

The crime of rape within the international law framework both in peacetime and in armed conflicts.

Abstract

The aim of this research is to analyse the nature of the crime of rape within the international law framework both in peacetime and in armed conflicts. There is a brief history of rape as a crime up to our recent times, and it includes the mass rapes of Rwanda and Yugoslavia.

There has been a hot controversy within the international community whether to consider rape as a war crime or a crime against humanity. Unfortunately, rape failed to be recognised as such both from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). Despite the fact that it was not considered a war crime, rape has had an international resonance which cannot be ignored furthermore. A slim victory but nevertheless a victory which sets a legal precedent for rape.

Exergo

'Violence against women in armed and in peacetime conditions are not distinct phenomena but form part of the same spectrum of behaviour. They are both the product of systematic relations of male power and domination. The focus on the systematic offences in former Yugoslavia and Rwanda, and the failure to make explicit that any rape committed in armed conflict is a war crime, entails the risk of creating the assumption that "lesser" rapes may still be committed with impunity.' Hilary Charlesworth and Christine Chinkin, *The boundaries of International Law: a feminist Analysis*.

Before arguing whether or not the failure to classify rape as a war crime can lead to the perception that *"lesser rapes may still be committed with impunity"*, we need to first analyse the historical and theoretical context in which rape is addressed as well as the attempt of the international community to re-address rape in armed conflict since the atrocities of Rwanda and Yugoslavia. Additionally, an overview of the international legal frameworks, which cover rape and sexual crimes, is required.

Rape is a forced sexual act perpetrated by men against women¹. This gender-based crime is thousand years old phenomenon, committed mainly against women both in peacetime and armed conflicts. Historically, rape entered the law of ancient patriarchs (early covenants) as a property crime of man against man where the property obviously was the woman. Forced abduction was a usual way of acquiring women, and it existed in England as late as the fifteenth century.² Furthermore, rape was a common feature in wars being used as a tool to humiliate communities, for revenge (Russians, WWII³), terror (Germans, World War I) (Brownmiller, 1975:16-30) for ethnic and religion reasons and as genocide like in recent armed conflicts (Rwanda, Yugoslavia).⁴ Women's position has changed little over the centuries because in some cultures they are still considered as male sexual property (mostly third world countries). Margareth Schuler states: "*The dominance of male power reduces women to economic and emotional dependence, the property of some male protector*"⁵.

Rape was ignored and underestimated for a very long time by the international law, criminal justice and both political and military leaders. It remained a neglected area until the 70s when 'violence against women' became a major issue due mainly to the feminist effort to make women more visible to the world. Second wave Feminist's researches and surveys on rape proliferated during the 70s to contrast and refute official statistics on rape and to understand why the crime of rape occurred. 'Let women speak of their experiences was their motto'. Brownmiller's book about rape captured the public attention by demonstrating that rape was indeed a serious crime and widely spread, contrary to common belief that it was a rare event. She shocked the world with her explosive statement (Tomaselli, Porter, 1986) "*Rape is man's basic weapon of force against*

¹ There are male rapes but are less widely spread and not well documented. (Stanko, 1985)

² See *Against our will: Men, Women and Rape*, S. Brownmiller for the history of rape, pp.16-30.

³ See what the Russian did when they moved in Berlin to monitor after the WWII).

⁴ War provides men with the perfect psychological backdrop to give vent to their contempt for women. The very maleness of the military – the brute power of the weaponry exclusive to their hands, the spiritual bonding of men at arms, the manly discipline of orders given and orders obeyed, the simple logic of the hierarchical command- confirms for men what they long suspect, that women are peripheral, irrelevant to the world that counts, passive spectators to the action in the centre ring. Men who rape in war are ordinary Joes, made unordinary by entry into the most exclusive male-only club in the world. (Brownmiller, 1975:32)

⁵ M. Schuler, 'Violence against women: An international Perspective', reported in Charlesworth and Chinkin, 2000, pp.13.

women, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestation and struggle, became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, and the triumph of his manhood". (Brownmiller, 1975:14)

Feminist interpreted the crime of rape as a tool of male power used to intimidate and keep women in constant fear and in a subordinate position. Radical Feminist's belief that any man is a potential rapist was heavily criticized for bias and discrimination, as it does not acknowledge the possibility of male rape. Their statements were rather extreme and exaggerated, but they had the effect wanted by shocking the public attention and bringing rape as violence against women onto the public arena. ⁶ (Walk late, 2001)

Lynn Segal, views society as constructed upon the hegemony of masculinity, which allows men to indulge in the sexual exploitation and physical abuse of women without fear of punishment. Society encourages and condones men's violence and rape is a product of this culture. ⁷ Feminist's commitment was to understand the gender's structure in society: and the disadvantageous position of women in respect to men's power. Historically, the law supported violence against women. Let's take rape as an example. The legal definition of rape, 'penetration with penis', both in the UK and in the US, stresses the importance of consent, focusing merely on women's sexuality. This discourse of sexuality constructs man as activist and woman without sexuality (Walkout, 1995:81-82) Naffine thinks that the law allowed quite a lot of persuasion and violence in rape for this pressure to get the consent. In the 1950s and 1960s rape's work was centred on the offender who was considered mentally or sexually disordered in some way, and it reiterated the victim blaming theory. Feminists challenged the blaming theory (to place the blame on women for behaving badly, in an unrespectable way), as well as the myth associated with rape. ⁸ (Walk late, 2001) Rape is a manifestation of violence due to the

⁶ Radical Feminism focused on the patriarchal structure of society where men have power over women. They explored the nature of power over women in both public and private places. It is associated with seeing the world from a woman's point of view. It is an epistemological standpoint.

⁷ Lynne Segal, (1990), *Explaining Male violence*, reported in *Criminological Perspectives: A reader*. Muncie, McLaughlin and Langan, 1996.pp.188

⁸ For example, 'when a women says 'no' means 'yes'; that stranger rape is a 'real' rape; that women frequently make up allegations of rape (they 'cry rape'); that a prostitute cannot be raped, etc. (Walk late, 2001)

global inequality of women's positions in the world that is tolerated by state authorities. (Culturally, economically, legally, socially and politically women were, and for certain aspects still are considered second class citizen in most societies) (Charlesworth, Chinkin, 2000).

Women are still fighting to have their rights as human beings recognised as Mackinnon has argued " *'Human' and 'female' are mutually exclusive by definition; you cannot be a woman and a human being at the same time*".⁹

The negation of women's human rights, the patriarchal supremacy in both private and public sphere both domestically and internationally; the absence of women in public sphere and in the male-dominated criminal justice systems; the police attitude, and the unfavourable laws¹⁰, have contributed to ignore, misrepresent, and underestimate rape.

Within the International Human Rights context violence against women finally made its way, in 1990's, onto the international agenda pushed by several NGOs and women's organisations. The Declaration on the Elimination of Violence against women (1994) is considered a landmark document as it places violence against women in the Human Rights discourse. However, the Declaration is rather vague, and does not have legally binding force and is, therefore, ineffective. It is only a supplement of the Women Convention rather than overtaking it. The Women Convention, after several attempted drafts, was drawn up in 1979, (Convention for the Elimination and Discrimination against Women), though it does not have violence as a provision. Nonetheless, violence is a form of discrimination and is thus covered by the treaty. The Convention, which is equality based and makes the states responsible for private and public bodies, is legally binding for the states that ratify it. Article 17 established a Committee (CEDAW), nominated by States. The states parties are supposed to report to the committee, which has a role of monitoring role. The Committee can make General Recommendations with the purpose

⁹ Mackinnon C. Rape, Genocide and Women's Human Rights. Harvard Women's Law Journal 19 94; 17 (Spring): pp 5-16.

¹⁰ Historically, the law supported violence against women. Let's take rape as an example. The legal definition of rape, 'penetration with penis', both in the UK and in the US, stresses the importance of consent, focusing merely on women's sexuality. This discourse of sexuality constructs man as activist and woman without sexuality (Walkout, 1995:81-82)

to extend the meaning of the articles of the convention. The Convention has been ineffective and inefficacious for several reasons: it lacks of effective implementation powers for its weak language; there are not explicit obligations for governments to take specific action to tackle this issue and to challenge state's inaction. (Cook, R., 1994:533) An example where this is evident is the lack of response to the report that the Committee sent to the UN Commission of Human Rights about the systematic rape to achieve ethnic cleansing in Bosnia and Herzegovina, but no action was taken.¹¹ (Charleworth, Chinkin, 2000) Violence becomes Human rights violence when the state is complicit; it fails to provide the system to prevent the violence being carried out (Due Diligence). Some feminists argue that violence should be seen inherently as Human rights independent violation. However, it has been argued that it would undermine the universality of human rights. The problem lies in the lack of enforcement mechanism, which makes States accountable and punishable for their inaction, their failure to prevent basic human rights violation. According to Rebecca Cook 'rape is a crime, which is committed mainly against women by actors who are allegedly 'private' rather than public'.¹² States are responsible for failing to recognise rape as a violation of women human rights; they must transpose the issue from private to public, and to condemn discrimination and violence against women. (Cook, 1994:533) According to Radhika Coomaraswamy, the UN Special Rapporteur on Violence against Women, women are vulnerable to violence because: of their sexuality (rape); they are related to a man (domestic violence, dowry and sati); they belong to a social group (rape in terms of armed conflict or ethnic strife); because of the lack of intervention from the states (private/public dichotomy) and, because they are subordinated to men (patriarchal society). Additionally, militarisation and violence against women are intimately connected.¹³ As Cook stated: "*War is a gendering activity...thus changing gender relations is one of essential tasks for reducing*

¹¹ Un. 1994

¹² Rebecca Cook is Associate Professor of the Faculty of Law and Director of the International Human Rights Law Program at the University of Toronto. She wrote, *Human Rights of Women, National and International Perspective*.

¹³ See Preliminary report submitted by the Special Rapporteur on Violence against Women, its causes and Consequences, Ms Radhika Coomaraswamy, in accordance with the Commission on Human Rights Resolution 1994/45, 22 November 1994, UN Doc. E/Cn.4/1995/42.

the risks of a war in the future".¹⁴

Gender-based sexual crimes, such as rape, sexual assault, enforced pregnancies, enforced abortions, enforced prostitution and so forth, are a common feature of armed conflicts.

The reasons for using rape as a tool of war include: to humiliate and shame a community or an ethnic group; racial and religious grounds; systematic ethnic cleansing (genocide); the perception of women as property of the victors; and finally the use of women as 'comfort women' like did the Japanese in World War II.¹⁵

Despite the rape's pervasiveness in armed conflicts, rape is the least condemned crime. Until as recently as the 1990s, very few cases of rape in armed conflicts had been taken to courts. Had it not been for the media exposure of mass rapes which led to the setting up of the International Criminal Tribunals for the former Yugoslavia (1993) and Rwanda, (1994) the international community and international human rights law would have ignored the issue of rape, as has been the case so far. Certainly, the problem was not due to the absence of laws or treaties, which prohibit rape but rather due to the lack of political will from governments and the international community, as well as their failure to recognise rape and sexual abuse as a serious human rights violation.

Consequent to the media outcry, there has been some positive development on rape within the human rights context, as both the World Conference of Human Rights and the fourth World Conference on Women affirmed that rape in armed conflict is a violation of human rights. (Charlesworth, and Chinkin, 2000:330)

From late 1991 and throughout the 1992 media coverage about the mass rapes, mass rape as genocide and other violent assaults against women made impossible for these facts not to be ignored as well as not to take actions against the perpetrators of such crimes.

As a response to the public outcry, the Security Council in 1993, decided to establish an *ad hoc* International Criminal Tribunal of the former Yugoslavia for the prosecution of war crimes. (ICTY)¹⁶ Subsequently, in 1994, after the atrocities exposed in Rwanda, the

¹⁴ J.Cock, (1992) *Women and War in South Africa*, London: Open Letters, reported in Charlesworth and Chinkin, p.252.

¹⁵ See Sarah Johnston, *International Law Relating to Rape in Armed Conflict*, written for Alliance for Africa' Electronic bulletin 5.

¹⁶ Resolution 808, 22 February 1993, Alston and Steiner, (2000), *International Human Rights in context*.pp.1146

Security Council established a second ad hoc tribunal: International Criminal Tribunal of Rwanda. (ICTR)¹⁷ The jurisdictions of these tribunals lie on the international humanitarian law, both customary law and conventional law. (The Hague Convention (IV); the Nuremberg Charter of 1945; IV Geneva Conventions, 1949; and the Convention on Genocide, 1948). The need of a permanent independent International Court of Justice dates back to the Nuremberg Charter. In 1998, the Rome Statute was drawn up to create an International Criminal Court (ICC). It has jurisdiction with respect to the following crimes: the crime of genocide, war crimes, crimes against humanity, and the crime of aggression. It is treaty based and need to be ratified by 60 states before entering into force. So far only 46 States have ratified it. The International Court includes rape as crime against humanity in article 7(g) and in article 8 rape and sexual slavery, enforced prostitution and so forth is not enumerated under the grave breaches of the IV Geneva convention but in section (b) under other serious violations of the laws and customs applicable in international armed conflict (Alston, Steiner, 2002:1192)

An international crime, which is a crime committed not by states as such but by individuals who bear a personal criminal responsibility for commission of crimes defined by international law, has basis in conventional law as well as customary law. (Alston, and Steiner, 2000:1132) It is possible to put rape on trial as a war crime at national level using either using domestic law or the international humanitarian law. International Humanitarian law has its origin with the Hague Convention (IV) Respecting the Laws and Customs of Wars on Land and the Regulations annexed thereto, in 1907. In its statute, it does not include rape or sexual crimes. However, we may interpret that article 46 as if it includes gender crime against women, when it mentions defence of family honour, the right of life of women, and private property as well as religious conviction and practice must be respected.

After the World War II, the Nuremberg tribunal was established to put crimes against peace (jus ad bellum), war crimes (jus in bello), and crime against humanity on trial. The Nuremberg Charter entered into force in 1945, failed to recognise rape or sexual crimes

¹⁷ A commission of Experts to investigate crimes against humanity in Rwanda was established by SC Res. 935, 1 July 1994. Its final report was submitted to the Security Council on the 9 December 1994, UN Doc. S/1994/1405.

as war crimes, alongside with murder, ill-treatment or deportation to slave labour, etc which are listed in the article 6 section (b). Conversely, the Military tribunal of the Far East (Tokyo tribunal), which lasted from 1946 to 1948, indicted and prosecuted officials of the Japanese army for mass murder and rape for the massacre known as ‘the Rape of Nankin’. Article 6, section (b), explicitly states that the list is not exhaustive hence it could be used or interpreted in the case of rape, or alternatively section (c) of article 6 may be quoted in the case of rape, arguing that rape is a crime against humanity.

The 1949 fourth Geneva Convention Relative of the Protection of civilian Persons in Time of War supplied rules about the treatment of victims of war and of occupied populations. Grave breaches of the Geneva Conventions, which are fundamental assault on human health, physical integrity and dignity listed in article 147¹⁸, are considered the most serious violation of international humanitarian law. (Charlesworth, Chinkin, 2000). The first explicit reference to rape in the Geneva Convention is in article 27, paragraph 2, which states: ‘women should be especially protected by any attack on their honour in particular against rape, indecent assault and forced prostitution’.¹⁹ This clause is reiterated in the 1977 Protocol I of the IV Geneva Convention, art. 76. Then, art. 4(2)(e) of protocol II to the IV Geneva Convention expressly prohibit outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault. The articles related to gender crimes in the Geneva Conventions and Protocols have been strongly criticised by feminists because of its terminology with reference to honour instead of dignity. It has been argued that this is a protective clause, which reflects the common perception that women are merely passive victims. The fact that rape and sexual assault are not listed as grave breaches has been the origin of controversial debates. (Charleworth, and Chinkin, 2000)

¹⁸ August 1949. Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The violations defined in the Geneva Conventions and the II protocols were made criminal offences under the Rwanda Tribunal statute, article 4, fortunately dropping the wording related to women's honour. The International Criminal Tribunal of Rwanda (ICTR, 1994) was established to persecute persons for genocide and other serious violations of international humanitarian law in that country. A particular and successful trial for the ICTR was that of Jean-Paul Akayesu, former mayor. He was first indicted for rape and charged in 1996. Then, his charge was amended and subsequently charged for genocide. In September 1998, the ICTR found Akayesu guilty of genocide, crimes against humanity and war crimes. It was the first time that rape was recognised to be an act of genocide to destroy a group.²⁰

The Yugoslavia Tribunal Statute in Article 5 clearly states that rape is a crime against humanity and the tribunal has used it in most of the its cases. For example, the Kunarac case (Bosnia, February 2001) was the first one in history where sexual slavery and rape were accepted as war crime and crime against humanity. To classify as such, a crime must be systematic and widespread. This case is important because it sets a precedent of no need of corroboration in case of rape that clears the controversial issue of the 'consent', which has been extensively criticized by feminists as explained earlier in this work. (Alston, and Steiner, 2000:112-122) However, the International Tribunal of Yugoslavia failed (as Nuremberg's), to declare rape as a war crime, which caused a debate whether or not this failure 'would create a hierarchy of rapes. In other words, would some rapes, which do not fall under a definition either of war crime or crime against humanity, be committed with the assumption that they will go unpunished? I think that regardless the definition used, rape is a crime and should be punished as such within both contexts of peacetime or wartime; as well as those with command responsibility, and individual perpetrators, must be indicted and prosecuted. The important victory, even if slim, is that seriousness of rape in armed conflict has been exposed; finally 'the silence of women sufferance has been broken'. (Charlesworth, and Chinkin, 2000:330)

¹⁹ Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of war, August 12 1949.

²⁰ See Human Rights Watch Report, *Human Rights Watch Applauds Rwanda Rape Verdict*, New York, 2 September, 1998)

The fact that there is no explicit definition of rape in international humanitarian or human rights law is not negative, rather I argue that it gives much wider range of action to women in their fights for the recognition of their rights. It is important that international laws and treaties are enforced by state authorities, and women human rights become an imperative for each state to fulfil. Neither the International Human Rights Law nor the International Humanitarian law has not been responsive to women's needs; they have failed to stop the systematic subordination of women, and to protect women's human rights regionally, domestically and internationally.²¹

²¹ See Cook, R.J. *Women's International Human Rights Law: The way forward*.

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