

Gender-based Violence in Conflict Areas: Perspective from India and Pakistan

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Introduction

Gender-based violence remains one of the most widespread violation of human rights across the globe. Despite the feminist movement having grown and advanced, certain areas still remain under heavy influence of patriarchal systems that condone such violence or are complicit in it. Two such states that are still suffer from rampant gender-based violence are India and Pakistan.

The neighbouring states have been hostile towards each other since Pakistan became an autonomous state and separated from India in 1947. The partition led to India becoming a secular state and Pakistan identifying itself as an Islamic republic. Kashmir has remained a bone of contention between the two states since the partition which has led to grave tension between the two states as well as a lot of internal conflict in the area. Meanwhile, areas in the north-eastern parts of India that are bordering the state of China remain high conflict zones as well. States such as Meghalaya, Manipur, Assam and Nagaland have also been high-tension zones due to ethnic and regional conflicts that have led to mass human rights violations. In Pakistan, areas of FATA and KPK have a heavy influence of Islamist extremists which has given rise to many violent conflicts.

Women in conflict zones have traditionally been seen as “collateral damage”. Rape, murder, abduction, slavery, forced marriages and prostitution of women and trans persons in conflict area have been issues that were never seen as issues that fall under the jurisdiction of international human rights law. They are considered as crime against an individual which is to be dealt with domestic law. However, after the evolution of international humanitarian law and human rights law, gender-based violence is being accepted as a war crime and crime against humanity. This is especially important as it opens up international remedies to the victims of such war crimes that were not available to them earlier.

However, conflict areas in India and Pakistan have specific domestic legislations that are in force that bar the victims from seeking such remedies. Gender-based violence is rampant in these areas but is often underreported as many of these violations are committed by the authorities themselves. UN Special Representative Margot Wallstrom stated that the “full scale” of sexual crimes will never likely be known since many cases remain unreported, understands the social dynamic that causes women not to report rape. “It has become such a way of life in some conflict zones that many victims are simply too afraid to report it and you

can understand that”¹ while referring to the problem of underreporting of violence against women in Kashmir. Apart from the problem of underreporting, the general apathy of the authorities, social stigma and prevalent lack of education about the violations foster and environment of impunity.

In the written component, the prevalent domestic and international laws are analysed with a view to understand whether the domestic laws of India and Pakistan are compatible with the international law standards. For this analysis, it is necessary to understand the factual backgrounds of the conflict areas and what the situation is like at present. After a comparative analysis, the aim is to recognize the loopholes in the laws and provide possible solutions to the same through the practical component.

¹ Aliya Bashir, *Kashmir: Rape as a weapon of war*, available at <https://news.trust.org/item/20110725045000rgzb5>

Chapter 1: Factual background

1. Types of Gender Based Violence in Conflict Areas

To categorize types of violence in conflict areas, one must first recognize that violence does not denote merely “physical” violence. Gender based violence ranges from physical, mental to economic and political. These classifications are important while understanding gender violence that exists in conflict areas, as many of the acts of violence are direct or indirect products of the conflict.

Sexual violence includes acts such as rape, assault, slavery, forced marriages and sex trafficking. According to the World Health Organization “The term “sexual and other forms of gender-based violence” comprises not only rape and attempted rape, but also sexual abuse, sexual exploitation, forced early marriage, domestic violence, marital rape, trafficking and female genital mutilation.”² Many of these acts of violence further inflict mental and emotional violence on the victims. “Psychological/mental health consequences include nonpathological distress (such as fear, sadness, anger, self-blame, shame, sadness or guilt), anxiety disorders (including posttraumatic stress disorder, PTSD), depression, medically unexplained somatic complaints, and alcohol and other substance use disorders, as well as suicidal ideation and self-harm.”³

Another form of violence that is prevalent in conflict areas is economic violence. This is especially true for areas of Kashmir and FATA, where there is widespread forced disappearance of male members of the family. Oftentimes the males are the sole breadwinners of the family and in their absence, the women have to take up work that may cause them further physical and mental abuse or live in abject poverty. For women who are dependent on other male members of the family in cases of disappearances of their husband or sons, they may be subjected to sexual or physical violence within the family itself. “As the family structure is disrupted, women are negatively affected economically, socially and psychologically. The emotional upheaval is thus exacerbated by material deprivation, made more acute by the costs incurred should they decide to undertake a search for their love ones. Furthermore, they do not

² World Health Organizations, *Sexual and other forms of gender-based violence in crises*, available at <https://www.who.int/hac/techguidance/pht/SGBV/en/>

³ World Health Organization, *Mental health and psychosocial support for conflict-related sexual violence: principles and interventions*, available at https://www.unicef.org/protection/files/Summary_EN_.pdf

know when—if ever—their loved one is going to return. [...] Therefore, economic and social marginalization is frequently the result of an enforced disappearance. In such circumstances, several economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and in other instruments, such as the rights to health, education, social security, property and family life are violated.”⁴

Lastly, another important aspect of violence in conflict areas is the political violence against women. One common element in these areas is the lack of political participation of women, due to the threat to their life and property. It is pertinent to note that various forms of violence may be interrelated or a by-product of each other. For example, widespread sexual violence may lead to women choosing not to participate in politics.

2. Areas of Conflict in India

Kashmir

Since the partition of India in 1947 till today when the government of India has fully integrated Kashmir within the territory of Republic of India, Kashmir has remained a zone of conflict. Separatists who want Kashmir to be a separate and independent state have been engaging in violent conflicts with the Indian army for the same. In retaliation, the government has deployed over a million army and paramilitary personnel in the area.⁵ Kashmir has been under heavy militarization since 1989, when there was an uprising of the separatist militant groups. There are various militant groups that exist in Kashmir such as Harkat-ul-Jihad al-Islami, Lashkar-e-Taiba, Jaish-e-Mohammed, Hizbul Mujahideen, Harkat-ul-Mujahideen, Al-Badr. Due to the recent change made in the constitution with the abrogation of Article 370 that stripped off Kashmir of its special status, there has been escalated tension in the area. The government has further deployed personnel from the Border Security Force (BSF) as well as the Central Reserve Police Force (CRPF).

Gender based violence by militants as well as military personnel is widespread and mostly unaddressed. “Reports of rape by security personnel have become more frequent. Rape most often occurs during crackdowns, cordon-and-search operations during which men are held for

⁴ United Nations Human Rights Council, *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session*, (October 31 to November 9, 2012), A/HRC/WGEID/98/2 of February 14, 2013, para. 12.

⁵ The Asian Age, *Forces deploy 1 million to guard Kashmir Valley*, available at <https://www.asianage.com/india/all-india/180819/forces-deploy-1-million-to-guard-kashmir-valley.html>

identification in parks or schoolyards while security forces search their homes. Rape is used as a means of targeting women whom the security forces accuse of being militant sympathizers; in raping them, the security forces are attempting to punish and humiliate the entire community.”⁶

North East

In the north eastern regions of India, there exist various groups categorized as militant groups by the government as these groups often indulged in violent conflicts with security personnel demanding separate statehood for their areas. Some of these groups are United Liberation Front of Assam (U.L.F.A.), Garo National Liberation Army (GNLA), East India Liberation Front (EALF), National Democratic Front of Bodoland and National Socialist Council of Nagaland (NSCN-K)⁷. As of today, most of these groups have become inactive. However, fractional violence still exists in areas of tension, especially against tribal women. “The ongoing armed-conflict situation prevalent in the North East of India has intensified the violence faced by women, which takes the form of sexual, mental or physical abuse, killings and clashes. Although all the members of communities are affected by the armed conflict, the impact on women and girls is far greater because of their status in society and their sex. The region, under the shadow of conflict, has witnessed a resurgence of patriarchal values and norms, which have brought with them new restrictions on the movement of women, the dress they wear and more overtly physical violence such as rape, which is systematically used as a tactic against a particular community. All this is compounded by the long social, economic and psychological trauma of armed conflict.”⁸

3. Areas of Conflict in Pakistan

FATA

Federally Administered Tribal Areas (FATA) is a tribal area that has seen a rise in conflict since the year 2004 due to increased terrorist activities and frequent clashes between militants

⁶ Asia Watch, *RAPE IN KASHMIR- A Crime of War*, Vol. 5, Issue 9

⁷ The Economic Times, *Army plans crackdown on key North East insurgent groups*, Available at https://economictimes.indiatimes.com/news/defence/army-plans-crackdown-on-key-north-east-insurgent-groups/articleshow/69848344.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁸ National Commission for Women, *Violence Against Women in North East India*, available at <http://ncw.nic.in/reports/publications/reports-published-by-the-commission/violence-against-women-north-east-india>

and armed personnel. “Unfortunately, today FATA has become one of the most vulnerable parts of Pakistan, where, owing to the widespread conflict, the economic and physical infrastructure has been shattered; several thousands of Pakistanis - including tribal elders, women and children, as well as the armed forces' personnel - have lost their lives; and the social fabric of the society has been badly affected, this has consequently urged the people to migrate to the neighbouring areas, and live as displaced citizens.”⁹

Due to the constant threat of danger and destruction of schools, residential areas and other institutions in conflict, many women are now living as Internally Displaced Persons (IDPs) in nearby areas. This has caused its own peculiar issues of gender violence in the area.

KPK

Unlike FATA, women in KPK have rights that are guaranteed under the constitution. However, they are often victims of violence inflicted by religious extremists and Islamist parties. Due to this, women face threats of political, economic and physical violence. “KPK’s Swat district is an example. Until dislodged by the 2009 offensive, the TNSM barred women from working and girls from attending schools and, on occasion, publicly flogged those who did not comply with its version of Sharia.”¹⁰

⁹ Khalid Rahman, Said Nazir Mohmand and Ayaz Wazir, *Conflict in FATA and Governance*, Policy Perspectives, Vol. 10, No. 2 (2013), pp. 49-70

¹⁰ International Crisis Group, *Women, Violence and Conflict in Pakistan*, Asia Report N°265, 8 April 2015 available at <https://d2071andvip0wj.cloudfront.net/265-women-violence-and-conflict-in-pakistan.pdf>

Chapter 2: Factors Contributing to Gender Based Violence

1. Militarization

Heavy militarization in conflict areas leads to a two-prong problem of gender-based violence. First, the violence is committed by state actors who have jurisdictional control over the area. This means that there is a clear imbalance in the power dynamic of the perpetrator and the victim. “One of the important fallout of militarization was the sexual violence by armed forces through instruments of rape, loss of husbands and social ostracism after being raped. This was motivated by idea that women of a particular community represent the parchment of their nationalism, and to do violence to them will be a means of collective dishonour to such community”.¹¹

Second, the authorities are quick to turn a blind eye to acts of violence committed by military personnel in conflict areas. For example, in the North Eastern region of India, tribal women have been the most vulnerable victims of militarization. “The impact of decades of militarization on women has been acute. Women have been molested and raped by military personnel who have escaped accountability under the AFSPA.”¹²

2. Militant Activities

Extremist militant groups, separatists or terrorist organizations in these conflict areas exercise control by perpetrating violence on vulnerable groups. Violence against women is often seen as a means of imposing religious or political ideologies by targeting their bodily autonomy, financial stability and political participation. “The Taliban and affiliated armed groups continued to attack schools and use children in suicide bombings in 2018. In August, militants attacked and burned down at least 12 schools in Diamer district of Pakistan’s Gilgit-Baltistan region. At least half were girls’ schools.”¹³

3. Gender Violence as a Weapon of War

¹¹ Rayees Ahmad Bhat, *The Role of Women in Kashmir politics – from ‘Just Peace’ to Confrontational Politics*, International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS), 2017, Vol 4, No.2,26-29

¹² ACHR, *India Human Rights Report 2007*, Tripura, 2007 available at <http://www.achrweb.org/reports/india/AR07/tripura.htm>

¹³ Human Rights Watch, *Pakistan Events of 2018*, available at <https://www.hrw.org/world-report/2019/country-chapters/pakistan>

One of the issues that till date remains largely unaddressed is the use of violence against women as a weapon of war. Abduction, forced marriages, slavery and rape are some of the crimes against women that are used as weapons of war in areas that are conflict zones.

In many south Asian states, women's honour has been equated with the honour of their communities. Hence, violations against women are considered as a mode of "seeking revenge" or "bringing shame" to the community to which they belong. The past couple of years have however seen an increase in the inter-ethnic violence. "Rape and sexual assault have been used as a tactic by one ethnic group to "attack the honour" of another group and to force people to flee their homes and communities in fear"¹⁴.

Therefore, crimes against women in conflict areas should not only be seen as individual acts of criminality, but as a weapon used against a community in times of conflict. Ms. Erika Feller, Director, Department of International Protection, UNHCR states that "violence against women in armed conflict, including rape and sexual violence, has been a widespread and persistent practice over the centuries. However, sexual violence and rape in the context of war have tended to be characterized as private acts or inevitable if regrettable excesses of the military in which women were the invisible victims."¹⁵

¹⁴ National Commission for Women, Violence Against Women in North East India, available at <http://ncw.nic.in/reports/publications/reports-published-by-the-commission/violence-against-women-north-east-india>

¹⁵ Ms. Erika Feller, Director, Department of International Protection, UNHCR presenting "*Rape is a War Crime. How to Support the Survivors: Lessons from Bosnia - Strategies for Kosovo (Vienna 18 - 20 June 1999)*" see <https://www.unhcr.org/admin/dipstatements/42a418a72/presentation-ms-erika-feller-director-department-international-protection.html>

Chapter 3: Existing Legal Framework

1. International Law

Gender violence in conflict areas was seen as an offence against an individual and to be dealt under domestic law. However, it is now being given more and more attention in international human rights law, international humanitarian law and international criminal law.

The earliest codified provision dealing with rape in war time can be found in the Lieber Code, 1863. Article 44 of the code states “All wanton violence committed against persons in the invaded country, ..all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.”¹⁶ In Geneva Convention (IV), Article 27(2) refers to duty to protect women during time of war - “*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*”¹⁷. Even though it was a recognition for the forms of violence against women during times of conflict, the phrasing of the article suggests that it was to protect the “honour” of the women and not their bodily autonomy or dignity.

Additional Protocol I to the Geneva Conventions adopted in 1977 expanded on the abovementioned principle. Article 76(1) stated that women are to be protected from “rape, forced prostitution and any other form of assault”¹⁸ and Article 77(1) protects the girl child from “indecent assault”¹⁹ Since the Geneva Conventions and Additional Protocols are a part of customary international law, they are binding on all states. “Thus, by the early 1990s, IHL prohibited the infliction of sexual violence, upon enemy civilians, members of the armed forces and persons accompanying them, prisoners of war, during international armed conflict, and, upon persons no longer engaged in combat during non-international armed conflict.”²⁰

¹⁶ Article 44, *Lieber Code 1863* available at https://avalon.law.yale.edu/19th_century/lieber.asp#art44

¹⁷ Article 27(2), *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/ffcb180d4e99cb26c12563cd0051bbd9>

¹⁸ Article 76(1), Additional Protocol I to the Geneva Convention, 1977 available at <https://ihl-databases.icrc.org/ihl/INTRO/470>

¹⁹ Article 77(1), Additional Protocol I to the Geneva Convention, 1977 available at <https://ihl-databases.icrc.org/ihl/INTRO/470>

²⁰ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, available at https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf

In the 1998 case of *Akayesu*, the ICTR in para 687 held “the Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²¹

Therefore, it was an effort to lay down the meaning of rape and sexual violence in the context of the international law framework and understanding it not only as a crime against an individual, but as a weapon of war. In para 688, the tribunal defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”²²

CEDAW in its General Recommendation 19 of 1992 that dealt with violence against women recognized in Article 1 that “Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”²³ Article 8 states that “the Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.”²⁴ Therefore, the Convention puts an obligation on state parties to ensure that public authorities are not able to perpetuate violence against women failing which, the state will be in violation of the Convention. General Recommendation 30 deals with “women in conflict prevention, conflict and post-conflict situations”²⁵ Para 36 of the General Recommendation states “During and after

²¹ *AKAYESU*, Jean Paul (ICTR-96-4), para 687

²² *AKAYESU*, Jean Paul (ICTR-96-4), para 688

²³ Article 1, CEDAW General Recommendation 19 of 1992

²⁴ *Id* at Article 8

²⁵ General Recommendation 30, CEDAW, adopted on 18 October 2013

conflict, specific groups of women and girls are at particular risk of violence, especially sexual violence, such as internally displaced and refugee women; women's human rights defenders; women of diverse caste, ethnic, national or religious identities, or other minorities, who are often attacked as symbolic representatives of their community; widows; and women with disabilities."²⁶ This not only identifies the most vulnerable classes of women, but also recognizes violence against women as a crime against humanity. Further, para 37 states "Gender-based violence also leads to multiple additional human rights violations, such as State or non-State attacks on women's rights defenders, which undermine women's equal and meaningful participation in political and public life. Conflict-related gender-based violence results in a vast range of physical and psychological consequences for women, such as injuries and disabilities, increased risk of HIV infection and risk of unwanted pregnancy resulting from sexual violence."²⁷ Therefore, General Recommendation 30 recognizes that there is not only physical and sexual violence against women in conflict areas, but also political and mental violence that has far reaching and long lasting impact on the victims of such violence.

Both India and Pakistan have ratified CEDAW. However, neither have successfully implemented the recommendations that CEDAW has made in General Recommendations 30.

2. Domestic Law

India

Despite having ratified CEDAW, India has failed in implementing its General Recommendations as well as protect the victims of gender-based violence in conflict areas under customary international law.

The Indian constitution under Article 14 provides for "equality before the law and equal protection of the laws"²⁸. However, the Armed Forces Special Powers Act (AFSPA) is a legislation that gives the armed forces extraordinary powers and protects them against prosecution from act criminal acts that maybe committed while on duty. "This results in army personnel committing grave human rights violations since they are given the opportunity to do so. Extrajudicial killings, mass rapes, sexual assault and other forms of harassment, enforced

²⁶Id at Para 36

²⁷ Id at Para 37

²⁸ Constitution of India, Article 14

disappearances and torture are but just a few.”²⁹ In Kashmir and areas of North East India, AFSPA has been misused to commit extreme violence against women with impunity.

In the case of Mubina Gani, who along with her aunt, was raped by my members of the Indian armed forces, the government had pleaded that the acts committed was during the course of a “crossfire”. However, after extensive media coverage and backlash, the government ordered a probe into the matter and charged the armed personnel. The enquiry proved that the act of rape had been committed but the perpetrators were never prosecuted for the same.³⁰ This sense of impunity and protection from prosecution by a complicit domestic law system has furthered the issue of violence at the hands of armed forces of women in conflict areas.

While Article 21 of the India constitution provides for the right to life and dignity to all persons, Indian law does not recognize sexual violence as a war crime or crime against humanity. Under the Indian Penal Code, section 376 deals with the offence of rape. members of the military and paramilitary forces can be prosecuted for the offence of rape under section 376(2)(b) that states whoever “ being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him”³¹ shall be “punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine,”³²

Pakistan

Article 25 of the constitution of Pakistan provides for equality of citizens. Article 25(2) states “there shall be no discrimination on the basis of sex”³³. However, constitutional provisions have become applicable to FATA and KPK only after the 25th Amendment to the Constitution of Pakistan came into force in 2018. Until then, FATA were governed by “political agents” appointed by the President. FATA is now integrated in the district of KPK and the jurisdiction of the Supreme Court of Pakistan now extends to FATA as well.

²⁹ WILPF, *A Look at Women's Rights in India through CEDAW*, available at <https://www.wilpf.org/a-look-at-womens-rights-in-india-through-cedaw/>

³⁰ Please see Amnesty International, *RAPE AND SEXUAL ABUSE: Torture and Ill-treatment of Women in Detention*, <https://www.amnesty.org/download/Documents/196000/act770111991en.pdf>

³¹ Indian Penal Code, Section 376(2)(b)

³² Indian Penal Code, Section 376

³³ The Constitution of Pakistan, 25(2)

Since the women in FATA were not covered by the constitutional provisions guaranteeing them equal protection of the laws and neither had an avenue to appeal the decisions made by the authorities, gender-based violence in FATA continued with impunity. “Their access to justice and security will remain elusive so long as legal and administrative barriers to political and economic empowerment remain, particularly the Hudood Ordinances (1979), FATA’s Frontier Crimes Regulations (FCR) (1901) and the Nizam-e-Adl (2009) in KPK’s Provincially Administered Tribal Areas (PATA).”³⁴

The Frontier Crimes Regulations law did not provide any remedy against the violence against the gender-based violence that was rampant in FATA. In fact, many practices continued with impunity and were condoned by the authorities. “The FCR is also insensitive towards other forms of violence against women and it does not provide any remedy. For example, parliament has passed several laws to protect women against harassment, rape, forced marriages, killing in the name of honour, domestic violence and attacks with acid but none of these laws applies to FATA.”³⁵ Section 10 of the FCR excluded lower courts from taking cognizance of any act that was committed in FATA and all superior courts were excluded from exercising their jurisdiction in the area under Article 247 of the Constitution.

3. *Comparative Analysis*

To understand whether India and Pakistan have been successful in tackling the issue of gender based violence in conflict areas, it is necessary to compare their domestic laws with the international human rights law standards.

In India, AFSPA has been one of the most controversial legislations that can be said to be in clear violation of human rights on many counts. It is especially dangerous for violence that is perpetrated against women living in conflict zones. The Supreme Court of India had entertained a petition challenging the constitutional validity of APSFA. The court, without going into the merits of whether AFSPA violated the provisions of the constitution, simply laid down certain guidelines for the armed forces to follow while exercising their powers under AFSPA.³⁶ While reviewing Section 7 of AFSPA that requires sanction of prior permission of the central

³⁴ ReliefWeb International, *Asia Report N°265 - Women, Violence and Conflict in Pakistan*, available at <https://reliefweb.int/report/pakistan/asia-report-n-265-women-violence-and-conflict-pakistan>

³⁵ Noor Hamid Khan Mahsud, Muhammad Zubiar, Sumbal Hussain, *Frontier Crimes Regulations (FCR), Status of Fundamental Human Rights in FATA and Pakistan’s International Obligations*, Global Social Sciences Review (GSSR) 06 Vol. I, No. II (Fall 2016) Page: 74 - 97

³⁶ Supreme Court of India, *Naga People’s Movement of Human Rights vs. Union of India*, 27 November 1997

government to prosecute armed forces for acts committed in areas where AFSPA is in force, the Supreme Court observed “You go to a place in exercise of AFSPA, you commit rape, you commit murder, then where is the questions of sanction? It is a normal crime which needs to be prosecuted, and that is our stand.”³⁷ However, the court did not strike down the validity of AFSPA. Despite the Act not being applicable anymore in states of Meghalaya, Assam and some parts of Arunachal Pradesh, it is still in force in Manipur and Kashmir where there have been repeated demands to repeal the same. Human rights groups have been very vocal about the misuse of AFSPA specially to perpetrate violence against women in the areas where it is in force. Sections 6 and 7 of AFSPA prevent victims of gender-based violence from exercising an effective remedy which is in violation of Article 2(3) of the ICCPR that states that state parties must “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity”³⁸ The UN 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 categorically states that state parties have a duty to ensure that “An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.”³⁹

Similarly, Pakistan’s failure to curb gender-based violence in the areas of FATA and KPK is in gross violation of international law. Despite the areas now being under the jurisdiction of the constitution of Pakistan, gender-based violence continues with impunity. It has been observed that “the military and civil bureaucracies restrict local and international NGOs’ access to FATA’s and PATA’s IDP-hosting areas, though they could fill gaps in the state’s help for displaced females.”⁴⁰ Blocking access to justice and condoning the violence against women that occurs in these areas is in violation of the international human rights standards that exists.

Therefore, in a comparative analysis it can be seen that both India and Pakistan have failed to adequately tackle the issue of gender-based violence in their respective conflict areas and hence, failed to meet the standards laid down under international human rights law. The fact

³⁷ Supreme Court of India, *CBI v. General Officer Commanding*, 1 May 2012

³⁸ Article 2(3), ICCPR

³⁹ Article 14, Resolution no. A/RES/60/147 adopted by the UN General Assembly, 21 March 2006

⁴⁰ Ibid at 9

that neither of the states acknowledge gender-based violence as either a war crime or a crime against humanity further elaborates on the same.

Conclusion

After analyzing the factual situation of conflict areas in India and Pakistan as well as the prevalent international law standards, it can be fairly stated that both the states have failed in their international obligations in protecting victims against gender-based violence in conflict zones. India and Pakistan have both ratified CEDAW yet have been unsuccessful in implementing General Recommendation 30 of the same. By not providing adequate legal remedies, the states have also failed their obligations under Articles 6 and 7 of the ICCPR.

In his report, Justice Verma had categorically noted that “impunity for systematic or isolated sexual violence in the process of Internal Security duties is being legitimized by the Armed Forces Special Powers Act, which is in force in large parts of our country. It must be recognized that women in conflict areas are entitled to all the security and dignity that is afforded to citizens in any other part of our country. India has signed the International Convention for the Protection of All Persons from Enforced Disappearance¹⁰⁶, which has to be honoured.”⁴¹ However, the Indian government has continued to turn a blind eye to the atrocities committed by the armed forces under AFSPA and has refused to repeal AFSPA in many areas despite national and international outrage.

Similarly, the Pakistani government has been unable to repeal legislations that allow acts of gender-based violence to continue in conflict areas. In its report dated 8 April 2015, International Crisis Group had called upon the government of Pakistan to “repeal the FCR and Nizam-e-Adl and to support women’s rights in the conflict zones and participation in the development of counter-insurgency/counter-terrorism policies and peacebuilding efforts.”⁴² The government has now replaced these laws with the FATA Interim Governance Regulation, 2018 but gender-based violence continues to be rampant.

In conclusion, it can be said that it is not just internal conflict and militant attacks that are responsible for the gender-based violence in these areas. Even though fear of consequence and terrorism have played a major role, unbridled power to the armed forces and a system the perpetrators get away with such acts with impunity is equally responsible. States have taken the easy way out by blaming the violence on militant groups and downplaying it as acts

⁴¹ J S Verma, *Report of Committee on Amendment to Criminal Law*, available at <https://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

⁴² Ibid at 9

committed against private individuals. Militarism and general apathy of the authorities towards the cases of gender-based violence in conflict areas are some of the structural problems that exist which have resulted in the perpetrators continuing to commit such crimes.

Legally, both states have failed to recognize sexual violence in conflict areas as war crimes as well as crimes against humanity. There is a long way to go before the same is addressed by the governments of the states as well as the courts in applying international human rights standards to such cases.

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