



Q&A: How the Systemic Discrimination against Women in Weapons Classification and Enforcement is a Serious Violation of International Humanitarian Law

The International Court of Justice is clear that it is a fundamental principle of international humanitarian law that “states do not have unlimited freedom of choice of means in the weapons” and that “it is prohibited to use weapons that cause unnecessary suffering to combatants.”

“It’s now more dangerous to be a woman than to be a soldier in modern conflict.”

- Maj. Gen. Patrick Cammaert, 2008
former UN Peacekeeping Operations
Commander. (DRC)

“I was raped by two gendarmes...one of [whom] was seriously ill, you could see that he had AIDS... He told me ‘take a good look at me and remember what I look like. I could kill you right now but I don’t feel like wasting my bullet. I want you to die slowly like me.’”

- Rwandan Genocide Survivor

INTRODUCTION

The central purpose of international humanitarian law (IHL) is to alleviate the suffering caused by war to the greatest extent possible. To do this, IHL requires states to ensure the protection of civilian populations and, regulates the means of warfare, including prohibiting the use of certain weapons.ⁱ The International Court of Justice (ICJ) describes IHL's regulation of weapons as "intransgressible principles of international law", to be observed by all States.ⁱⁱ

Yet, women do not enjoy the equal protection of these intransgressible laws on weapons.

The major weapon used against women and girls in today's armed conflicts is rape. However, rape is not categorized by states as a "real" weapon, one that must be evaluated under the "intransgressible" principles of the laws of weaponry. Thus, unlike other weapons unlawful to use in armed conflict, such as starvation, herbicides, and chemical weapons, rape has never been declared to be an illegal weapon or means of warfare.ⁱⁱⁱ Consequently, rape victims, who are disproportionately women, are denied the full panoply of remedies for their injuries, including sanctions on the violator state, available to other victims of unlawful weapons. Further, the failure to classify rape as an illegal weapon of warfare is a dangerous lapse in global security.

The failure to classify rape as a weapon is an affirmative act by states that constitutes a serious violation of IHL.

Weapons classification is not the only discrimination against women under IHL. The use of biological weapons is unlawful in all circumstances. Yet, no state has been held accountable, nor any commander prosecuted, for the ongoing, systematic, and deliberate transmission of HIV via rape of women in armed conflict.

The deliberate transmission of HIV *by any means in armed conflict* is the unlawful use of a biological weapon and violators must be held accountable. The failure to enforce illegal biological weapons use when the victims are female is a shocking breach of the non-discrimination principle grounding IHL, and one which has created dangerous lapses in global security.

This Q and A addresses both discriminatory breaches of the laws of weaponry; the failure to classify rape as a weapon and the failure to prosecute deliberate HIV transmission as the use of an unlawful weapon

I. HOW THE FAILURE TO CLASSIFY RAPE AS AN UNLAWFUL WEAPON VIOLATES IHL

1. What is meant by the phrase "rape as a weapon of war"?

This phrase accurately describes that in today's armed conflicts, rape has become a major strategic weapon designed to accomplish military objectives, such as destroying a community, forcing displacement of populations, and accomplishing genocide. Rape is a major weapon used against civilians in armed conflict in the Democratic Republic of Congo (DRC), Burma, Libya, Syria, Uganda, and elsewhere.⁴

The United Nations Security Council (UNSC) has recognized that the systemic use of sexual violence targeting women in armed conflict, including rape, is a risk to global peace and security. Security Council Resolutions (SCR) 1820 and 1960 characterize rape in armed conflict as a “tactic of war,”⁵ defined by the UN as “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.”⁶

2. Is rape an effective weapon of war?

Yes. Rape and forced pregnancy are powerful, cheap, available, and effective weapons for destroying the lives of women as well as families and entire communities. The high prevalence of gang rape and public rapes, particularly of young women before their families or community leaders in highly visible areas, demonstrates the intent that such rapes have a public and terrorizing effect.

The International Criminal Tribunal for Rwanda (ICTY) in the *Akayesu* case, as well as in the Rome Statue of the International Criminal Court, holds that rape can be a constitutive act of genocide.

3. Does rape fall under the international definition of a weapon?

Yes. There is no one simple international definition of the term “weapon,” but rape used for strategic purposes in armed conflict falls under the weapons definition used by the International Committee of the Red Cross (ICRC), the authoritative body interpreting IHL. The ICRC has interpreted the phrase “methods and means of warfare” very broadly:

...the words ‘methods and means’ *include weapons in the widest sense, as well as the way in which they are used.* The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions.⁷

4. If rape is a weapon of war, why isn’t it classified as a weapon?

Discrimination. It is commonly acknowledged that rape is the major weapon used to injure, kill, mutilate, destroy, infect with HIV and forcibly impregnate women and girls in armed conflict. If rape were treated like other weapons, it would immediately be declared an illegal weapon. However rape is not treated like other weapons because the law of weaponry did not have today’s use of rape in mind when it formulated procedures for evaluating whether a weapon is unlawful, nor have crimes against women in war been viewed as part of military strategy - which they are.

5. If rape can already be prosecuted as a war crime, crime against humanity and constitutive act of genocide, why does it also need to be classified as use of an illegal weapon?

First, the failure to classify rape as a weapon is an affirmative act of omission that violates IHL. Deciding what is or is not a weapon, and whether to explicitly classify it as such, is not a policy choice but mandate on states under IHL.

Second, victims have access to additional accountability measures when they are subjected to crimes perpetrated by an unlawful weapon. The ICC lists the use of an unlawful weapon as a separate chargeable war crime that can be added to other charges. Women who are raped as a weapon of war do not have access to this charge because rape is not considered a “real” weapon.

Third, prosecuting rape as the use of an unlawful weapon involves different forms of evidence and standards of proof than required to obtain a conviction of rape as a war crime. Illegal weapons use can be proved by a wide variety of circumstantial evidence, including doctors testimony and public statements. To obtain a conviction of rape as a war crime, on the other hand, involves a rape victim testifying about the personal and intimate details that make up the elements of rape. This deters many women from seeking accountability.

Fourth, if rape is declared an illegal weapon, and a commander issues orders to rape, the commander would be culpable for violating the prohibition against using rape as a weapon. This is an easier charge on which to obtain convictions on top officials.

Fifth, classifying rape as an illegal weapon would make more rape victims eligible for reparations. Once sanctions are imposed on a violator state, or charges drawn up to prosecute a commander for unlawful weapon use, all women subjected to rape in that territory would be considered victims of the use of illegal weapons – making many more victims eligible for state reparations than would result from a conviction for a single rape.

II. THE CONTINUING FAILURE TO ENFORCE THE PROHIBITION ON BIOLOGICAL WEAPONS AGAINST THE DELIBERATE TRANSMISSION OF HIV BY RAPE IN CONFLICT IS A DANGEROUS BREACH OF IHL

1. Is the deliberate transmission of HIV/AIDS by rape being used as a weapon of war?

Yes. Credible evidence exists that combatants are raping young girls and women with the strategic military objective to deliberately transmit HIV/AIDS. These include:

- ✦ WHO suggests *67% of the 200,000-535,000* rape survivors of the Rwandan genocide contracted HIV. Behind this shocking figure are reports that Interhamwe leaders ordered HIV infected Hutu militia to transmit HIV to Tutsi women by rape, and thus ensure that the women's deaths would be "slow and agonizing." Survivor groups allege that the Rwandan government paid men known to be HIV positive to rape Tutsi women.
- ✦ The DRC reported to the African Union that 2,000 Ugandan soldiers with HIV/AIDS were sent to the front in the eastern province of Congo to deliberately rape and infect girls and women in order to decimate the local population with an AIDS pandemic.
- ✦ Women in northern Uganda report that they were intentionally infected with HIV through rape by UDPF soldiers, a claim supported by ethnographic research. A UN-OCHA report documented claims by women that the Ugandan army ordered HIV positive soldiers to rape and abuse the Acholi people.

2. How is HIV/AIDS a biological weapon of war?

Certain biological agents, including HIV/AIDS, while not inherently illegal, constitute an unlawful weapon *when used as a weapon or means of warfare*. The 1972 Biological Weapons Convention (BWC) codified customary laws prohibiting the use of *any* microbial or other biological agents/toxins for hostile purposes or in armed conflict.⁸

Thus, the deliberate transmission of HIV to carry out military objectives to destroy specific communities and individuals violates the Biological Weapons Convention and customary international law.

3. How does deliberate transmission of HIV in war disproportionately affect women?

While boys and men are also infected with HIV via rape in conflict, girls and women are the main targets of HIV infection via rape. Infecting girls and women with HIV by rape is particularly damaging to families and communities; rape destroys the “honor” of a woman and her family, and the subsequent HIV infection is a constant reminder of this.

Further, girls and women are 2 to 8 times more susceptible to contract HIV through intercourse than men. Rape in conflict further increases women’s rate of HIV infection, especially in cases involving abduction and sexual slavery. The vast majority of rapes of women in conflict are gang rapes accompanied by severe genital trauma. These create open wounds, which are additional entry points for HIV/AIDS to enter the bloodstream.

When girls and women are targeted for HIV infection via rape, the issue of condom use is moot.

4. Who is obligated to enforce this unlawful use of biological weapons? What are the consequences for failure to enforce?

No one disputes that the deliberate transmission of HIV/AIDS in armed conflict is the unlawful use of a biological weapon. All states, and the Security Council, are on notice of their existing *erga omnes* obligations to halt, prevent and punish its use. The fact that states, individually or through the Security Council, have failed to enforce penalties against states using the unlawful weapon of deliberate HIV transmission via rape in war, is a growing threat to global peace and security.

States that violate biological warfare prohibitions can be held accountable under the BWC as well as various Security Council resolutions. Resolution 1540, in particular, focuses on “weapons of mass destruction,” WMD, of which biological weapons are one. The SCR 1540 oversight body examining states’ compliance with biological weapons prohibitions must be urged to include deliberate HIV transmission via rape in war in its oversight.

States that do not meet their commitments are subject to United Nations sanctions, which can be used to finance victims’ trusts.

III. WOULD CLASSIFYING RAPE AS A WEAPON OF WAR AND ENFORCING EXISTING BIOLOGICAL WEAPONS PROHIBITIONS ON DELIBERATE TRANSMISSION OF HIV IN WARFARE INCREASE ACCESS TO JUSTICE FOR WOMEN, DETER THE USE OF RAPE, AND REINFORCE GLOBAL SECURITY?

Absolutely. These two steps would effect a paradigm change in the way the laws of war are perceived and enforced; this would be transformative for women and for global peace.

First, classifying rape used in war as a weapon would open up new accountability (legal) avenues for rape victims, including increased chances of prosecution of perpetrators of rape under national

(universal jurisdiction) laws and in the ICC. And by enforcing the existing ICC provisions on poisonous weapons, which can be read to cover biological weapons, and the BWC, a radical change in how rape is perceived and enforced can be effected. Such enforcement expands the culpability of the accused and the options to charge under theories of command responsibility and joint criminal enterprise. Rape victims' difficulty in testifying about rape will be alleviated by shifting the victims' burden of testifying to elements of "rape crime" to the varied type of evidence that can be proffered to prove elements related to illegal weapons use.

Second, both classifying rape as a weapon and enforcing biological weapons prohibitions on use of HIV via rape in war would greatly expand civil remedies available under the laws of state responsibility and various UN resolutions on weapons. Such enforcement increases access to reparations for victims and also promotes IHL compliance and its deterrence value.

Third, if rape were classified as a weapon, automatically the types of information, statistics and tracking of injuries that are done with "real" weapons would apply to rape. How many women have died from rape in armed conflict? No one can answer that. But deaths and injuries from landmines, albeit imperfect, are systemically collected and analyzed.

The use of rape would be a less effective weapon once it is treated like one; injuries like pregnancy and HIV infection would be categorized as "weapons injuries," reducing the stigma and shame connected with rape, and increasing the likelihood of long term medical care for the victims. Normatively, when there is a shift in understanding war rape or deliberate HIV transmission as weapons injuries, rather than personal afflictions, the victims will less easily be cast out of their communities or subject to the other exclusionary impacts of these weapons that are now so common, including; familial abandonment, loss of community, shame over a "rape child," and the related lost economic opportunities.

Chart 1 - Weapons: a comparative look at weapons: rape and deliberate HIV/AIDS transmission

<u>Weapon</u>	<u>Delivery (means, method)</u>	<u>Prohibited?</u>
Blunt physical force		
Regular bullets	By any means	Prohibited against civilians, permitted under IHL (LOAC)
Dum Dum (expanding) bullets	By any means	Prohibited
Biological, chemical, other weapons (WMDS)		
Anthrax	By any means	Prohibited
Herbicide, white phosphorous	Depends on where	Prohibited: densely populated areas
Famine (tactic of war)	By any means	Prohibited
Disproportionately used against women and girls		
Rape	By any means	Not classified/Not prohibited
HIV (WMD)	By any means	Bio-warfare prohibition not enforced

RECOMMENDATIONS:

1. Take the lead on changing domestic laws implementing the IHL laws on weaponry, including in military guidelines and manuals, to reflect the use of rape as an unlawful weapon of war;
2. Take the international lead by proposing an amendment to the existing list of unlawful weapons contained in the Rome Statute for the International Criminal Court for review at the next Review Conference;
3. Liaise with domestic and global International Committee for the Red Cross leaders, in decision-making and legal roles, to advise them of gender discrimination in the current application of IHL and to call for changes, not only in the legal standards and guidance notes under the ICRC purview, but also for enhanced coordination in provision of services to victims of these weapons in armed conflict (see recent Norad report⁹ for related recommendations on enhanced coordination);
4. Liaise with other progressive states to implement these changes and call on other states to comply with their obligations under international humanitarian law to protect civilians; this is particularly critical for countries in armed conflict and those operating as humanitarian actors in conflict countries;
5. Support other related efforts by publicly declaring support in publications and presentations to international bodies, including at the UN.

ABOUT THE GLOBAL JUSTICE CENTER

As experts on human rights-based rule of law premised on gender equality, GJC occupies an unparalleled point of intersection grounded in international legal expertise. While it is uncommon for military experts to speak about gender justice or even about law per se, or for women rights or human rights legal experts to tap into the possibilities of international humanitarian law (IHL), including weapons law, GJC's work spans these fields and draws expertise from a range of dedicated actors on the ground and across justice and related disciplines, including health and security. As a result, GJC is uniquely able to identify and harness a wider range of integrative international legal tools that enable us to nimbly and capably lead responses to the most pressing international legal problems, such as the escalating use of rape and deliberate HIV transmission as weapons of war.

ⁱ International Court of Justice, *Threat or Use of Nuclear Weapons, Advisory Opinion*, ¶78, I.C.J. Reports 1996, 8 July 1996.

ⁱⁱ International Court of Justice, *Threat or Use of Nuclear Weapons, Advisory Opinion*, ¶79, I.C.J. Reports 1996, 8 July 1996.

ⁱⁱⁱ The International Committee of the Red Cross (ICRC) provides that IHL treats the terms “methods or means of warfare” and “weapon” interchangeably. “The terms “means and methods of warfare” designate the tools of war and the ways in which they are used. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977 [hereinafter Protocol I] refers alternately to ‘methods or means of warfare’ (Art. 35(1) and (3), Art. 51(5)(a), Art. 55(1)), ‘methods and means of warfare’ (titles of Part III and Section I of Part III), and ‘means and methods of attack’ (Art. 57(2)(a)(ii)), and ‘weapon, means or method of warfare’ (Art. 36).” ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, pg. 3, fn. 1, November 2006 [hereinafter ICRC Art. 36 Guidance].

⁴ For example: (1) in 1971, between 200,000 and 400,000 Bangladeshi women were raped by West Pakistani soldiers; in the 1994 100-day genocide in Rwanda, between 200,000 and 535,000 female genocide survivors were raped; (2) during the 1990s conflict that engulfed the Balkans, conservative estimates show that 20,000 women were raped. More likely, 50,000 women in the region were raped, mostly Muslim; War rape has long been used as a weapon by Burma's soldiers, particularly in Burma's northern ethnic areas, where “orders to rape” suggest ethnic cleansing or even constitutive acts of

genocide. In the Spring 2011 alone, in just one ethnic area, more than 81 women were raped. The youngest was a five year old girl; the eldest, a grandmother. Of these women, 36 rape victims were also killed; In the DRC, often called the rape capital of the world, in 2010 at least 8,000 women were raped; in the wake of reports of mass rape in Libya during early 2011, the international criminal court is now investigating the alleged unprecedented “official policy of rape.” US Ambassador Rice reported that Viagra had been used to enhance soldiers’ ability to implement this war rape policy.

⁵ Security Council Resolution 1820, UN Doc. S/RES/1820 (2008) [hereinafter SCR 1820], and Security Council Resolution 1960, UN Doc. S/RES/1960 (2010) [hereinafter SCR 1960].

⁶ UN Action, *Analytical & Conceptual Framework of Conflict-Related Sexual Violence*, June 2011.

⁷ ICRC, Commentary on the Additional Protocols, ¶ 1402, *citing* ICRC Art. 36 Guidance, pg. 9.

⁸ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972.

⁹ Joar Svanemyr, “Sexual Violence in Conflict and the Role of the Health Sector,” Scoping Paper, Norad Report 21/2011.