

## Sexual and Gender-Based Violence in War Crime: An Overview of International Legal Regime

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### Abstract

Since the beginning of time, wars have been inherently gendered. Men typically go to war and fight, while women remain at home and care for the family. The battlefield itself is gendered as well; men are murdered while women's bodies are taken as booty. As history has repeatedly demonstrated the onset of conflict and war enhances the vulnerability of women and girls to war crimes, including all types of gender-based violence, unjustified killings, rape, and trafficking. The article begins by explaining the connection between sexual and gendered violence in wartime and then makes clear the use of sexual violence by forces in the history. After concentrating on the various forms of gendered violence against women seen during the wars, the article reiterates the necessity of ending the tolerance for sexual and gender-based crimes. This paper examines the so-called hard law that international tribunals and courts have produced in the wake of recent international conflicts and genocide. Further the paper will attempt to identify, on the one hand, progress made, and on the other hand to highlight gaps in the IHL and international criminal regimes that possibly undermine the rights of women and girls.

**Key Words:** Gender-Based Violence, War Crime, Sexual Violence, genocide, and Wartime.

### Introduction

*“Sexual violence in conflict needs to be treated as the war crime that it is; it can no longer be treated as an unfortunate collateral damage of war.”<sup>1</sup>*

A phone call between a Russian soldier and his wife was allegedly intercepted by Ukrainian law authorities in April 2022. Throughout the phone call they were making mockery of the soldier raping Ukrainian women. Wife assured him ‘Yes I permit it’. Just have safety protection’. Due to the historically gendered character of war, shockingly the casual mindset of these two young Russians' toward rape is understandable.

Modern armed conflict is much more likely to result in civilian casualties than military casualties. According to UN Action Against Sexual Violence in Conflict, civilians—mostly women and children—make up most of the casualties in today's wars. Women in particular face the dreadful forms of sexual violence, which are sometimes used systematically to achieve military or political objectives.

The purpose of rape during war is frequently to scare the populace, sever families, ruin communities, and, in certain cases, alter the ethnic composition of the following generation. Sometimes it is also used to make women from the targeted population incapable of having children or to purposely infect them with HIV.

### A Global Problem That Can Affect Anyone

Children and adults suffer terrible repercussions because of sexual violence in war. It does not discriminate between people of any sex, age, or race can participate; it is inclusive. According to a recent UN study, the DRC documented 1,429 cases of gender-based violence (GBV) over the course of a calendar year. Children made up 68% of the surviving population. Men and boys are also targeted, although women are extremely affected. It is documented that rape has been used against men and boys as a weapon of war in Bosnia, Sri Lanka, the Central African Republic (CAR), and the Democratic Republic of the Congo (DRC). Sexual violence occurs wherever there is unrest. Reports of sexual assault, including rape, have increased in Yemen by 70%. However, no data or figures can ever accurately

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reflect the problem's full scope. This is so because conflict interferes with the operation of the police and the legal system. As a result, rape and other sexual assaults frequently go undetected. According to UN estimates, between 10 and 20 rapes go unreported in war zones. Military officers, terrorists, citizens, or employees in camps for displaced people can all commit crimes.

### **War, Women & Sexual Offences**

Rape is frequently simply one of the ways that women are targeted in violent conflict situations; violence against women takes many different forms. While other atrocities, including murder and various types of torture, have long been condemned as war crimes. Rape, on the other hand, has been minimized as an unfortunate but necessary byproduct of sending men to war. It is disregarded as human rights violation, when rape is then recorded and denounced, as it has in Bosnia and Herzegovina<sup>2</sup>, the abuses are referred to as unusual and exceptional in scope. In reality, rape during war has never been confined to a single historical period or region of the world.

For instance, Moroccan mercenary troops fought with Free French forces in Italy during World War II under conditions that "included authority to rape and rob in enemy territory"<sup>3</sup>. Despite troops' worries about "race contamination," Nazis raped Jewish women and raped countless other women when they invaded the Soviet Union<sup>4</sup>. Then, when the forces fought their way to Berlin, the Soviets exacted their vengeance on German women<sup>5</sup>.

The recent past offers more proof of rape during battle. Bengali citizens were intimidated by Pakistani soldiers who were battling to thwart Bangladesh's independence, which was proclaimed in 1971, by conducting night raids during which women were either sexually assaulted in their villages or taken to the soldiers' barracks<sup>6</sup>. Like this, several women and girls were raped by Turkish forces who took part in the invasion and occupation of Cyprus in 1974. In one case, 25 women who told Turkish commanders about being raped by Turkish soldiers were raped again by the officers<sup>7</sup>.

In Bosnia, countless women have been attacked and brutally raped. J., a thirty-nine-year-old Croatian woman, was detained in Omarska, a detention camp where Serbian forces tortured and summarily executed scores of Muslims and Croats. She recounted her rape by a reserve captain of the self-proclaimed "Serbian Republic." "He threw me on the floor, and someone else came into the room.... Both Grabovac and this other man started to beat me. They said I was an Ustasa and that I needed to give birth to a Serb—that I would then be different"<sup>8</sup>.

In the ongoing armed confrontation between the Communist Party of Peru-Shining Path and government counterinsurgency troops in Peru, the rape of women by security forces is a regular occurrence. More than 40 instances of rape of women by soldiers were reported by Human Rights Watch in 1992, occurred during interrogations, in emergency situations in Peru, or during security force sweeps and killings<sup>9</sup>.

Rape is one of the most common crimes against women perpetrated during a conflict. Although males are sometimes raped during times of conflict, research shows that women constitute the majority of the victims. For instance, of the 192 reported rapes of Somali immigrants in Kenya during February and March 1993, 187 included women, four involved children, and one involved a male<sup>10</sup>.

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<sup>2</sup><https://www.trtworld.com/perspectives/genocidal-rape-and-the-invisible-children-of-bosnia-48312>

<sup>3</sup>Michael Walzer, "Just and Unjust Wars: A Moral Argument with Historical Illustrations" (New York: Basic Books, Inc., 1977), 133

<sup>4</sup>Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1975), 46-51

<sup>5</sup>*Ibid.*, 64-65

<sup>6</sup>In March of 1971, the Bengal state-at that time officially East Pakistan-declared its independence as Bangladesh. West Pakistan imported troops to put down the rebellion. Until India's armed intervention in December 1971, Pakistani troops waged war against the Bengalis. Estimates place the death toll at 3 million, the refugees into India at 10 million, the number of women raped at over 200,000 and their resultant pregnancies at 25,000.

<sup>7</sup>Report of the Council of Europe on Human Rights in Cyprus, 1974 (London: 1980), 121-22.

<sup>8</sup>Helsinki Watch, *War Crimes in Bosnia-Herzegovina: Volume II* (New York: Human Rights Watch, 1993), 163-65.

<sup>9</sup>Women's Rights Project/Americas Watch, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (New York: Human Rights Watch, 1992).

<sup>10</sup>Women's Rights Project/Africa Watch, *Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya* (New York: Human Rights Watch, 1993), 2. Almost 300,000 refugees, most of them women and children, have fled the violence of war-torn Somalia since 1991 for refugee camps in North Eastern Kenya. For many of these women, rape played a role in inducing them to flee-the United Nations High Commissioner for Refugees recorded 85 cases of rape in Somalia between February and August 1992. Yet, instead

### Function of Sexual-Violence in War

Military and political authorities, or those in a position to stop it, have long misrepresented and disregarded rape as a private crime, a sexual act has been accepted just because it is so ordinary. For instance, Peruvian military officers have dismissed reports of soldier rape as a "shameful excess" despite the fact that there have been numerous allegations of it. The Kenyan government has denied that there are any rapes taking place or has placed the responsibility on the victims in response to accusations of frequent rapes of refugee women in camps in Northeastern Kenya. According to a Kenyan official, the accusations of rape were made only to "draw sympathy and give the administration bad press."<sup>11</sup> Bosnian Serb commander Radovan Karadzic denied knowledge of mass rape in April 1993, saying, "We know of perhaps eighteen incidences of rape in all, but this was not coordinated; it was done by psychopaths."<sup>12</sup>

Rape is neither accidental nor personal. It frequently performs a strategic role in conflict and is a crucial weapon for accomplishing certain military goals. Rape and other severe abuses are carried out by Serbian forces in the former Yugoslavia with the intention of forcing the non-Serb populace to flee. The non-Serb populace was removed from villages by Serbian troops by first bombarding the towns, separating the men from the women, and then transporting the males to detention facilities. In towns held by enemy troops, women are either left to fend for themselves or brought in groups to holding facilities where they may be raped, gang-raped, and abused for days or even weeks at a time. When Serbian soldiers started to bomb Doboj, B., a Muslim lady of forty, and her husband were still inside their house. As ground forces swept through the city, they ordered the women and children onto buses and forcibly removed residents from their homes. B. was transported to an abandoned high school, where she spent nearly a month being raped repeatedly: "It started there as soon as I got there"<sup>13</sup>.

Rape was even utilised to eject the Rohingya in Burma as well. Soldiers broke open the door while Eslam Khatun, the local headman's wife, was inside with her children and her sister-in-law Layla. As they carried Layla away, the troops undressed her and started abusing her. A week later, Layla's body was discovered by Eslam; she looked to have died from vaginal bleeding.<sup>14</sup>

It is crucial to document where and how it is used as a military strategic instrument to dispel the widespread misconception that rape in war is personal or accidental. The attention to rape's strategic function, however, has attached much significance to "mass rape" and "rape as genocide." This emphasis on rape's scale as what makes it an abuse demanding redress distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape.

Whether it occurs on a substantially large scale or is connected to a general policy, rape qualifies as a war crime or a grave violation of the Geneva Conventions. Individual rapes used as torture, or other cruel or inhumane punishment are grave violations of the Geneva Conventions<sup>15</sup>. Rape is therefore illegal under international law, even if it appears to be random, is not carried out as part of a larger strategic plan and does not occur frequently. Rape is classified as a crime against humanity and is prosecuted as such when it does occur on a large scale or because of planned policy, to acknowledge this additional dimension of the crime<sup>16</sup>.

Although rape is a kind of sex-specific abuse, it typically has similar effects to other forms of torture in terms of intimidating and punishing specific women. However, in other cases, it can also serve a glaringly sex-specific purpose, such as when it is done with the intention of getting its victims pregnant. A rape victim from Bosnia told Human Rights Watch, "It was their intention to have a child"<sup>17</sup>. This Function of Rape has never been reflected in the remedies available for rape victims. Pregnancy is more often seen as an "inevitable outcome of... rape" than as a discrete problem deserving of a separate solution.

Occurrences of rape are frequently considered an inevitable byproduct of war with the non-sequitur 'boys will be boys' (p. 87) throughout the history of war, no matter where the location, "rape in warfare is not bound by denitions of which wars are just or 'unjust'..... rape nourishes in warfare irrespective of nationality or geographic location"

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of escaping the violence, Somali refugees encounter similar abuse in Kenya: UNHCR has documented another 107 cases of rape in the Kenyan refugee camps.

<sup>11</sup>Women's Rights Project/Africa Watch, Seeking Refuge, 18.

<sup>12</sup>Roy Gunnan, "Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadzic's Pals," New York Newsday, April 19, 1993, 7, 31.

<sup>13</sup>Helsinki Watch, War Crimes in Bosnia-Herzegovina, 216, 218.

<sup>14</sup>Asia Watch, Burma, 2

<sup>15</sup>Meron, Rape as a Crime under International Humanitarian Law, 87 Am.J.Ind L 424 426 (1993)

<sup>16</sup>Ibid., 427.

<sup>17</sup>Helsinki Watch, War Crimes in Bosnia-Herzegovina, 215.

Barstow (2000) identifies three different forms of sexual violence<sup>18</sup>:

1. Individual rapes, sexual violence against women during war and armed conflict can be a series of singular, isolated acts such as the tragedy that occurred in Mahmudiyah,<sup>11</sup> Outside the town of Mahmudiyah, Iraq, fifteen-year-old Abeer Qasim Hamza al Janabi was gang raped, her skull smashed and her body set on fire. Her parents and younger sister were also killed in the murder that took place in early March 2006, involving five United States soldiers.

2. Military sexual slavery or forced prostitution such as Japan's 'comfort women': ...the purpose is to satisfy the sexual desires of an army with maximum efficiency, by supplying women, almost always from a different national group, for the troops. Military sexual slavery...is not prostitution. To be a prostitute is a voluntary choice, that is, as voluntary as a choice made under extreme economic pressures can be. Women and girls forced into military brothels have not made that choice. They have been tricked or kidnapped into servicing soldiers, and they are confined as if they were prisoners of war.

3. Mass rape, as specifically planned in the conflict in Bosnia-Herzegovina and Rwanda's genocide. It serves as both a strategy and ...as a political weapon, it can change the balance between ethnic, racial, or religious groups.... When it is combined with a deliberate policy of forced impregnation, as by the Serbs in Bosnia and the Hutus in Rwanda, it aims at the destruction of an ethnic group. It becomes a technique of genocide: to so defile the enemy's women that they will no longer be considered as future mothers for their own people. Thus, the rapes and sexual violence that took place in Bosnia-Herzegovina and in Rwanda fulfilled the objective of both wars and became part of military strategy behind them.

Wartime rape is an abuse of power and a breach of international humanitarian law if it is carried out by a state agency or an armed rebel, whether as a matter of policy or because of a specific instance of torture. It is noteworthy that rape has not been criminalized like other types of abuse given that it often behaves in much the same way as torture or other cruel and inhumane acts. The fact that rape is treated differently from other crimes highlights the reality that, for the most part, the issue is not a lack of sufficient legal restrictions, but rather the readiness of the international community to accept women's subjugation.

#### **Why Women's Are Targeted**

A few decades ago, women and girls in conflict situations were forced to endure brutal incidents of sexual violence, had fewer resources for protection and survival, lost their loved ones and had to take responsibility for their families, were forced to join the combatants, or to flee leaving everything behind. Today, all these risks are not only just as real, but they are compounded by the fact that the very nature of wars invades ever more private spaces, becoming a threat to their identity and their security. Added to this, many outbreaks of violence today are of religious or ethnic origin, linked to issues of identity, which play against women and women's rights. Many of these conflicts are marked by extreme violence and gender-based abuse.

Armed conflict is felt by women and girls in a manner like that of men and boys. They are tortured, slaughtered, and rendered unable to function. Weapons are used against them, and they experience social and economic disruption. As loved ones pass away or they see violence against their family and neighbors, they experience the psychological effects. Before, during, and after leaving a battle zone, they experience the aftereffects of violence. They are more vulnerable to illnesses like HIV/AIDS and sexually transmitted infections (STDs). They are impacted by the depletion of resources brought on by armed war. They enlist in the military or rebel groups voluntarily or under duress. They provide care for the ill, injured, hopeless, and displaced and are among the most vocal peacemakers.

Women and girls suffer severe injury during and after armed conflict, which frequently exposes them to more pain and violence. Many of the wars of today involve the use of gender-based and sexual violence as weapons of war, including rape, forced marriage, forced pregnancy, forced abortion, torture, trafficking, sexual slavery, and the deliberate spread of STDs like HIV/AIDS. Women are subjected to extermination and forced into servitude. Girls and women are frequently seen as the keepers of culture and the progenitors of "the enemy," making them perfect targets. Due to their parental obligations and bonds, which increase their susceptibility to maltreatment, women are exploited.

#### **International Framework Against Sexual Violence in War**

International Humanitarian Law (IHL) treaties have occasionally come under fire for what critics claim to be their inadequate consideration of the interests of women during armed conflict and their inadequate prohibition and

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<sup>18</sup>[http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FMCM2/\\$file/unicefwomenWarPeace.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FMCM2/$file/unicefwomenWarPeace.pdf)? Open Element Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace building by Elisabeth Rehn and Ellen Johnson Sirleaf (New York: UNIFEM, 2002) at p. 10,

criminalization of sexual violence<sup>19</sup>. It is submitted that this critique is overly severe. Although its approach to sexual violence may not be ideal, the 1949 Geneva Conventions and their 1977 Additional Protocols do include the essential safeguards against and prohibitions against rape and other types of sexual assault. This is accomplished in two ways: first, rape is expressly forbidden; and second, the prohibition of rape and other forms of sexual violence is covered by less-explicit provisions such as those intended to ensure respect for people and honour, such as those that forbid cruel treatment and torture, indecent assault, and forced prostitution.

The renowned Lieber Code of 1863 had specifically forbade rape. Its Article 44 said the following:

All willful violence carried out against people within the invading country... Any rape, injury, maiming, or killing of these residents is forbidden and punishable by death or another harsh penalty that is appropriate given the seriousness of the offence. A soldier, officer, or private who engages in such violence while violating a superior who orders him to refrain from doing so may be rightfully executed there and then by that superior<sup>20</sup>.

The Hague Regulations of 1899 and 1907, among the earliest accords governing armed conflict, defend the "family honour and rights" of the populace of an invaded country<sup>21</sup>. Footnote 47 According to the Geneva Convention of 1929, prisoners of war have the right to respect for "their persons and honour" and must be treated with "every regard due to their sex." Even though they were products of their period and did not explicitly address it, IHL accords demonstrated an awareness of sexual assault during armed conflict and attempted to prevent it from occurring from an early stage<sup>22</sup>.

Rape and other types of sexual assault are forbidden in both international and domestic armed conflicts, according to modern IHL conventions. The Third Geneva Convention of 1949 continues to provide that woman "must be treated with all respect due to their sex" and that prisoners of war are "in all circumstances entitled to respect for their persons and honour" in international armed conflicts<sup>23</sup>. The terminology employed by the drafters was the same as that of the 1929 Convention on POWs. Women in civilian life "must be notably safeguarded against any attack on their honour, in particular against rape, forced prostitution, or any kind of indecent assault," according to the Fourth Geneva Convention, which is more specific<sup>24</sup>. Although rape and other forms of sexual violence are expressly addressed in the Fourth Geneva Convention, which was adopted in 1949 as the first treaty focused on the protection of civilians during armed conflict, this language has drawn criticism because it seems to downplay the seriousness of the offence, which is an assault on the victim's physical and psychological well-being<sup>25</sup>. While the term "honour" now may sound archaic and out-of-date, it had a very different meaning in those days. Although they appear weak and symbolic in modern times, concepts of honor—such as the idea of chivalry, for example—were at the heart of IHL regulations in 1949 and earlier<sup>26</sup>.

The First and Second Additional Protocols to the 1949 Geneva Conventions were added to and expanded in 1977. The explicit prohibition of rape and the minimal requirements of Common Article 3 of the First, Second, and Third Geneva Conventions of 1949 were endorsed in both international and domestic wars that include weapons of mass destruction character<sup>27</sup>.

The *jus in bello* during international armed conflict is specifically governed by Additional Protocol I. It acknowledged that violations of personal dignity, including humiliating and degrading treatment, forced prostitution, and any type of indecent assault, are forbidden for civilians and military agents to commit in Article 75(2)(b), named the Fundamental Guarantees<sup>28</sup>.

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<sup>19</sup>Durham, Helen, "Women, Armed Conflict and International Law", *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 655–659

<sup>20</sup> Lieber Code: Instructions for the Government of Armies of the United States in the Field, General Order No. 100, 24 April 1863, Art. 44, available at: [www.icrc.org/ihl/INTRO/110](http://www.icrc.org/ihl/INTRO/110)

<sup>21</sup>The Hague, 1899, Art. 46; Convention (III) relative to the Opening of Hostilities, The Hague, 1907, Art. 46.

<sup>22</sup>Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 3.

<sup>23</sup>Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (GC III), Art. 14.

<sup>24</sup> *Ibid* at 27

<sup>25</sup>J. Gardam, above note 45; C. Lindsey, above note 42, p. 57.

<sup>26</sup>Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, No. 293, March–April 1993, pp. 94–119.

<sup>27</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, done 8 June 1977, 1125 U.N.T.S. 609, entered into force 7 December 1978

<sup>28</sup> API, Article 76(1), entitled Protection of Women, underscores the special protection extended to women. It

Women are specifically protected in Article 76(1) against "rape, forced prostitution, and any other kind of assault<sup>29</sup>," while minors, including girls, are protected in Article 77(1) from "indecent attack." The totality of Additional Protocol I is governed by binding international law on all States<sup>29</sup>.

Regarding non-international armed conflict, the Geneva Conventions' Second Additional Protocol from 1977 is relevant. Article 4, titled "Fundamental Guarantees," lists a number of offences that are forbidden at all times and in any location when committed against people who "do not take a direct part or have ceased to take part in hostilities," including "outrages against personal dignity, rape, forced prostitution, and any form of indecent assault."

Article 4 expanded the prohibited activities to include internal armed conflict as an offshoot of Common Article 3. Unfortunately, not all States have fully ratified Additional Protocol II of 1977 to the Geneva Conventions of 1949 as a body of established international law. However, it might be claimed that during the past ten years, the Common Article 3 provisions that address gender-based violence have become part of customary law<sup>30</sup>.

### **Conclusion**

Sexual violence has been increasingly used as a means of warfare in the armed conflicts worldwide. There is an urgent need to address this issue because this poses potential threat to the peace and security of the world. To establish permanent peace in conflict areas, the offence of sexual violence must be stopped. We should adopt three-headed strategy, First- redefining 'use of sexual violence' in the armed conflicts as a separate crime like genocide. This is essential for the purpose of reordering and deterring breach of the law. Secondly, recognition and conceptualization of secondary (aftermath) sexual violence to the victims. The tribunals and courts should consider the personal sufferings of the victim women. An International Compensation Commission for Women with its own fund should be established. Thirdly, social-economical-political empowerment of the women and end of gender-based discrimination against women in all spheres of our life. Because war times sexual violence has its root in the persisting patriarchal notions of the societies.

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states: "Women shall be the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault"

<sup>29</sup> API, Article 77(1), entitled Protection of Children states, inter alia in paragraph 1 that, "(c) children shall be the object of special respect and shall be protected against any form of indecent assault"

<sup>30</sup> APII Article 4. This position has been confirmed in the Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-AR72, para. 92, ("Tadic Jurisdiction Decision"). The Appeals Chamber held that protections of common article 3 apply through article 3 of the ICTY Statute to persons taking no active part in hostilities. Id. Para. 69.