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War Crimes and Global Legal Issues: Sexual Assaults and Rape of the women

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The criminal trial of the people who are accused of committing war crimes is a foundational factor of the victim's right to justice. War crimes are defined as serious violations of humanitarian laws during a conflict. The established definitions of war crimes by the Rome Statute of the ICC are derived from the Geneva Convention of 1949¹. The concept of war crimes is primarily based on the idea that a person can be held responsible for the actions of a state or its military individually. The taking of hostages, willful killings, torture, or inhuman treatment of prisoners of war, and forcing children to fight are some examples of war crimes. Under International Criminal statute², war crimes are divided into 4 categories. Article 8(2)(a)³ is dealing with the serious infringement of the Geneva Convention of 1949 and Article 8(2)(b)⁴ is dealing with the serious violations of laws and customs which are applicable in the international armed conflict, established within the framework of international law. To stop war crimes, we need a law-abiding international community and respect for International Human Rights. The thought of exemption from prosecution of those who are responsible for the commission of international war crimes should be uprooted. It is the law of International War Crimes that should prevail. The legal issue here is that all kinds of sexual violence/ assaults that are committed during wartime are not fully considered violations of International Humanitarian Laws. Whatever the rules and regulations are there for the time

¹ 'Geneva Conventions 1949 and their additional Protocols' (ICRC, 29 October 2010)

<<https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>> accessed 20 February 2023

² Rome Statute of the International Criminal Court 1998

³ Geneva Convention 1949, art 8(2)(a)

⁴ Geneva Convention 1949, art 8(2)(b)

being, they are not capable to prosecute and punish the offenders. Henceforth, this work will primarily examine the area of prosecution and punishment of the offenders.

Keywords: *war crimes, rape, sexual assaults, international criminal court.*

INTRODUCTION

War finds its traces from way back to the existence of Homosapiens. Where there is war, war crimes will be there and crimes related to women are also prevalent in the war zone. It is not only the soldiers who fight in the war. There are civilians including children and women who fight for their survival and for women specifically 'dignity', protecting themselves from the soldiers of war. In the recent war between Ukraine and Russia, many allegations were made against Russian soldiers for committing rape and forceful sexual assaults and Ukrainian women and female teenagers. But the point here is those are just the allegations. The primary question here arises is that if the Russian soldiers are violating the humanitarian laws, WILL they have to face criminal trials for committing such heinous offenses, WHO is going to put them up for trial or prosecution, and HOW they will be tried? There are many instances in which gender-specific crimes are not even considered to be punishable in humanitarian laws and conventions or customary international laws. It is hard to find the terms like 'forced maternity', 'forced impregnation', or 'genocidal rape'. However, it is pertinent to note that these terms are prohibited in the 1949 Geneva Conventions. The objective of this research is the prosecution of the offenders who are involved in sexual violence/abuse during the time of ongoing wars.

MEANING OF RAPE FROM THE INTERNATIONAL PERSPECTIVE

The global perspective of sexual violence or rape is comparatively a new concept. Customary International Law of land warfare which was codified by 1863 Lieber Instructions categorized rape as a crime of 'troop discipline'.⁵ Rape was specified as a capital crime that should be

⁵ Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15(1) European Journal of International Law
<<http://dx.doi.org/10.1093/ejil/15.1.97>> accessed 20 February 2023

punished by the death penalty. As per Hague Convention, women should be protected by the protection of their 'honor'.

HISTORICAL BACKGROUND

Sexual violence of all kinds or rape directly affects the dignity of the victims. In simple terms, it shakes the very core of the person who suffers from such tragedy. Being raped is being violated in the most intimate way possible. Being raped causes a woman to experience great fear- fear of future harm, fear of retribution from the perpetrator, and fear of being revealed as the victim.⁶ From time immemorial, rape and sexual violence on the conquered children and women have been common and it is to be noted that it left a deep scar on the victim. It has been provided in the Bible that women and girls of tender age are sacrificed, raped, and then murdered by the invading armies in ancient Israel⁷. The records in history are proof that the warfare between the two different tribes involves capturing and raping women as an end the symbol of victory over the enemy. Rape is considered by the Greeks to be part of the war by which they could get wives and concubines as trophies. George Washington, former president of the USA, sentenced a soldier to the death penalty reason being he committed the offense of rape on a woman during the American Revolution⁸.

Rape is considered to be an incentive for a soldier to enlist, a way to celebrate victory over the enemy. It was considered to be one of the underlying customs of war, an unprecedented way of reaffirming the manhood of soldiers, means of destroying the cultural development of the opponent. Rape has served the tactical function of demonstrating the totality of victory over enemies.⁹ The victims of wartime rapes become, to her people, the evidence of the enemies'

⁶ Fortune MM, 'Book Review: Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror' (1993) 47 Journal of Pastoral Care 435

⁷ Society of Biblical Literature, 'Terror in the Bible' (*International Voices in Biblical Studies*) <https://www.sbl-site.org/assets/pdfs/pubs/9781628375008_OA.pdf> accessed 20 February 2023

⁸ Thomson Reuters, 'Bush approves execution of U.S. Army Private' (*Thomas Reuters*, 29 July 2008) <<https://www.reuters.com/article/us-usa-soldier-bush-idUSN2826007420080729>> accessed 20 February 2023

⁹ Simon Chesterman, 'Never Again...and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond' (1997) 22 YALE J INT'L L 299, 325

bestiality, a symbol of a nation's defeat, a pariah, damaged property, a pawn in the subtle wars of international propaganda.¹⁰

From time immemorial, the laws of warfare were either omitted, underestimated, or conflated. The offense of forcible sexual intercourse was treated to be pre-destined damage of war. Even the international community overlooked the offense of rape as a war weapon. However, it is very recently that rape as a crime of war has begun to get recognition. It is pertinent to note that prosecution of rape used as a weapon of war is not a simple matter.

LEGAL ISSUES CONCERNING RAPE AND SEXUAL VIOLENCE

The issue here is relating to gender-specific crime and to be a specific crime and to be particularly, systematic mass rape. In September 1998, the Rwanda tribunal delivered a judgment in a case named *Prosecutor v Akayesu*¹¹. The judges from three different states stated and defined their points of view on rape. "Rape is considered to be a form of aggression"¹², a violation of personal dignity, and rape and sexual violence constitute the worst ways of harming the victim as he or she suffers both bodily and mental harm. It is pertinent to note that the judge here mentioned 'he' as well as 'she' because in these wars a new crime is coming out, rape of men by men. It was the first time in the history of IHL, the Rwanda Tribunal ruled conviction for rape as an offense against humanity.

In *Prosecutor v Akayesu*¹³, Mr. Akayesu was the mayor of Taba city in Rwanda and was conferred with the powers and responsibility to maintain law and order in Taba in 1994. In 1994, the war was going on in Rwanda. The tribunal held that Mr. Akayesu had knowledge of the genocide of many Tutsis in Taba and he didn't try to prevent such genocide although he has all the powers to prevent and stop such crimes and do the needful. It was also established that he was found to be involved in all those crimes of genocide and rape and other sexual violence that

¹⁰ Susan Brownmiller, 'Making Female Bodies the Battlefield', in *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Roy Gutman ed, 1994) 180-181

¹¹ 'International Criminal Tribunal for Rwanda: *Prosecutor v Akayesu*' (1998) 37 *International Legal Materials* 1399 <<http://dx.doi.org/10.1017/s0020782900012304>> accessed 20 February 2023

¹² Norton R & Grant T, 'Rape Myth in True and False Rape Allegations' (2008) 14 *Psychology, Crime & Law* 275

¹³ *International Criminal Tribunal* (n 11)

happened in Taba. The court, in addition, also held that Akayesu had been intimidated about the sexual violence with civilians who were refuged with the local communal militia but didn't try to prevent such things. The court found Akayesu guilty of sexual violence, genocide, and a crime against humanity.

One of the early United Nations resolutions leading to the decision to establish the Yugoslavia Tribunal contained the first condemnation ever by the Security Council of rape in war. The main motivation behind the establishment of the tribunal was that the Security Council was appalled by the reports of systematic and organized rape of women, in Bosnia and Herzegovina. The Secretary-General's Report, which led to the drafting of the statute for the Yugoslavian Tribunal, refers to "sexual assaults". Article 5(g) of the proposed statute broke new ground by enumerating rape as a crime against humanity.¹⁴ It went on to suggest that given the fact that the Tribunal would have to deal with victims of rape and sexual assault, due consideration should be given to the appointment of qualified women in the Office of Prosecutor.¹⁵ So, even before the Tribunal began its work, the Security Council and the Secretary-General were giving specific attention to gender-related matters. The suggestions were accepted, and the statutes of the two Tribunals set important precedents in enumerating rape as a crime against humanity and entrenching various procedural safeguards for the protection of victims and witnesses in sexual assaults. The statute for the Rwanda Tribunal went even further than its Yugoslavian counterpart, especially referring to "rape, enforced prostitution and any form of indecent assault" as violations of Article 3 common to the 1949 Geneva Conventions.¹⁶

During modern armed conflicts, the maximum casualties are civilians, a group that is increasingly deliberately selected as targets in each international and non-international conflict. According to the UN Secretary-General, the impact on civilians in this new warfare goes "far beyond the notion of collateral damage" and includes targeted attacks, forced displacement, and

¹⁴ 'Safe Areas: Report of the Secretary-general Pursuant to Security Council Resolution 959 (1994)' (1995) 2 International Peacekeeping 115

¹⁵ 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Including the Statute of the Tribunal' (1994) 5 Criminal Law Forum 597

¹⁶ Zagaris B, 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence' (1994) 33 International Legal Materials 484

sexual violence.¹⁷ Summarily, after examining and analyzing different literature and papers, one of the two main legal issues here is that the definition of the crime of sexual violence and rape was never defined in International Law and it is pertinent to note that the crime which has been committed by the militias in the wartime is not enough to get the recognition and attention.

Secondly, the offender who do such crimes as rape and sexual violence are not prosecuted or not given the punishments that they deserve for their mis-doing or exaggerating their authority and power over the women. This leads to another bigger issue of Universal Jurisdiction. For example, if rape has been committed at one place by a soldier of war, in that very case his state (the state from where the soldier belongs) would never be interested in prosecuting him as a criminal.

GLOBAL PROGRESS REGARDING PROSECUTION OF RAPE

Global progress could be understood with the example of Colonel Lama's Case of Nepal.

Colonel Lama's Case: Starting with the infamous case of Colonel in Nepal Army, Kumar Lama who was detained at sunrise on Thursday dated 3rd January 2013 in St. Leonard's- on – Sea, East Sussex, United Kingdom. He was accused of two counts under Section 134(1) of the Criminal Justice Act 1988 in the United Kingdom¹⁸. The allegations were that in the year 2005, during the armed conflict between Maoist and the Nepal government, Lama actively participated in the torture of two detainees in barracks of the Nepal Army commanded by Colonel Lama. United Kingdom exercised its authority followed by the legal principle of Universal Jurisdiction which authorizes the state party to inquire, try and extradite for the trial any person alleged or suspected of committing certain acts which are criminalized under IHL- which also includes torture.

UK is obligated to take such steps, which derives its power from being a state party to United Nations Conventions against torture or cruel inhuman, or degrading treatment or punishment

¹⁷ 'United Nations Security Council Resolution 1738: Protection of Civilians in Armed Conflict' (2007) 46 International Legal Materials 8

¹⁸ Criminal Justice Act 1988

(UN Convention against torture)¹⁹. Nepal too is a state party to this convention since the year 1991²⁰. Article 4 of this convention (UN Convention against Torture) explicitly requires making all attempts of torture into punishment along with appropriate penalties.²¹

Article 7 of the UN Convention against torture, authorizes to extradite and prosecute of any person suspected of committing torture.²² In pursuance of the UN convention, the UK enacted Criminal Justice Act 1988. Section 134(1) of said Act reads "A public official or person in an official capacity, whatever his nationality, commits the offense of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.²³ Since Lama's Case, like other similar cases in the UK, the jury was involved. The primary objective of this jury is to decide the fact and asses the evidence accordingly. This is one of the examples in which we can assert that howsoever slow, global countries are adapting and witnessing the trials and prosecution of the crimes committed during the war.

CONCLUDING OBSERVATIONS

Recommendation No. 19 of the CEDAW²⁴ and the instruments promoting non-discrimination against women and girls are operational all the time even during the war. Research, review, and discussions on the topic of IHL, Human Rights Law show that there has been a growing tendency to deal with and define the types of sexual offenses and abuses including rape. While talking about the offense of rape, consent is the most major element, the lack of which eliminated the legal relevance. The jurisprudence of rape or sexual abuse is primarily constructed on the circumstances of the forced physical or mental conditions, abuse of power, or solely based on the victim's/ survivor's status. In addition to the judicial recognition, the survivor's sexual

¹⁹ 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (UN) <<https://legal.un.org/avl/ha/catcidtp/catcidtp.html#:~:text=The%20Convention%20against%20Torture%20and,been%20ratified%20by%2020%20States.>> accessed 20 February 2023

²⁰ 'Torture in Nepal - Asian Human Rights Commission' (*Asian Human Rights Commission*) <<http://www.humanrights.asia/tortures/torture-in-nepal/>> accessed 20 February 2023

²¹ *Ibid*

²² *Ibid*

²³ *Ibid*

²⁴ *Ibid*

dignity, integrity, autonomy, and equality have widened their understanding of gender-based violence. The protection of human rights seeks additional and refined rights to equal access to justice under the Humanitarian norms and international criminal law for women and girls.

Those rights must encompass procedural and substantive aspects of access to justice that are not mired in gender-weighted myths about sexual violence nor legal inaction or inappropriate actions, especially when dealing with the crime of rape. Tellingly, if the "impact" of the lack of consent element in rape, is sanctioned and raised more frequently with female victims/survivors, even when rape is prosecuted under another crime, like persecution or torture, or sexual slavery, a disproportionate gendered chilling effect will descend on the females' exercise of their rights to access humanitarian norms.²⁵

²⁵ 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (OHCHR) <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 20 February 2023