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict" (2019) 95 *Int'l L Stud* 161 168-170.

63 *Prosecutor v Dusko Tadic a/k/a "Dule"* IT-94-1-T (07-05-1997) para 561, which refined the Tadic formula so that the definitional criteria determine the existence of a non-international armed conflict as follows:
"The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict, the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely-related criteria are used solely for the purpose, *as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law*." (emphasis added).

64 Sassòli (2010) *Journal of International Humanitarian Legal Studies* 46. See further *Prosecutor v Boskoski and Tarculovski (Trial Judgment)* IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (10-07-2008). In the *Boskoski* case the ICTY explores the factors indicative of the "organisational criterion" as identified by the ICTY and adopted by the ICC in the *Situation in the Democratic Republic of the Congo, In the case of the Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 ICC (14-03-2012). See also JS Pictet *Commentary on the Geneva Conventions of 12 August 1949 III* (1960) 39 for a list of requirements that Pictet deems need to be satisfied in order to trigger the application of Common Article 3 and to constitute an armed group in the context of non-international armed conflict; Kleffner (2019) *Int'l L Stud* 168-170.

65 *Prosecutor v Boskoski and Tarculovski (Trial Judgment)* IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (10-07-2008) paras 199-203.

66 Para 199.

67 Paras 200-201.

68 Bradley (2018) *African Yearbook of International Humanitarian Law* 50-79.

69 T Rodenhäuser *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (2018) 72-96.

70 72-96.

71 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga* ICC-01/04-01/07 (07-03-2014) paras 671-684; *Prosecutor v Boskoski and Tarculovski* IT-04-82-T (10-07-2008) paras 199-203; *Prosecutor v Slobodan Milosevic* IT-02-54-T (16-06-2004) paras 23-4; *Prosecutor v Vlastimir Dordevic* IT-05-87/1-T (23-02-2011) paras 1537 and 1541. See also *Juan Carlos Abella v Argentina* Report no 55/97 Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998) para 156 (*La Tablada* case). For a scholarly analysis of this case, see CM Cerna "The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict" (2011) 2 *International Humanitarian Legal Studies* 3 37-41; L Moir "Law and the Inter-American Human Rights System" (2003) 25 *Human Rights Quarterly* 182 189-190.

72 IT-04-84-T (03-04-2008) para 52.

73 Kleffner (2019) *Int'l L Stud* 161-178; Bradley (2018) *African Yearbook of International Humanitarian Law* 75-77.

74 Kleffner (2019) *Int'l L Stud* 168-169.

75 168-169.

76 168-169.

77 169.

78 169.

79 169.

80 For a discussion of protracted armed violence, see SK Door "The Threshold of Non-International Armed Conflict – The Tadic Formula and its First Criterion Intensity" (2009) 102 *Militair Rechtelijk Tijdschrift* 301; Kleffner (2019) *Int'l L Stud* 172-178; L Moir "The Concept of Non-International Armed Conflict" in A Clapham, P Gaeta & M Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (2015) 391 410; A Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010) 27-29.

81 For a general discussion on the threshold requirements for NIACs, see N Quenivet "Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict" in D Jinks, S Solomon, JC Maogoto (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (2014) 31; A Cullen "The Parameters of Internal Armed Conflict in International Humanitarian Law" (2004) 12 *University of Miami International and Comparative Law Review* 189; DE Graham "Defining Non-International Armed Conflict: A Historically Difficult Task" (2012) 88 *Intl L Stud* 43; S Küfner "The Threshold of Non-International Armed Conflict" (2009) 102(b) *Militair Rechtelijk Tijdschrift* 309; S Vite "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2000) 91 *International Review of the Red Cross* 69; Kleffner (2019) *Int'l L Stud* 161-178.

82 A Reinisch "The Changing International Legal Framework for Dealing with Non-State Actors" in P Alston (ed) *Non-State Actors and Human Rights* (2005) 42.

83 Cassese "Current Challenges to International Humanitarian Law" in *The Oxford Handbook of International Law in Armed Conflict* 71; I Brownlie *Principles of Public International Law 7 ed* (2008).

84 Cassese "Current Challenges to International Humanitarian Law" in *The Oxford Handbook of International Law in Armed Conflict* 72; ICJ "Reparation for injuries suffered in the service of the United Nations, Advisory Opinion" (1949) *ICJ* 174, 178; Reinisch "The Changing International Legal Framework" in *Non-State Actors and Human Rights* 70. Reinisch argues that a more liberal approach allows for the inclusion of non-state actors as subjects on the basis that an entity is considered a subject if it has rights and/or obligations under a specific legal system or field. In following his theory, it can be shown that as non-state actors, at a minimum, are bound by Common Article 3 to the Geneva Conventions and thus incur international obligations, these groups should qualify as subjects of international law.

85 Murray *Human Rights Obligations of Non-State Armed Groups* 23-50.

86 For an extensive discussion of legal personality of such non-state actors, see Murray "International Legal Personality" in *Human Rights Obligations of Non-State Armed Groups* 23-50.

87 Cassese "Current Challenges to International Humanitarian Law" in *The Oxford Handbook of International Law in Armed Conflict* 72; *Reparations for Injuries* (n 84) 178; Reinisch "The Changing International Legal Framework" in *Non-State Actors and Human Rights* 70.

88 See JK Kleffner "The applicability of international humanitarian law to organized armed groups" (2011) 93 *International Review of the Red Cross* 443-461; MN Schmitt "The Status of Opposition Fighters in a Non-International Armed Conflict" (2012) 88 *International Law Studies Series US Naval War College* 119; AP Rubin "The Status of Rebels Under the Geneva Conventions of 1949" (1972) 21 *ICLQ* 472; S Sivakumaran "Binding Armed Opposition Groups" (2006) 55 *ICLQ* 369; Murray "International Legal Personality" in *Human Rights Obligations of Non-State Armed Groups* 23-50; A Bellal "ICRC Commentary of Common Article 3: Some Questions Relating to Organized Armed Groups and the Applicability of IHL" (05-10-2017) *EJIL:Talk!* (accessed 06-10-2017); GD Solis *The Law of Armed Conflict: International Humanitarian Law in War* (2010) 157-159; Sassòli (2010) *Journal of International Humanitarian Legal Studies* 5-51.

89 For an in-depth-analysis of these theories, see Kleffner (2011) *International Review of the Red Cross* 443-461; Sivakumaran (2006) *ICLQ* 369; Sassòli (2010) *Journal of International Humanitarian Legal Studies* 5-51; A Clapham "Focusing on Armed Non-State Actors" in A Clapham & P Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (2014) 771-786.

90 Kleffner (2011) *International Review of the Red Cross* 460.

91 Common Article 3 binds each party to a NIAC occurring in the territory of one of the High Contracting Parties to *inter alia* a prohibition against violence to life and person, cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment, in respect of persons taking no active part in the hostilities.

92 For an overview of the legislative jurisdiction theory, see Kleffner (2011) *International Review of the Red Cross* 445-449; Sivakumaran (2006) *ICLQ* 381-393; Sassòli (2010) *Journal of International Humanitarian Legal Studies* 13-14; Clapham "Focusing on Armed Non-State Actors" in *The Oxford Handbook of International Law* 771-779.

93 Common Article 3. For a discussion of the parties to a CA3 type NIAC, see Bradley (2018) *African Yearbook of International Humanitarian Law* 58-66.

94 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" (16-07-2010) 47 *Military legal resources* <https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> (accessed 02-09-2020).

95 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" *Military legal resources* 47.

96 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 13, 44, 47, 79 *Military legal resources.*

97 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 11, 12, 15, 57, 522 *Military legal resources*.

98 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 15, 36, 15, 36, 41, 44, 47, 57, 79, 93, 94, 522 *Military legal resources.*

99 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 11-15, 36, 41, 44, 47, 57, 79, 93, 94, 522 *Military legal resources*.

100 General Order no 100: Instructions for the Government of Armies of the United States in the Field (24 April 1863) Art 151. In this regard Art 10 of the ASR deals only with the attribution of the conduct of an insurrectional movement (such as an OAG) to a state. Although it does not assign responsibility to the OAG as a collective directly, the conduct of the OAG is attributed to the state where such a movement becomes the new government of the state or succeeds in establishing a new state. Thus the OAG (being the same entity) is held responsible. However, Art 10 is an insufficient foundation in order to establish a framework dealing with the collective responsibility of OAGs and proves contentious with regard to its theoretical foundation, application and scope.

101 A Cullen "Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law" (2005) 183 *Mil L Rev* 66 69. See further RA Falk "Janus Tormented: The International Law of Internal War" in JN Rosenau (ed) *International Aspects of Civil Strife* (1964) 185 197-199. Prior to the adoption of Common Article 3, rebels were not afforded protection under the law.

102 E Crawford "Insurgency" in W Rüdiger (ed) *Max Planck Encyclopaedia of Public International Law* (accessed 20-04-2021). For other authors and sources giving content to the definition of insurgency, see United States Department of the Army (ed) *Field Manual 3-24: Counterinsurgency* (2006) 1; E Castrén *Civil War* (1966) 212; HA Wilson *International Law and the Use of Force by National Liberation Movements* (1988) 24.

103 Wilson *International Law* 23.

104 For an overview of the law related to belligerency, see C Kress & F Mégret "The Regulation of Non-International Armed Conflict: Can a Privilege of Belligerency be Envisioned in the Law of Non-International Armed Conflict" (2014) *International Review of the Red Cross* 96; YM Lootsteen "The Concept of Belligerency in International Law" (2000) 166 *Military Law Review* 109; K Mastorodimos "Belligerency Recognition: Past, Present and Future" (2014) 29 *Connecticut Journal of International Law* 303; Sivakumaran *The Law of Non-International Armed Conflict* 9-16.

105 H Lauterpacht *Recognition in International Law* (2012) 176.

106 176.

107 In regard to insurgency, Lauterpacht *Recognition in International Law* 276-277 argues that
"[a]ny attempt to lay down conditions of recognition lends itself to misunderstanding. Recognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity and of economic interest."

108 In the Seventh Report of the Special Committee, Mr Cohn of Denmark noticed a tendency by the Committee to replace the term "belligerents" with the phrase "parties to the conflict". Seventh Report drawn up by the Special Committee of the Joint Committee 16 July 1949: Art 2 para 4 (Application of the conventions to armed conflicts not of an international character) in "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 120-126 *Military legal resources*. See also "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 36 *Military legal resources*.

109 36.

110 36.

111 For a discussion of parties possessing military units and they themselves not being only a military unit or being more sophisticated, see Bradley (2018) *African Yearbook of International Humanitarian Law* 66-69.

112 Moir *The Law of Internal Armed Conflicts* 65; Pictet *Commentary on the Geneva Conventions* 60-61.

113 D Murray *Human Rights Obligations of Non-State Armed Groups* (2016) 36-37 explains:
"[B]y extending recognition of belligerent status may elevate an armed group to the level of a *pro tanto* international subject, bringing into effect the application of international law, including what is now referred to as the law of international armed conflict. Recognition of belligerent status thus gives rise to a number of significant legal consequences . . . Given the significant consequences associated with recognition of belligerency, state's concerns at Geneva are entirely understandable. The legal status clause must thus be regarded as a means of addressing these concerns, and starting with the Conventions themselves that the application of the Conventions did not confer belligerent status on armed groups."
At the time of drafting, some states opposed the notion of the legal personality of OAGs on this basis. For example, the representative from Italy commented:
"[T]he declaration to be made by the rebels presupposes a legal personality which they could not possess."
"Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 47 *Military legal resources*.

114 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 10, 36, 46-47, 50, 98-99, 330, 362 *Military legal resources*.

115 Common Article 3. The article promotes the humane treatment of civilians not party to the conflict as well as those who are placed *hors de combat*; it offers these categories some judicial protection and obliges all parties to a Common Article 3-type armed conflict to collect and care for the wounded and sick. Additional to these basic obligations, Common Article 3 further encourages parties to the conflict to agree to be bound more extensively by other provisions, if not all provisions of the four Geneva Conventions.

116 For a discussion of "status" itself, see Rubin (1972) *ICLQ* 472; MN Schmitt "The status of opposition fighters in a non-international armed conflict" in Y Dinstein (eds) *Israel Yearbook on Human Rights* (2012) 27. For an in-depth discussion of the legal personality of OAGs, see Murray "International Legal Personality" in *Human Rights Obligations of Non-State Armed Groups* 23-50.

117 "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 10, 36, 46-47,50, 98-99, 330, 362 *Military legal resources*. Final Record 362 Resolution 10, Final Record of the Diplomatic Conference of Geneva reads:
"The Conference considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva conventions."
See also Seventh Report Drawn Up by the Special Committee of the Joint Committee (16-07-1949) Art 2 para 4 (Application of the conventions to armed conflicts not of an international character) in "Final Record of the Diplomatic Conference of Geneva of 1949 II-B" 120-126 *Military legal resources*.

118 See ASR Arts 20-27.

119 Art 20.

120 Art 21.

121 Art 22.

122 Art 23.

123 Art 24.

124 Art 25.

125 Art 26.

126 Art 23.

127 Art 24.

128 *Force majeure* as a ground necessitates the application of a demanding three-element threshold test before it can be employed to preclude wrongfulness. The three elements are: first, that the act in question must be a direct response to an irresistible force or unforeseen event; second, that the act in question must be beyond the control of the author of the action; and, finally, that the irresistible force or unforeseen event must make it impossible to perform the specific obligation. In this regard, a material possibility refers primarily to natural or physical events. Crawford *The International Law Commission's Articles on State Responsibility* paras 2, 3, 170. The OAG is in full control of actions that breach Common Article 3. The event, the NIAC in question, also is not unforeseen. This exclusionary ground envisions a scenario of natural disasters or unforeseen military insurrections by third states and clearly does not apply to breaches of the LoNIAC by parties to a NIAC.

129 "Distress" cannot serve as a ground in relation to violations of Common Article 3 by OAGs owing to its formulation and overall purpose, which concerns the commission of an internationally wrongful act for the purpose of saving a life where the agent had no other reasonable way of doing so. Historically, it is used in cases involving ship and aircraft-related accidents. Art 24 of the ASR determines:
"(1) The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. Paragraph 1 does not apply if (a) the situation of distress is due, either alone or in combination with the other factors, to the conduct of the State invoking it; or (b) the act in question is likely to create a comparable or greater peril."

130 For a discussion of distress, see Crawford *The International Law Commission's Articles on State Responsibility* 174-176.

131 ASR Art 21.

132 Art 22.

133 For a discussion on the difference between *jus ad bellum* and *jus in bello*, see ICRC "What are *jus ad bellum* and *jus in bello*?" (22-01-2015) *ICRC* <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> (accessed 02-09-2020). The ground of self-defence is included in Art 21 of the ASR. The wording of this provision in Art 21 of the ASR clearly indicates its regulation by Art 51 of the Charter of the United Nations (24-10-1945) 1 UNTS XVI. The law applicable to self-defence forms part of a *corpus* of law known as the *jus ad bellum,* peacetime law. As this contribution concerns the LoNIAC that is part of *jus in bello,* self-defence clearly is not a relevant ground. See Crawford *The International Law Commission's Articles on State Responsibility* 166-167 for a discussion of self-defence as a ground precluding wrongfulness.

134 For a discussion of Art 50(1)(c), see Crawford *The International Law Commission's Articles on State Responsibility* 290. Art 22 of the ASR deals with the ground of countermeasures as precluding wrongfulness in response to the commission of an internationally wrongful act and is worded as follows:
"The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act *constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three*" (emphasis added).
The italicised words in Art 22 as emphasised are a reference to the detailed rules dealing with countermeasures included in ch II, part III of the ASR. Art 50 of the ASR is relevant to this discussion as it specifically details obligations that are never to be breached and presented as a countermeasure and, furthermore, may not be affected by any type of countermeasure. Owing specifically to the inclusion of Art 50(1)(c), OAGs cannot rely on "countermeasures" as a ground precluding wrongfulness. Art 50(1)(c) determines that countermeasures shall not affect obligations of a humanitarian character that prohibit reprisals. This position corresponds to the ruling of customary IHL but it is uncertain whether reprisals are also outlawed by customary LoNIAC. For a discussion of Art 22 of ASR, see Crawford *The International Law Commission's Articles on State Responsibility* 168-169. For a discussion of Art 50, see Crawford *The International Law Commission's Articles on State Responsibility* 288-293.

135 Art 53 of the Vienna Convention on the Law of Treaties, 1969. For a discussion of Art 50(1)(c), see Crawford *The International Law Commission's Articles on State Responsibility* 290. For a discussion of *jus cogens* norms, see AC de Beer *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (2019) 61-87.

136 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23-T & IT-96-23/1-T ICTY (22-02-2001) para 150 *Refworld* (accessed 20-04-2021). See further *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-T ICTY (16-11-1998) para 495 *Refworld* (accessed 20-04-2021):
"Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."
See also *Prosecutor v. Radoslav Brdjanin* IT-99-36-T ICTY (01-09-2004) para 485; *Prosecutor v Stanišiæ and Župljanin* IT-08-91-T ICTY (27-03-2013) para 48; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23-T & IT-96-23/1-T ICTY (22-02-2001) para 151; *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-A ICTR (01-06-2001) para 682.

137 De Beer *Peremptory Norms of International Law (Jus Cogens) and the Prohibition of Terrorism* 173. See further ICJ "*Belgium v Senegal* (Questions Relating to the Obligation to Prosecute or Extradite)" 2012 *ICJ Reports* para 99. In justifying its conclusion that the prohibition against torture is a norm of *jus cogens*, the ICJ noted that the prohibition was grounded on "widespread international practice and the *opinio juris* of states", that it appears in "numerous international instruments of universal application and the domestic law of almost all states and that acts of torture are regularly denounced within national and international fora".

138 ASR Arts 20 and 26. See also Crawford *The International Law Commission's Articles on State Responsibility* 164. Art 20 of the ASR determines that valid consent may serve as a circumstance precluding wrongfulness but restricts the validity of the consent to the act to the limitations of the permission (see para 1 of the Commentaries to Art 20). Para 7 of the Commentaries to the ASR indicates situations in which consent may not be validly given and in that case consent cannot serve as a circumstance precluding wrongfulness.

139 See para 7 of Commentaries to Art 20 ASR; Crawford *The International Law Commission's Articles on State Responsibility* 164.

140 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/0501/08 T (21-03-2016) para 105.

141 W Schomburg & I Peterson "Genuine Consent to Sexual Violence under International Criminal Law" (2007) 101 *The American Journal of International Law* 128.

142 130.

143 ASR Art 25.

144 See Crawford *The International Law Commission's Articles on State Responsibility* 178.

145 183.

146 ICRC "CIHL Study Rules 46-69 and 150" *ICRC Customary IHL database* (accessed 02-09-2020.)

147 For an overview of Art 31, see Crawford *The International Law Commission's Articles on State Responsibility* 201-206.

148 ASR Art 31:
"The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."
See further Art 2 of ASR:
"There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

149 ICRC "CIHL Study Rules 46-69 and 150" *ICRC Customary IHL database.*

150 See ICRC "CIHL Study Rule 149: Responsibility for violations of International Humanitarian Law" *ICRC Customary IHL database* (accessed 20-04-2021).

151 ICRC "CIHL Study Rule 149: Responsibility for violations of International Humanitarian Law" *ICRC Customary IHL database.*

152 ICRC "CIHL Study Rule 149: Responsibility for violations of International Humanitarian Law" *ICRC Customary IHL database.*

153 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database*.

154 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database*.

155 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database.*

156 See also Kleffner "Collective Accountability" in *System Criminality in International Law* 257.

157 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database.*

158 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database*.

159 See ICRC "CIHL Study Rule 150: Reparation" *ICRC Customary IHL database*.

160 UNGA Res 60/147 UN Principles.

161 UNGA Res 60/147 UN Principles.

162 UNGA Res 60/147 UN Principles.

163 UNGA Res 60/147 UN Principles 22.

164 ILA "Declaration of International Law Principles on Reparation for Victims of Armed Conflict" Resolution 2/2010 *Refworld* (accessed 25-04-2021).

165 ILA "Resolution 2/2010 on the Reparation for Victims of Armed Conflict" *Refworld/*

166 ILA "Resolution 2/2010 on the Reparation for Victims of Armed Conflict" *Refworld/*

167 UNGA Res 60/147 UN Principles 1619; T van Boven "The United Nations 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" (16-12-2005) *United Nations Audiovisual Library of International law* (accessed 12-11-2019).

168 UNGA Res 60/147 UN Principles 12.

169 Compare Geneva Protocol II Additional and Article 3 Common to the Geneva Conventions of 1949, and compare J Henckaerts & L Doswald-Beck (eds) *Customary International Humanitarian Law* (2005) Rule 150 *ICRC* (accessed 05-03-2020).

170 For a discussion of collective harm, see also F Rosenfeld "Collective Reparation for Victims of Armed Conflict" (2010) 82 *International Review of the Red Cross* 734.

171 734.

172 734.

173 "Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned."
ICJ "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion 09-07-2004)" 2004 *ICJ Reports* 131 152. See also Zegveld *Accountability of Armed Opposition Groups in International Law* 196.

174 See Zegveld *Accountability of Armed Opposition Groups in International Law* 194-196; UNGA Res 60/147 UN Principles 8; Crawford *The International Law Commission's Articles on State Responsibility* 14.

175 UN General Assembly Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (15-10-1999) A/RES/54/4.

176 See Rosenfeld (2010) *International Review of the Red Cross* 733.

177 732.

178 There is heated discussion among scholars as to whether and, if so, to what extent public international law endorses the idea of group rights. For further reference, see Crawford *The International Law Commission's Articles on State Responsibility* 14; J Combacau & D Alland "'Primary' and 'Secondary' Rules in the Law of State Responsibility: Categorizing International Obligations" in R Provost (ed) *State Responsibility in International Law* (2002) 67-95. See C Dröge *Positive Verpflichtungen der Staaten in der Europ?ischen Menschenrechtskonvention* (2003). See, for example, J Raz *The Morality of Freedom* (1986) 208 *et seq*; L Rodriguez-Abascal "On the Admissibility of Group Rights" (2003) 9 *Annual Survey of International and Comparative Law* 103 *et seq*; JA Corlett "The Problem of Collective Moral Rights" (1994) 7 *Canadian Journal of Law and Jurisprudence* 252 *et seq*; N Brett "Language Laws and Collective Rights" (1991) 4 *Canadian Journal of Law and Jurisprudence* 353 *et seq*; L Green "Two Views of Collective Rights" (1991) 4 *Canadian Journal of Law and Jurisprudence* 323; J Waldron *Liberal Rights* (1993) 361. Examples of group rights are contained in Art 1 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; Arts 3 *et seq* of the International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (C169 of 1989); Arts 23 *et seq* of the African Charter on Human and Peoples' Rights; M Hartney "Some Confusions Concerning Collective Rights" in W Kymlicka (ed) *The Rights of Minority Cultures* (1995) 203.

179 Rosenfeld (2010) *International Review of the Red Cross* 745.

180 745.

181 For a discussion of this view, see R Rubio-Marin (ed) *The Gender of Reparation: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (2009) 381-402.

182 *Case of the Moiwana Community v. Suriname* Serie C no 124 Inter-American Court of Human Rights (15-06-2005) *Refworld* (accessed 20-04-2021). The survivors of a massacre that took place in Moiwana village during the Surinamese civil war asserted a violation of their rights. Having found that Suriname had violated Arts 5, 8, 21, 22 and 25 of the Organization of American States ("OAS") American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, the Tribunal stated that, given that the victims of the present case are members of the N'djuka culture, it considers that the individual reparations to be awarded must be supplemented by communal measures, and that reparations will be granted to the community as a whole.

183 *Case of the Moiwana Community v Suriname, Refworld* (accessed 20-04-2021) See also Rosenfeld (2010) *International Review of the Red Cross* 731-746 for a comprehensive discussion of the potential of collective reparations.

184 See Rosenfeld (2010) *International Review of the Red Cross* 731-746.