

# The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare

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## Abstract

The Security Council has found that the endemic use of rape in war for military advantage – which is primarily targeted against women and girls – is a military tactic that presents a threat to global peace and security. Despite concerted global efforts over the last two decades to end its use, rape as a tool of war continues undeterred. This article links the intransigent use of strategic rape with states' failure to treat it as an unlawful tactic of war under the rules of international humanitarian law (IHL) that regulate the 'means and methods of war'. Embedding strategic rape under IHL's weapons framework will increase its stigmatization, a critical factor in stopping the use of abhorrent weapons or tactics in war. Other potential benefits include the opening up of civil and criminal accountability frameworks and others which provide restitution and reparations for war rape victims. This article focuses on the role of all states in enforcing the weapons framework and it calls for states to undertake an impact and injuries assessment of strategic rape under the Article 36 weapons review process.

## Policy Implications

- Embedding strategic rape within the purview of the laws of war governing the legality of tactics and weapons will foster its stigmatization, which has proven critical to stopping the use of other abhorrent weapons and tactics. Further, changing the norms around strategic rape by bringing it under the weapons framework and shifting the focus of responsibility from individual perpetrators to violator states will mobilize states to work together to end the use of this abhorrent weapon.
- Treating strategic rape, which disproportionately impacts women and girls, as an unlawful tactic of war, will be the first time the nondiscrimination mandates of IHL have been applied to its weapons framework. Extending IHL's weapons protections to victims of strategic rape will ensure their equal rights to justice, reparations, medical treatment and deterrence, which are currently available to victims of other unlawful weapons and tactics.
- Treating strategic rape as an unlawful tactic would help save women's lives, make clear that injuries from strategic rape are 'war wounds', and that foreseeable injuries, including pregnancy, must be treated with the same professional care, treatment advances and restorative health goals accorded to injuries from conventional weapons.

There is global consensus that systematic mass rape of girls and women is routinely used as a tactic of warfare to accomplish military objectives. As stated by the United Nations (UN) Secretary-General Ban Ki-moon, 'systematic sexual violence, without a doubt, can be every bit as destructive to communities as more conventional weapons' (UN, 2009a). It has been reported that between 1980 and 2010 mass war rapes have occurred in over 45 different countries (Hagan and Yohani, 2010).

The Security Council, having found that the use of rape as an instrument of war presents a threat to global peace and security, has passed seven resolutions since 2000 containing measures to stop<sup>1</sup> 'the use of sexual violence, including as a strategic and tactical weapon of war' (UN, 2002a). In 2008 the Council unanimously concluded that 'women and girls are particularly targeted by

the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilians members of a community or ethnic group' (UN, 2008a).

The intransigent use of rape continues to define today's armed conflicts undeterred by global efforts including criminal prosecutions of rape as a war crime. This is not surprising given that rape is a powerful, cost-effective weapon available for destroying the lives of 'enemy' women, families and entire communities; demoralizing enemy forces; accomplishing genocide; and deliberately transmitting the HIV virus.

This article proposes a new way for states to stop the use of rape as a tool of war: address its use under the international humanitarian law (IHL) rules governing the legality of weapons and tactics used in war ('the weapons

framework'). This approach builds on existing global consensus supporting the IHL norms that the choice of weapons and tactics in armed conflict is not unlimited and that the purpose of IHL is to reduce human suffering. The weapons framework, including the power of its processes to stigmatize states, use of abhorrent weapons and tactics, has proven effective as demonstrated by the global condemnation of Syria's use of chemical weapons in August 2013. State pressure on Syria resulted in the Syrian government agreeing to the destruction of its chemical stockpiles and in fact, doing so. In just nine months after the reported use of the weapons, nearly 50 per cent of Syria's stockpiles have been destroyed (Evans, 2014).

Recognizing that not all rape in war is tactical, this article uses the term 'strategic rape' to distinguish opportunistic rape from rape used as a tactic of war to gain military advantage, as those terms are defined under the weapons framework.

This article demonstrates that although strategic rape is indisputably an unlawful tactic of war under IHL, more has to be done than just states making explicit declarations to that effect. Rather, its use needs to be stigmatized by having all states subject it to the impact and injuries assessments applied to conventional weapons, which is essential to effectively deterring its use.

Strategic rape targets girls and women to destroy, or dominate female sexual and reproductive organs, and female victims suffer distinct modes of lethality and injuries from such rapes (UN, 2013a; Combaz, 2013, p. 5). In fact, as demonstrated by one comprehensive study of armed conflict in general on female life expectancy as compared to men, 'over the entire conflict period, interstate and civil wars on average affect women more adversely than men' (Plümper and Neumayer, 2006, p. 723). The disparate impact of war and the use of strategic rape against girls and women require that the failure to treat strategic rape as an unlawful tactic be considered under the prohibition on discrimination, which applies to how all IHL rules, including the weapons framework, are implemented. Treating the use of strategic rape as an unlawful tactic will entitle war rape victims to the same rights to restitution and reparations as victims of other unlawful weapons or tactics.

A regime change around strategic rape is long overdue. The laws of war were developed on the patriarchal model of men fighting other men, using conventional weapons, in wars between countries. Modern armed conflict reflects a vastly different reality, distinguished by the impact of war on civilians, mainly women and children, the development of new weapons and tactics of war and the fact that nearly all conflicts are internal not international. Despite this changed landscape, the weapons framework retains its saliency and should be applied to strategic rape.

## 1. Strategic rape is a recognized tactic of modern warfare

It is undisputed that rape is being used as a weapon or instrument or tactic of war. Strategic rape for military advantage is perpetrated in today's armed conflicts as the means to accomplish genocide and ethnic cleansing, forced impregnation and political intimidation and demoralization. In the past 30 years alone, strategic rape has been wielded as a 'weapon of choice' in armed conflicts worldwide including those in the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Mali, Myanmar, the Syrian Arab Republic, Somalia, South Sudan, Sudan (Darfur), Yemen and Zimbabwe (UN, 2013b; Cohen, 2013, pp. 461–477).

Repeated condemnations of rape used as a weapon or tactic of war by states and the UN are not merely rhetorical, but recognize strategic rape as distinct from opportunistic rape in armed conflict. In fact, in response to Security Council measures to address conflict-related sexual violence, the UN developed a definition of when the use of sexual violence in armed conflict constitutes a 'tactic of war':

[When such acts] 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 (Stop Rape Now, 2011, p. 2).

The International Committee of the Red Cross (ICRC) has also concluded that sexual violence is a 'method of warfare' under IHL when certain features are present including:

[A] chain of command and systematic practice... [and] the rape or sexual violence must be widespread; the acts of sexual violence must take place in a context of or target a population group in connection with an armed conflict; [and] the acts must be committed under the responsibility of an authority and/or weapon bearers, even if they are not carried out as a result of an explicit order or command (ICRC, 2009).

The distinction between strategic rape and opportunistic rape is also increasingly recognized by governments, the international community and in legal procedures and

decisions. The International Criminal Tribunal for Rwanda (ICTR), in the *Akayesu* case, found that rape 'was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole' (ICTR, 1998, p. 731). The Eritrea–Ethiopia Claims Commission, which was established to determine the civil liabilities of Eritrea and Ethiopia for violations of international law during the conflict between those two states, preliminarily found that rape was not used as an 'instrument of war' and that neither 'side alleged strategically systematic sexual violence against civilians,' before proceeding to examine the allegations of rape of civilians (Eritrea–Ethiopia Claims Commission, 2004). This demonstrates that strategic rape is clearly established as a separate phenomenon from opportunistic rape and that the distinction is relevant when examining state civil accountability for such crimes.

Examples of strategic rape include the July 2010 series of military attacks against 13 villages in Walikale territory in DRC, in which the UN documented militia commanders explicitly ordering their troops to 'carry out systematic rapes to demonstrate the coalition's capacity to harm' (OHCHR, 2011, p. 21). In the Guatemalan genocide, it was found that 'the decision to rape the women was not just meant to treat them as spoils of war, but also to destroy the social fabric and to achieve the elimination of the [Maya] Ixil seed' (Open Society Justice Initiative, 2013, p. 42).

There is no single definition of the terms 'weapon' or 'tactic' under IHL. The term weapon commonly refers to 'a thing designed or used for inflicting bodily harm or physical damage' (Oxford Dictionary, 1997) or 'an offensive capability that can be applied to a military object or enemy combatant' (McClelland, 2003). Under certain national laws, body parts used to kill or harm have been deemed to be a weapon (Court of Appeals of Texas, 1997). Under IHL, the phrase 'weapons or tactics of warfare' is used interchangeably with the phrase 'means or methods of warfare'.

The term 'tactic' generally refers to the ways in which a weapon is used; a weapon 'cannot be examined in isolation from the way in which it is to be used... the method of warfare associated with it' (Lawand, 2006b). Some unlawful tactics, such as perfidy or attacks on civilians, accomplish their ultimate goals through the use of particular weapons. In the case of strategic rape, the underlying weapons used include rifles, sticks, knives or bullets, to penetrate the vagina or anus (Mukwege and Nangini, 2009). The use of such weapons to accomplish rape is supported by the definition used by the International Criminal Court (ICC). This article uses the term 'tactic' to describe strategic rape, however, regardless of whether something is deemed a weapon or tactic, IHL requires that states use the same legal criteria to adjudicate their legality.

Although strategic rape is an unlawful tactic of warfare governed by IHL, no state, international body or tribunal has treated it as such under the weapons framework. The UK has come the closest to doing so by acknowledging that the 'use of rape as a method of war is clearly prohibited under international humanitarian law' (UK House of Commons, 2013) but this has yet to be reflected in UK law.

## 2. Strategic rape under IHL

States and individuals perpetrating strategic rape are civilly and criminally accountable under three interrelated fields of international law: IHL or the laws of war, international criminal law, which governs individual criminal accountability and the customary laws of state responsibility, which govern the duties of states under international law.

### A. The IHL weapons framework

IHL, which was developed solely to relieve human suffering caused by war, establishes protections for war victims and restricts or prohibits the use of certain tactics and weapons to conduct hostilities. Originally these laws were divided between 'Hague Law' limiting the weapons and tactics or 'means and methods' of warfare and 'Geneva Law' protecting victims of war, including disabled combatants and prisoners of war. Legal developments, in particular the 1977 Additional Protocols to the Geneva Conventions, have largely eliminated the distinctions between these two branches, which collectively form IHL (International Court of Justice, 1996, p. 75).

The governing principle of the conduct of war is that the right of parties to a conflict to choose 'the means and methods of warfare is not unlimited' (ICRC, 2006, p. 3). Under the weapons framework, certain weapons and tactics are explicitly prohibited, such as dum dum bullets and starvation. Additionally, recognizing that pernicious tools of war could be developed and used at any time, IHL is clear that in the absence of an express prohibition, the legality of tactics and weapons must be assessed by states under certain, well-developed criteria (Additional Protocol (I) to the Geneva Conventions of 12 August 1949 (AP I), 1977). The International Court of Justice (ICJ) has deemed certain rules of IHL, including the weapons framework, to be 'intransgressible principles of international customary law,' affirming their status as *jus cogens* or peremptory (ICJ, 1996, p. 79). This means that the IHL weapons framework is considered to be so fundamental that states cannot derogate from those rules and any breach invokes the *erga omnes* or nonderogable duties of all states to respond and act to stop the breach.

The legal protections and regulations under the weapons framework have expanded greatly in the last 30 years. First, the Rome Statute strengthens the rules

around the enforcement of the IHL weapons framework by criminalizing the use of certain unlawful weapons and tactics of war. Second, the 1977 AP I to the Geneva Conventions added explicit prohibitions on the use of tactics or weapons to destroy cultural objects and those that have the potential to cause widespread, long-term environmental damage, and expanded the prohibition on attacks on civilians to include those designed to terrorize the civilian population. Article 36 of AP I expands upon the long-standing duty of states to ensure the legality of the weapons and tactics of war (ICRC, 2014, Rule 88) by requiring states to assess the legality of new weapons or tactics they use or plan to use. The term 'new' used in Article 36 must be understood in the context of these pre-existing obligations, which presumes that the legality of those weapons and tactics already in use have been determined.

The scope of duties under Article 36 has been interpreted broadly by states. For example, the UK requires that '[t]he review process takes account not only of the law as it stands at the time of the review but also attempts to take account of likely future developments in the law of armed conflict' (UK, 2004). The position of the British government is that strategic rape is an unlawful 'means or methods of warfare' under IHL, and moreover, that it falls under the scope of Article 36: 'Under article 36 of additional protocol I to the Geneva conventions [sic], states parties have an obligation to determine whether the employment of a new means or method of warfare would be unlawful' (UK House of Commons, 2013). Norway has similarly adopted a broad interpretation and its assessment process under Article 36 requires that the legality of a weapon or tactic be determined under both existing international law and 'relevant rules of International Law that may be expected to enter into force for Norway in the near future,' and significantly, that 'particular emphasis shall be put on view on International Law put forward by Norway internationally' (Norwegian Ministry of Defence, 2003, p. 2). Although the Norwegian government has not publicly called for strategic rape to be treated as an unlawful tactic of war under IHL, the Norwegian Labour Party has stated that one of its political priorities is to classify rape in war zones as a weapon/tactic of war under the Rome Statute (Norwegian Labour Party, 2013).

Strategic rape is an unlawful tactic of war that has a disproportionate impact on women and girls, and not treating it under the weapons framework discriminates against these victims. Adjudging exactly what tactics and weapons will be assessed for their legality is subject to the IHL prohibition on discrimination, including based on sex, which underlies the application and implementation of all of IHL (Pejic, 2001). Under IHL, nondiscrimination means 'no adverse distinction,' meaning that women can be treated differently or even more favorably

than men as needed to ensure equality in outcomes, but in no case can IHL be implemented in ways where the outcome is 'less favorable' for women than men (Geneva Convention III, 1949; Geneva Convention IV, 1949). This principle is so fundamental that it constitutes (ICRC, 2014, Rule 88), and there are strong arguments that when the underlying rule of IHL is peremptory, such as the weapons framework, then the requirement of nondiscrimination with regard to those laws is peremptory (Nieto-Navia, 2001). Further, the radical advances in protecting women's right to equality in international law, including by such human rights treaties as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), underscore that women must be given equal protection under all laws (CEDAW, 1981, Article 2).

Including strategic rape under the weapons framework addresses the growing concern that women receive the full benefit of IHL protections as demonstrated by the Security Council's mandate for states to take action to ensure that women victims of sexual violence and rape in war are accorded 'equal protection' and 'equal access to justice' under IHL (UN, 2008b).

## **B. Strategic rape is an unlawful tactic of war under IHL**

A weapon or tactic of war that is not specifically prohibited is unlawful if its use violates certain IHL criteria. These criteria are deliberately phrased in general terms to accommodate changing norms about what makes a weapon or tactic unlawful (Doswald-Beck, 1997). Weapons and tactics that were lawful when first used, such as landmines or mustard gas, can later be considered unlawful often because studying its impact on victims stigmatizes its use.

The principles of distinction and proportionality guide determinations of legality under the weapons framework (AP I, 1977; UK, 2004, pp. 24–25). Distinction refers to the absolute prohibition in IHL against attacks on civilian targets (ICRC, 2014, Rule 1). Proportionality refers to using only as much force as necessary to accomplish a legitimate military objective (AP I, 1977; UK, 2004, pp. 24–25). In addition to these two baseline principles, IHL sets forth certain criteria to adjudge the legality of weapons or tactics, under which strategic rape is an unlawful tactic of war.

First, attacks on civilians are never a legitimate military objective under any circumstances (AP I, 1977, article 48) and IHL makes clear that attacking civilians and engaging in acts designed to terrorize the civilian population are per se unlawful tactics of war, regardless of the legality of the weapons used in the attacks (AP I, 1977, Article 51 (2)). The use of these tactics is a grave breach of IHL when conducted willfully and it results in 'death or

serious injury to body or health' (AP I, 1977, Article 85(3) (a)). Strategic rape is an unlawful tactic of war under these prohibitions.

Strategic rape is also an unlawful tactic of war because its use indisputably violates (1) the 'principles of humanity' or (2) the 'dictates of public conscience,' either one of which is sufficient to render a weapon or tactic unlawful under IHL (Meron, 2000). These two baseline standards, referred to as the 'Martens Clause,' were first set forth in the preamble to the 1899 Hague Convention on the Laws and Customs of War. The Martens Clause has stood the test of time and retains its saliency because it was deliberately written in general terms to accommodate 'changing conditions' of warfare, including new weapons and changes in the 'outlook and tolerance levels of the international community' (ICJ, 1996, p. 406). The 1977 Additional Protocols to the Geneva Conventions explicitly affirm the Martens Clause and make clear that in the absence of any other law, both civilians and combatants remain under its legal protection (AP I, 1977, Article 1(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, Preamble; ICJ, 1996, p. 78). The types of evidence used to determine whether a tactic violates the 'dictates of public conscience,' include draft rules, declarations, resolutions and authoritative sources (Ticehurst, 1997). Strategic rape is unlawful because its use violates the dictates of public conscience, as demonstrated by the long list of Security Council resolutions,<sup>2</sup> UN reports (Stop Rape Now, 2013) and governmental declarations (UK, 2013a; UK, 2013b) condemning the use of rape as a weapon or tactic of war.

A third criterion developed mainly to evaluate conventional weapons used against combatants (ICRC, 1973) is whether the weapon or tactic is of a 'nature to cause superfluous injury or unnecessary suffering' (AP I, 1977, article 35; UK, 2004, pp. 101–102). Of course, because the use of all weapons causes human suffering, the prohibition here is whether such suffering is 'unnecessary' and whether the injury is 'superfluous' to achieving legitimate military objectives. For example, the use of bullets is legal in war, but the use of dum dum bullets, which explode in the human body, are prohibited because they cause *superfluous* injury and *unnecessary* suffering (ICRC, 2014, Rule 70). An ordinary bullet would suffice for the legitimate military purpose of disabling or rendering a combatant *hors de combat*. Although adjudging the legality of strategic rape under this criterion is not appropriate (Doswald-Beck, 1997) since strategic rape is unlawful per se, the guides developed to assess the impact and injuries from conventional weapons under this criterion can equally be applied to strategic rape and is key to successfully stigmatizing its use. For example, one of these guides sets forth four criteria, any one of which renders the use of such a weapon unlawful (ICRC, 1997). Strategic rape, as demonstrated in Section 3, fails each

one of these four criteria. Although the primary obligation to determine the legality of weapons or tactics is on states who use or plan to use them, there is normative value impelling such assessments by all states.

### C. Stigmatization under the weapons framework

Conceptualizing strategic rape under the IHL weapons framework has legal consequences for both violator and third-party states, which are examined in section 2D below. Integral to the effectiveness of the weapons framework in changing states' behavior is the use of peer pressure and stigmatization to deter the use of 'unlawful means and methods of warfare,' as illustrated by the efforts to prohibit and deter the use of dum dum bullets, landmines and chemical weapons (Bryden, 2013; Finne-more and Sikkink, 1998, p. 908). As discussed, the weapons framework is designed to be adaptable to changing norms and patterns of warfare. Therefore, the process of determining the legality of a new weapon, or revisiting the legality of an old weapon, depends on developing a global consensus against its use, focusing mainly on its impact on victims and the environment.

Integral to preventing or reducing the chances that a prohibited weapon or tactic will be used is the stigmatization that arises from the very process of determining a weapon or tactic's legality, including by looking at its impact on the human body (ICRC, 1997, p. 28). This is supported by analyses concluding that campaigns to change international regimes, such as the movement to ban landmines, are most successful when they focus on 'norms prohibiting bodily harm' (Finne-more and Sikkink, 1998, pp. 907–908).

For example, the global outrage at the use of mustard gas in the First World War to kill or maim led to a campaign to deter its use that emphasized the horrific impact on individuals of such weapons, as well as the importance of making its use unlawful under IHL. This resulted in the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. The stigmatization attached to the use of such weapons through this process successfully deterred its use in the Second World War (Bryden, 2013, p. 37), which was the first time that a 'major weapon employed in one conflict was not carried forward to be used in a subsequent conflict' (Brown, 1968).

The relationship between actual changes in states' behavior and international norms and laws, such as in deterring the use of unlawful weapons, has been extensively studied under a 'regime theory' framework (Krasner, 1993; Bryden, 2013). The term 'regime' in this context refers to the explicit laws, norms and principles that governments agree govern an issue. For example, there is a global consensus that the IHL weapons framework is the

'regime' that governs states' choices in their 'means and methods of warfare'. It is this consensus that gives a normative push to treat the use of strategic rape under the weapons framework, in particular because studies have shown that '[t]he nexus between de-legitimization and political will is particularly significant in the context of a regime nested within the broader framework of IHL' because '[s]tigmatization provokes effects that extend far beyond declaratory statements' (Bryden, 2013, p. 130).

Despite global condemnation of rape as a tool of war and strong political will to end its use, these efforts have yet to deter the use of strategic rape. Treating strategic rape under the weapons framework would leverage both the existing political will around ending its use in war and the strength of the IHL weapons framework in putting in place effective legal restraints. These normative implications are key to understanding why strategic rape should be considered under the weapons framework, in particular through the impact and injury assessment discussed in Section 3 below.

#### D. The role of states and the IHL weapons framework

The Geneva Conventions were designed to be enforced by actions taken by the state parties themselves, including in response to breaches of the Conventions by other state parties. Common Article 1 of the Geneva Conventions requires states to 'respect' and 'ensure respect' for the Conventions, in all circumstances (ICJ, 1986; Boisson de Chazournes, 2000) and this obligation is considered to be customary international law. Additionally, in response to the use of a prohibited weapon or tactic, such as strategic rape, third-party states have an obligation to 'ensure respect,' including by holding violator states civilly accountable, and individuals criminally accountable. In this context states' obligations are defined as an 'obligation of means,' not of results (Kellenberger, 2008; ICRC, 2004). This means that 'states must take all measures available to them, regardless of the chances of success' (ICRC, 2004). In addition to expanding the weapons framework, AP I also expanded the 'means' available to states through its Article 89, which provides a mechanism for third-party states to act collectively through the UN (AP I, 2007).

The customary laws of state responsibility, which were codified in the International Law Commission's. Articles on the Responsibility of States for Internationally Wrongful Acts, give definition to state obligations under common Article 1. States using strategic rape are under the duty to 'cease the act, if it is continuing' and to offer 'appropriate assurances and guarantees of nonrepetition, if circumstances so require'. Under the laws of state responsibility, the act of a state, whether it is an act, omission, legislation, or a 'specific administrative action,' is an

'internationally wrongful act' if it, in whole or in part, can be (1) attributed to the state and (2) is a violation of an international obligation, such as a treaty. Further, when a state breaches its obligations under the IHL weapons framework, it is said to have committed an 'internationally wrongful act' (UN, 2001) that arises to the level of a breach of a peremptory norm of international law (Sassoli, 2002; Cherif Bassiouni, 1996). Where there is a breach of a peremptory norm, under the laws of state responsibility, it triggers the *erga omnes* obligations of third-party states to take actions in response (ICJ, 2013), to stop the breach and ensure accountability (UN, 2001).

### 3. Strategic rape under the weapons framework

Treating strategic rape, by listing it as unlawful, alongside other weapons and tactics would be norm changing, however to change states' behavior, this would need to be coupled with a process to further stigmatize its use. Key to this process is to examine the distinct harms, injuries, and modes of lethality of strategic rape on people. This scrutiny is not a pre-condition to determining the unlawfulness of strategic rape in war; it is per se unlawful under IHL and customary international law. However, exposing the true impact of strategic rape by examining it under weapons injury criteria would be a step towards stigmatizing and deterring its use. Given the central role of assessments in deterring the use of illegal weapons and tactics, there is a strong normative value for all states to assess strategic rape under the impact and injuries standards used for conventional weapons.

#### A. The distinct characteristics of war rape

The use of strategic rape has never been assessed or systematically monitored and analyzed by states under the weapons framework. Strategic rape is *sui generis*, with distinct characteristics rarely, if ever, seen outside of conflict. The unique and defining features of strategic rape include:

- Rape that deliberately aims to destroy or dominate specific anatomical reproductive and sexual organs and body functions, resulting in traumatic genitourinary injuries rarely, if ever, seen outside of this context.
- Rape committed by multiple perpetrators: in some conflicts up to 90 per cent of the rapes are gang rapes (Hagen and Yohani, 2010).
- The routine use of objects, in addition to or instead of the penis, forced into the vagina or anus, including guns, knives, burning firewood, or broken glass (Mukwege and Nangini, 2009, pp. 1–4; Hagen and Yohani, 2010, p. 15).

- Rape that takes place in public to maximize its terrorizing effect, with family members forced to watch, or even participate in, the rapes (Gingerish and Leaning, 2004).
- Rape that focuses on girls: in some conflicts, up to 80 per cent of rape victims are children, some as young as six months old (Save the Children, 2013; Nichols, 2013). Rape of young girls is often lethal, and those who survive inevitably suffer irreparable damage (Human Rights Watch, 2009; Liebling, Slegh and Ruratotoye, 2012, p. 25).
- Rape that inflicts intergenerational harms including: HIV transmission through childbirth, ostracism of children born from war rape, and destruction of social and ethnic cohesiveness (PATH, 2010; World Health Organization (WHO), 2000, p. 113; Harvard Humanitarian Initiative and Oxfam International, 2010, p. 5).

These distinct characteristics result in death and often untreatable, crippling injuries to girls and women and underscore the need to scrutinize strategic rape under the injury and impact assessment criteria.

## B. Impact and injuries from strategic rape

Although the detailed health-based impact and injuries assessment criteria used to determine the legality of weapons and tactics of war were developed solely based on the model of conventional weapons (ICRC, 1973; ICRC, 2006, p. 19), they are applicable to strategic rape. This section previews what such a state assessment would expose by using two guides developed to assist states with the implementation of their obligation to review weapons and tactics under Article 36 of AP I: the ICRC Guide to the Legal Review of New Weapons, Means and Methods of Warfare ('Article 36 Guide') and the related Superfluous Injury or Unnecessary Suffering (SIrUS) Project, developed specifically to assess whether the use of a weapon causes 'superfluous injury' or 'unnecessary suffering' (ICRC, 2006; ICRC, 1997).

### Lethality

The lethality of a weapon or tactic is a critical focal point of impact and injury assessments under the weapons framework (ICRC, 1997, p. 23). However, strategic rape is not considered 'lethal' or a cause of direct death by those who collect data on the numbers of battlefield deaths or war casualties and the global indices on armed conflict only count deaths or injuries to combatants and civilians from conventional weapons (UCDP, 2014). Further, there is no monitoring of the number of women 'raped to death' on the battlefield, despite the fact that women are routinely killed as a part of strategic rape (Ormhaug, 2009). Nor is there data on the number of

delayed deaths caused directly by war rape including from infection, hemorrhaging, HIV or other infections, destruction of organs, high-risk pregnancy or childbearing or suicide.

For example, in the 1994 Rwandan genocide, out of the estimated 337,120 Tutsi women who were raped, over 75 per cent or about 277,120, were killed during or as part of the rapes (Bijveld et al., 2009; Verpoorten, 2005). This far exceeds the 25 per cent field mortality rate that is considered the baseline for rendering a weapon prohibited because it causes 'unnecessary suffering' or 'superfluous injury' (ICRC, 1997, p. 24). Despite this, deaths from sexual violence in armed conflict are routinely categorized as 'nonviolent' and 'indirect' (Geneva Declaration, 2008).

Pregnancy is a foreseeable, and oftentimes intended, direct consequence of strategic rape, which can increase a woman's risk of death. Pregnancy from rape, in particular where safe abortion services are not available, can result in death from unsafe abortion, suicide and risky childbearing (Hagen and Yohani, 2010). This is compounded by the fact that girls and women impregnated by strategic rape face additional risks to their lives from other brutal injuries from the rape, including fistulas and infection with HIV. Further, the population of impregnated war rape victims is often young girls and those 'under 15 are five times more likely to die, compared with women aged 20 and older' (Save the Children, 2013). Deaths from pregnancy that result from rape are considered to be 'indirect' deaths and are most often counted as a part of statistics on maternal mortality.

### Targeting a specific anatomical part or body function

Critical to the legality of a weapon or tactic is whether it targets 'specific biochemical, physiological or anatomical features or . . . vital organs or functions,' (ICRC, 1997; Dosswald-Beck, 2003) which is considered particularly abhorrent under weapons evaluations (ICRC, 1997). Such weapons which are unlawful per se include blinding lasers that target the eyes, or chemical or biological weapons that target specific bodily functions (ICRC, 1997, p. 27). Applying this criterion to strategic rape is simple: the very *raison d'être* of strategic rape is to aim to destroy or dominate the sexual and reproductive organs and functioning of girls and women (Hagen and Yohani, 2010).

### Specific and permanent disability or specific disfigurement

The vast majority of girls and women surviving strategic rape suffer terrible injuries that require multiple 'difficult and painstaking' surgeries (Longombe, Claude and Ruminjo, 2008) best performed in specialized facilities (Mukw-

ege and Nangini, 2009). This renders strategic rape unlawful under the assessment criteria examining whether a weapon or tactic 'foreseeably' causes injuries that require 'multiple operations,' such as 'multiple reconstructive operations in a specialized facility' (ICRC, 1997).

Further, girls and women surviving strategic rape routinely incur severe genitourinary trauma from war rape, which results in 'specific and permanent disability and specific disfigurement' (Liebling-Kalifani et al., 2011) including:

- **Fistulas:** 'Traumatic gynecologic fistulas' result from the extraordinary force of strategic rape, which includes rape with objects and gang rape. This results in the detachment of the uterus and/or the vagina from the walls of the abdomen causing 'uncontrollable leakage of urine or feces or both through the vagina' (Longombe, Claude and Ruminjo, 2008, p. 133). One study in the DRC found that 702 out of 4,715 women and girls surviving war rape had life-altering genital fistulas, which not only leave the victim in constant distress and pain, but also further ostracize them from their communities and families (Longombe, Claude and Ruminjo, 2008, p. 133). Even where access to reconstructive surgery exists, women have to suffer for three months or more until inflammation is reduced and surgery is possible (Sachdev et al., 2009, p. 10). For some women, the fistulas cannot be repaired and for others, reconstruction efforts can take years and multiple surgeries (Longombe, Claude and Ruminjo, 2008, pp. 134, 137): 'Some women – especially those who have had foreign objects forcibly inserted into their vagina and/or rectum – are unable to heal even after repeated surgery, and are left permanently scarred' (Pinel and Bosire, 2007, p. 18).
- **Mutilation:** Mutilation is a defining characteristic of strategic rape in some armed conflicts, particularly when rape is intended to kill (Gingerish and Leaning, 2004, p. 27). One report on the Rwandan genocide described how '[s]exual mutilations included the pouring of boiling water into the vagina; the opening of the womb to cut out an unborn child before killing the mother; cutting off breasts; slashing the pelvic area; and the mutilation of vaginas' (Human Rights Watch, 1996, p. 37).
- **Sterility:** Examining the effects of a weapon or tactic on fertility and the potential for sterility is central to impact and injury assessments. Sterility is a foreseeable consequence of strategic rape due to both the types of injuries inflicted, including sexually transmitted diseases (Liebling-Kalifani et al., 2011, p. 10), and because it can be an intended outcome. As reported by a doctor treating war rape survivors in the DRC '[t]o render the woman sterile, the rapists complete the brutality by firing a bullet into the vagina or shredding

the vaginal walls using a rifle butt or tree branch' (Smith, 2010).

The near invisibility of the extraordinary genitourinary injuries to girls and women from war rape, which are a matter of course in some conflicts, stands in sharp contrast to the attention paid to genitourinary injuries to male combatants (Giannou, Baldan and Molde, 2013, pp. 501–506, 557, 567; Hudak and Hakim, 2009; Jezior, 2012). For example, the recent rise in such injuries during the conflicts in Iraq and Afghanistan, from an expected 5 per cent of all injuries to about 12 per cent (Dismounted Complex Blast Injury Task Force, 2011, p. 16), led to calls for a US congressional task force (US 113th Congress, 2013), amending of US soldiers' insurance plans to include payment for loss of testicles or other reproductive organs (US Department of Veteran Affairs, 2011), the development of new medical treatments, including sperm retrieval technology (American Fertility Association, 2012), and the rapid development (Lopez, 2012) and distribution of 'combat codpieces' to British and American soldiers (Schwartz, 2012; Wyatt, 2010).

#### Long-term or permanent alteration of the victim's psychology or physiology

Girls and women surviving war rape will suffer from 'long term or permanent alteration' to their 'psychology or physiology' (ICRC, 2006, p. 19). Permanently altered physiology outcomes include HIV, Hepatitis C and other infections (Shanks and Schull, 2000, p. 1153), sexual and reproductive dysfunction (Lončar et al., 2006, pp. 73, 74), and outcomes from forced pregnancy including uterine ruptures (Liebling, Sleggh and Ruratotoye, 2012, p. 25) and hypertension. Further, war rape survivors frequently suffer long term, mostly permanently altered mental functioning including depression and post-traumatic stress disorder (Tol et al., 2013, p. 2). A study conducted of the long-term psychological consequences of rape in the conflict in the former Yugoslavia found that women continued to suffer from sexual dysfunction, social phobia and anxiety disorders (Lončar et al., 2006, p. 73). For those women forced to bear the child of their rapist, the trauma not only continues indefinitely but is also exacerbated (J. Trenholm, unpublished data).

The consequences of war rape are frequently intergenerational, extending beyond the direct victim. As described earlier, one distinct characteristic of strategic rape is its public nature, often committed before family members (Gingerish and Leaning, 2004, p. 15). The traumatic impact on children who have watched their mother or sister being raped is incalculable. Further, researchers have found that the impact of war trauma on a mother's mental health has a 'significant effect' on her child's mental health, including the existence of anxi-

ety or post-traumatic stress disorder, even where the child was not necessarily directly exposed to 'war stressors' (Smith et al., 2001, pp. 398, 402). As for children born from war rape, they suffer dire consequences including possible HIV transmission through being born to mothers infected by HIV from rape (PATH, 2010), ostracism from community (WHO, 2000, p. 113), and diminished educational and social opportunities (Josse, 2010, p. 194).

### Full restoration of the physical and mental health of the victim

Crosscutting all assessments of injuries from various weapons or tactics is an overarching determination of whether foreseeable injuries are treatable. This assessment of the 'treatability' of expected injuries to survivors of strategic rape is critical for stigmatization. It is agreed that many of the predictable injuries from war rape are irreparable, including: psychological damage; sexual dysfunction; loss of reproductive function (sterility); mutilation resulting in disfigurement; infection with HIV and Hepatitis C; forced pregnancy; and certain traumatic fistulas. By contrast, an analysis of over 26,000 weapons injuries found that in the great majority of cases conventional weapons – where they do not kill the victim – cause wounds that are not 'severe' and that are treatable by current medical protocols (Coupland, 1999).

Further impeding the full restoration of health is the fact that military surgical manuals, such as the NATO war surgery handbook, as well as guides for establishing hospitals in combat zones are limited in scope to treating injuries from conventional weapons and ignore the existence of strategic rape, much less provide for treatment options (US Department of Defense, 2011; Hayward-Karlsson et al., 1998; Giannou and Baldan, 2009; Giannou, Baldan and Molde, 2013). This not only impedes the care given to women, but runs counter to the prohibition of discrimination in IHL that mandates that although the medical treatment for female victims of rape may be different from that of male victims of rape, under IHL, 'the outcome for each gender' must be the same.

## 4. The practical benefits of treating strategic rape like all other unlawful weapons or tactics

This article has argued that a new step towards ending the use of rape in war against women and girls is for states to affirm that strategic rape is an unlawful tactic under IHL and to seek to stigmatize its use to ensure that the legal restrictions truly change the behavior of parties to conflict. It is accepted that such stigmatization 'will contribute to accelerating its marginalization as an

instrument of policy or defense' of unlawful tactics and weapons of war (Article 36, 2013a).

The most effective way to further stigmatize strategic rape is to expose publicly its impact and injuries to women under the criteria designed to implement the weapons framework. Applying the weapons framework to strategic rape will help change the focus from it being considered as the acts of errant commanders or soldiers to holding rape-using states responsible for unlawful tactics of war used in their territory. In addition, treating strategic rape as an unlawful tactic under the IHL weapons framework could result in real and practical benefits for war victims.

### A. Saving lives and restoring health

Deterring the use of strategic rape will save the lives of girls and women.

Rape used as an instrument of war has claimed the lives of hundreds of thousands of victims, either by killing victims outright or by making the lives of surviving girls and women intolerable, painful and shorter. Women continue to die despite ongoing global efforts, including a limited number of criminal prosecutions by tribunals for the former Yugoslavia, Rwanda, Iraq and Sierra Leone, and the ICC taking an additional approach to those already being prosecuted, treating strategic rape as an unlawful tactic under IHL; has great potential to change this paradigm.

Additionally, crucial to saving the lives of war victims is the fact that weapons and tactics being used in armed conflict are constantly assessed for the lethality and severity of the injuries they cause, both for determining whether their legality should be reviewed and for updating and improving relevant medical protocols. Examining the injuries of strategic rape and including them in the medical protocols for war zones, as is done with other weapons, would lead to enhanced knowledge and preparation among medical providers in military and other field hospitals to treat the complex genitourinary injuries of female survivors of strategic rape.

Surgical manuals for the war wounded rarely, if ever, mention injuries to girls and women from war rape and when they do, they reflect an underlying bias against women. For example, one leading two-volume manual on 'war surgery' contains a short chapter on 'war wounds in pregnant women,' which focuses on pregnant women who are injured by conventional weapons (Giannou, Baldan and Molde, 2013, p. 525). This manual reminds doctors treating pregnant war rape victims that they have two patients to consider, the woman rape survivor and the fetus, and further notes that 'survival of the mother has priority [over survival of the foetus] because... [the mother] may have other dependent children and, of course, the potential for future pregnancies' (Giannou,

Baldan and Molde, 2013, p. 526). In the entire 998 page manual, the word 'rape' only appears twice (Giannou and Baldan, 2009, p. 97; Giannou, Baldan and Molde, 2013, p. 526) including a fleeting acknowledgment that 'projectile and blast trauma are not the only dangers' faced by women, another being 'rape [used] as a method of warfare' (Giannou, Baldan and Molde, 2013, p. 526). The heinous injuries to girls and women inflicted by war rape – and relevant medical treatment protocols – are never discussed in the manual.

Treating strategic rape as a tactic of war would help save women's lives, make clear that injuries from strategic rape are 'war wounds,' and that foreseeable injuries, including pregnancy, must be treated with the same professional care, treatment advances, and restorative health goals accorded to injuries from conventional weapons.

### B. Expanding victims' access to justice

Treating strategic rape as a prohibited weapon or tactic expands accountability options, both civil and criminal. First, with respect to individual criminal accountability, the use of an unlawful weapon or tactic is a separate and additional war crime to any that might arise out of the same act. For example, a perpetrator who deliberately shoots and kills a civilian in war using a dum dum bullet is accountable both for the war crime of murder as well as the war crime of using an unlawful weapon. While there is limited precedent for prosecuting the use of a prohibited weapon or tactic of warfare, such as the Martić case at the International Criminal Tribunal for the former Yugoslavia (ICTY) (ICTY, 1996, p. 71), prosecution for the use of illegal weapons or tactics as war crimes is a developing area of international criminal law. For instance, although the Rome Statute includes the use of prohibited weapons or tactics as a war crime, to date, there have been no such prosecutions and the law around the elements of this crime is still being developed (Cryer, 2003).

The prosecution of strategic rape as an illegal tactic of war, in addition to as a war crime arising out of the same act of rape, would help ensure that the full criminality of the act is accounted for. Furthermore, this could also provide opportunities to prosecute commanders who order or sanction strategic rape under theories of direct liability, instead of indirect modes, such as under command responsibility or joint criminal enterprise. While this additional accountability would not be available in all cases of war rape, the recognition of strategic rape as an illegal weapon of war would expand the arsenal of tools available to prosecutors.

Additionally, it is probable that the prosecution of strategic rape as an illegal weapon could lessen the testimonial burdens on survivors, who, under the evidentiary standards of the ICC, must testify to specific details of

their rape(s). The elements of the war crime of using a prohibited weapon or tactic, as opposed to the war crime of rape, focus on intent, rather than on individual acts. The past 20 years have shown that justice for war rape victims has been the exception not the rule, making it all the more important to make available additional avenues for justice to victims of strategic rape.

Second, although war rape is already a crime for which states are civilly accountable to victims under IHL, treating strategic rape as a prohibited weapon would increase the likelihood of reparations and redress for survivors from states, under of the customary laws of state responsibility (Sassoli, 2002, p. 418). Historically both IHL and the laws of state responsibility render the violator state liable for restitution and reparations to the injured state, not to individual victims, under the assumption that states receiving reparations will then turn around and fairly distribute those reparations to individual victims, but this has not proven to be the case. This is changing.

In 2005, the UN General Assembly passed a resolution on the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,' which affirmed and clarified the rights of individual victims of IHL to reparations and restitution and clarified that victims must be able to directly access reparations and that all states should cooperate to provide mechanisms for doing so. A model for doing so is the commission established by the Security Council, with funds seized from Iraq, to provide reparations to Kuwaiti victims of the 1991 Iraqi invasion, including to women raped by Iraqi army soldiers (UN, 1991, p 16–19). For some women, their only chance for reparations may be through such administrative civil processes, as fear and retraumatization prevents them from pursuing reparations from individual perpetrators as part of a criminal process.

### C. Restructured data collection

Data collection is imperative for understanding the impact of conflict and serves as one of the bases for prohibiting weapons (Article 36, 2013b, p. 1). Currently, women who are raped to death as an intended outcome of strategic rape are not even included in 'battle deaths,' which are counted to determine whether a certain situation constitutes an 'armed conflict' to which IHL applies. Deaths caused by sexual violence in conflict are categorized as 'indirect' deaths, contrasted with 'direct' deaths that are defined as those 'caused by war-related injuries and attacks (such as those inflicted by a bullet, bomb, mine, machete, or assault)' (Geneva Declaration, 2008, p. 33). Victims of strategic rape are entitled to be counted as war casualties in order to give them equal and full access to the protections of IHL.

## Conclusions

The failure to treat strategic rape as a 'real' weapon is not surprising given the historic marginalization and invisibility of rape as a 'real' crime and despite two decades of global efforts to end strategic rape, this scourge continues unabated (UN, 2008b, p. 8).

Ensuring that strategic rape is governed by the weapons framework will buttress existing efforts to end its use, including by focusing on the responsibility of states, which undermines the ability of states to deflect responsibility on errant commanders or soldiers and by further stigmatizing its use. Additionally, bringing strategic rape under the weapons framework holds the potential to open up the criminal and civil accountability framework for its use and can help provide rape survivors the same opportunities for justice, reparations, medical treatment and deterrence available to victims of other unlawful weapons or tactics.

## Notes

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- 1 UN, 2000; UN, 2008b; UN, 2009b; UN, 2009c; UN, 2010; UN, 2013c; UN, 2013d.
- 2 UN, 2000; UN, 2008b; UN, 2009b; UN, 2009c; UN, 2010; UN, 2013c; UN 2013d.

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