



HOW THE LAWS OF WAR FAIL WOMEN:

THE INEXCUSABLE FAILURE TO HOLD STATES ACCOUNTABLE FOR THE USE OF RAPE AS AN UNLAWFUL WEAPON AND TACTIC OF WAR

The laws of war prohibit the use of all weapons or tactics of warfare that cause superfluous injury, unnecessary suffering, or violate **"principles of humanity and the dictates of public conscience."** Rape is a prohibited weapon or tactic of war under the criteria set by the laws of war. **Yet, despite the endemic use of rape as a weapon, no state has ever been held accountable for the use of rape as a prohibited weapon of war.**

Rape is the most powerful, cost-effective weapon available for destroying the lives of "enemy" women, families, and entire communities; demoralizing enemy force; and, in some cases, accomplishing genocide. Rape is being used more than any other prohibited weapon of war including starvation; attacks on cultural objects; and the use of herbicides, biological or chemical weapons, dum-dum bullets, white phosphorus or blinding lasers.

It is time to punish states that use rape as an unlawful weapon in armed conflict.

The failure to treat war rape like other illegal weapons or war tactics removes the central protection of the laws governing the conduct of war from rape victims, mainly women and girls. Victims' rights to accountability and reparations for their injuries from the use of illegal weapons is separate **and in addition** to their rights to accountability for other crimes arising out of the same act, including having perpetrators charged with rape as a war crime, a crime against humanity or a constituent element of genocide.

Governments, international humanitarian law experts, international war crimes tribunals, military experts, and global civil society all agree that rape is being used as a weapon of war. The Security Council recognized that rape as a weapon of war can be a threat to international security, including in Resolutions 1820, 1888, and 1960. Therefore, the failure to hold rape-using states accountable for use of rape as a prohibited weapon is inconsistent with global consensus and the laws of war.

Discrimination against women under the laws of weaponry runs deep. The deliberate transmission of bacteriological agents and toxins, including the HIV virus, **by any means** in armed conflict violates the prohibition on use of biological weapons. Despite credible evidence of commanders ordering HIV/AIDS infected soldiers to rape "enemy women" **in order to transmit HIV**, there have been no prosecutions or even investigations for the deadly use of HIV as a biological weapon.

Rape is the most terrorizing and life-destroying unlawful weapon being used in armed conflict - yet not one rape-using state has ever been held accountable for the use of an unlawful weapon under the laws of war.

WHY WAR RAPE MUST BE TREATED AS AN UNLAWFUL WEAPON OF WAR

Addressing rape as a prohibited weapon is the duty of all states under international humanitarian law (“IHL” or the “laws of war”) and will promote deterrence by changing norms that legitimize war rape. Putting focus on the accountability of rape-using states for use of a prohibited weapon deflates the ability of states to place the blame for tactical mass rapes on “errant” commanders.

Addressing rape as a prohibited weapon will make visible the numbers of women killed and injured by rape. Global indices that track fatalities and injuries by weapons type do not consider rape to be a weapon for these purposes. Estimates of the numbers of women raped in armed conflict **are only of survivors**. This means that, for example, **women raped to death in conflict are not counted in this number**.

Addressing rape as a prohibited weapon opens up additional avenues of redress for victims of war rape. Indeed, this may be the only avenue of redress for families of women raped to death or for survivors who are reluctant to testify about their individual rapes for fear of reprisals or other reasons. Rape-using states must be held accountable for all possible injuries to victims of rape used as a weapon during war, including restitution for HIV infection, forced pregnancy and child-bearing, and child-rearing costs for children born of war rape.

Addressing the deliberate transmission of HIV via rape as use of a biological weapon is critical to deterring the use of biological weapons as matter of global security and to establishing redress for the survivors, mainly girls and women, who will suffer from life-long disabilities from HIV and may bear HIV-infected children.

FAQ

1. HOW IS A “WEAPON” OR A “TACTIC” OF WAR DEFINED UNDER INTERNATIONAL LAW AND WHERE DOES RAPE FIT IN?

War rape falls under the technical meaning of a “tactic” or ‘method’ of warfare rather than a “weapon” or “means” of warfare under IHL. However the term “weapon” is frequently used by the International Committee of the Red Cross (ICRC) and others as a broad term to cover both the means (“weapon”) and methods (“tactics”) of warfare, and this practice is followed in this FAQ. The criteria for assessing the lawfulness of a weapon (or a tactic) under IHL is the same for all practical purposes.

The term “weapon” means the objects, materials or projectiles used for gaining military objectives, whereas the term “tactic” or “method” refers to strategies that may involve the use of legal items or weapons. For example, the deliberate starvation of civilians for military advantage is a prohibited method of war. The Security Council has characterized the use of rape in armed conflict both as a “weapon” and as a “tactic” of war, but the more correct term under IHL would be “tactic.”

2. WHEN IS CONFLICT-RELATED RAPE CONSIDERED A (PROHIBITED) WEAPON OF WAR?

Rape, which is always a crime, is a prohibited weapon of war when it is used to achieve military objectives, for example to destabilize enemy forces or genocide. The United Nations recently defined sexual violence as a tactic of war as follows:

“Sexual violence [used] as a ‘tactic of war’ refers to acts of sexual violence that are linked with military/political objectives and that serve (or intend to serve) a strategic aim related to the conflict. This will rarely be reflected in overt orders, but may be evidenced by the fact that an armed group has a functioning chain of command and is able to restrain other offenses (like mutiny or desertion), while sexual violence is neither condemned nor punished by military hierarchy. It may also be apparent that sexual violence is in line with the overall objectives of the group.”

3. HOW PREVALENT IS THE USE OF RAPE AS A WEAPON IN CONTEMPORARY ARMED CONFLICTS?

It is endemic. UN Secretary-General Ban Ki-Moon reported in 2009 that *twenty-nine* countries were using or had used rape during war, and in 2012 that list included the Democratic Republic of Congo (DRC), Burma, Libya, Syria, and Côte d'Ivoire. Rape is the only weapon routinely used in modern warfare that enjoys impunity from laws governing weapons use. Prohibiting the use of rape as a weapon should be a central focus of the International Committee for the Red Cross and others who monitor state compliance with weapons law.

4. ISN'T RAPE IN ARMED CONFLICT PERPETRATED IN MANY DIFFERENT WAYS? HOW CAN RAPE BE CONSIDERED ONE "WEAPON"?

All unlawful weapons, including rape, can be perpetrated in different ways and using different objects. For example, starvation of civilians is an unlawful method of war that can be perpetrated in many ways, including blockades or burning crops. Various acts and objects, not just forced intercourse, can be used to perpetrate rape. The International Criminal Court's (ICC) definition of rape in the Rome Statute's Elements of Crimes includes "penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."

Rape as a weapon of war necessarily includes single and multiple instances of rape, gang rape, forced impregnation and sexual slavery.

5. DOES IT TAKE A SPECIAL TREATY TO MAKE RAPE A PROHIBITED WEAPON?

No. A basic premise of IHL is that weapons do not have to be specifically listed or named for their use to be unlawful, though there are special treaties banning certain weapons. Additional Protocols I and II to the Geneva Conventions reinforce the Martens Clause, a fundamental rule of customary international law (CIL), by setting forth criteria that make use of a weapon unlawful, which include that the use of such a weapon shocks the "public conscience."

6. IF RAPE IS A PROHIBITED WEAPON TO USE IN ARMED CONFLICT WHY ISN'T IT TREATED LIKE OTHER PROHIBITED WEAPONS?

Discrimination. It is commonly acknowledged that rape is now used as a weapon to kill, mutilate, destabilize enemy forces, accomplish genocide, and win wars. However, when the laws of wars were drafted, rape was not viewed as a tactic to win military objectives. Determinations of the lawfulness of weapons mainly relied on a premise of distinction between combatants (men) and civilians (women, children, old men), which has become much less relevant in modern day conflicts.

Nonetheless, these patriarchal origins of the laws of war – men winning wars by fighting other men – are very much alive in the legal culture and framework governing the lawfulness of weapons used by governments, experts in the laws of war and the military. Rape is never considered alongside other weapons in international conferences or trainings on the legality of weapons or in the recent focus on assessments of the long-term health and environmental effects of weapons.

7. HOW CAN LAWS ON PROHIBITED WEAPONS BE ENFORCED AGAINST STATES USING RAPE AS A WEAPON OF WAR IN ARMED CONFLICT?

States must ensure that **"all weapons and tactics of war" they use or plan to use in armed conflict are "lawful,"** a duty characterized by the International Court of Justice as being "intransgressible." However, IHL does not rely on self-enforcement of weapons law by parties in conflict. Once a state becomes aware of a prohibited weapon, including rape, being used in any armed conflict, it has a duty to act, both individually and collectively through such entities as the Security Council and ICC, to stop its use and to hold the offending state civilly, and top officials criminally, accountable.

This duty is a legal imperative, not a policy choice. The use of an unlawful weapon is a grave violation of IHL and a war crime. Laws of war require weapons violations to be addressed and enforced **in addition to** addressing any other potential crimes arising out of the same act such as rape as a war crime, a crime against humanity and a constitutive act of genocide. International customary and treaty laws governing weapons reflect *jus cogens* norms, meaning that weapons prohibitions are fundamental principles of international law from which **no derogation** by states is permitted.

8. IS THE DELIBERATE TRANSMISSION OF HIV/AIDS IN ARMED CONFLICT VIA RAPE A USE OF A BIOLOGICAL WEAPON?

Yes. The use of **any** microbial or other biological agents/toxins, including the HIV virus, for hostile purposes or in armed conflict is unlawful under specific treaties such as the 1972 Biological Weapons Convention (BWC), as well as under CIL.

9. IS THERE ANY EVIDENCE THAT HIV/AIDS IS DELIBERATELY BEING USED AS A WEAPON IN ARMED CONFLICT?

Yes. The World Health Organization (WHO) suggests **67% of the 200,000-535,000 rape survivors of the Rwandan genocide, nearly all women, contracted HIV from war rape.** Of course, not all of these transmissions resulted from a deliberate intent to use HIV transmitted via rape as a weapon to infect “enemy women,” but there are reports that interahamwe leaders ordered HIV-infected soldiers to rape young girls and women in order to transmit HIV to Tutsi “enemy” women. In northern Uganda, there have been multiple reports by women that Ugandan soldiers had intentionally infected them with HIV through rape.

10. HOW DOES THE USE OF TRANSMISSION OF HIV AS A WEAPON IN ARMED CONFLICT DISPROPORTIONATELY AFFECT WOMEN?

Studies have concluded that girls and women are two to eight times more susceptible to contract HIV through intercourse than men, and rape in conflict increases women’s rate of HIV infection, especially in cases involving abduction and sexual slavery. The vast majority of war rapes are accompanied by vicious assaults, and nearly all include severe genital trauma, which creates open wounds that provide additional entry points for HIV/AIDS to enter the bloodstream.

“If we can ban cluster bombs, we can ban sexual violence in conflict, in war and conflict.”

—Margot Wallström, Special Representative of the Secretary General on Sexual Violence in Conflict

For more information on discrimination against women under the laws of war, please see the GJC website: www.globaljusticecenter.net

We welcome feedback and questions of this FAQ, which will become part of a White Paper on Weapons Law, Rape and Women. Please contact the Global Justice Center at info@globaljusticecenter.net.