

## **“War Rape” and its Differentiation from the Rape as a Crime Against Female Sexual Freedom and Sexual Inviolability**

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**Abstract:** Wartime sexual violence is rape or other forms of sexual violence committed by combatants during armed conflicts or war or military occupation often as spoils of war. Rape means violated sexual act committed by a man against a woman. The closer look shows that sometimes, particularly in ethnic or religious conflict, especially if it has the character of genocide that phenomenon has broader motives. However, in contrary with the murders or robberies, rape is the only crime with its unchangeable legal definition have also very different interpretation that depends of the specialties of a particular period of time, culture and morality, legal and social understandings of rape’s character of violation and consequences for a victim. Wartime sexual violence should be distinguished from sexual assaults and rape committed amongst individual victims that usually prohibited by national law. A further confirmation of the fact that rape in international law is part of the military acts of hatred or genocide can be regarded as a formulation that is designed to identify the nature of the offense with the conditions and factors of its commitment that is to the circumstances that made it possible not only to the assault itself but also contributed to the reasons why the appearance of the motive, purpose, creation and implementation of criminal intent. In that study, the researchers tries to differ the rape and the war rape as different sexual offences and explain, why war rape should be included into the international criminal law as war crime or crime against humanity. Also author provide the theory that war rape because of its characteristics is a femicide the type of genocide crimes that committed against the socio-gender groups-women.

**Key words:** War rape, femicide, war crimes, crimes against humanity, international criminal law

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### **INTRODUCTION**

Retrospective analysis of different criminal law resources shows that rape included into that list of crimes that can be characterized as historically stable. During all the legal history, rapes not only were included into almost every legal system but also had the same legal structure. In other words in the past rape, together with murders and robberies has its legal definitive character, regardless of governmental system or law features of a particular state. However, in contrary with the murders or robberies, rape is the only crime with its unchangeable legal definition have also very different interpretation that depends of the specialties of a particular period of time, culture and morality, legal and social understandings of rape’s character of violation and consequences for a victim. In that study, we try to describe the new concept of a rape-so called war rapes and explain why that type of a crime should be counted as totally dangerous crime.

### **MATERIALS AND METHODS**

The study is built on the basis of criminological comparative method and legal comparative method, national and international criminal law analysis, analysis of international criminal cases and data obtained by the author during research work at the University of Macau and University of Australia in 2012-2015 as well as in Law School of Far Eastern Federal University.

### **RESULTS AND DISCUSSION**

**Historical analysis of war rapes: the defining process in international law and practice:** We totally agreed that the main role into differentiation of interpretation of rape plays the concept “woman as a legal subject”. It is obvious that the term of rape is not more than the derivative of legal status and socio-cultural understanding of woman in the society of a particular period. The comparative analyses of all the tendencies of

so-called “gender law” shows that all the changes into the legal status of women were just before the changes into the definition and legal structure of rape. That means the criminal law were determined by the progress in society including evolution of human rights. In addition, we can mention that such determination cannot be found in other types of historically stable crimes.

However, during very long period of time rapes were the part of only national legal systems. Almost until the second part of 20th century rape were the crime that caused by the sexual dissoluteness of a criminal or a victim. International law totally ignored even the possibility to consider as a war crime, even if we had many evidences that mass rapes were the part of wars during all the human history. That does not mean they were never mentioned in the tribunals, there are examples from Nurnberg tribunal when the prosecutors from France and USSR put the mass rapes into the lists of crimes against humanity and proved it (Shkurkin *et al.*, 2015). But, we should also count that the problem of mass war rapes as a common war crimes were never raised until the feminists’ wave in law and practice started.

Thanks to that the classification of rapes was distinguished into the international legal science. According to the analysis of legal and scientific resources, we can highlight three big groups of rapes:

- Acquaintance rape (Gunton, 2009; Raphael, 2013) this term is used when the rape committed by a criminal who is familiar with a victim and the rate of intimacy between them are very important, including family relations, reiterations of a rape and so on
- Stranger rape Bonnycastle (2012) when the rape is committed by a man, not familiar to a victim, by stranger (for example, serial rapists usually in this category)
- War rape, rape as genocide Rittner and Roth (2012) this term came from the international law and it used to describe rapes committed during wars as a part of war crimes, crimes against humanity, terrorism

But in this way rape were described only after establishing the Tribunal of former Yugoslavia. Earlier for example, Tokyo Tribunal took into account only mass rapes committed against women in China. In addition, these rapes were qualified in two different ways: in most cases, they were classified as war crimes committed in the occupied territories, not as the crimes against humanity Tuba. Exclusions here were only some mass rapes like those committed during Nanking massacre in 1937. The reason of such difference is not clear for. So in fact, before force actions in Rwanda and on the territories of former

Yugoslavia and before establishing ad hoc tribunals, war rapes were never really classified as a separate form of international crimes against women. After that the unified definition were established into the Elements of Crime of International Criminal Court. According to it the rape is the action committed when “the perpetrator invaded the body of a person by conduct resulting in penetration, however slight of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body” committed “by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent”.

For the recognition of rape as a mass war crime it requires that the act is committed as part of a widespread and systematic attack on the civilian population and the perpetrator knew that his act is covered by the general intent to commit attacks against the entire population and it was not a single case of a crime caused by sexual arousal. From this we can conclude that all the mass rapes committed by the Japanese armed, by the Nurnberg Tribunal and committed by the Nazis, genocide rapes in Rwanda and mass war rapes in former Yugoslavia all this crimes fully correspond to the concept, given by the International Criminal Court.

**War rapes now a days: characteristics of crime:** The definition, given by the International Criminal Court is very different from the usual definition established in national legal systems for example in Criminal Code of the Russian Federation. First, we see that the legislator refused to use the classical term of the rape that means the vaginal penetration of a woman committed by a man, what is historically more common meaning in national laws. In our opinion, this difference caused because in national laws the rape is the sexual abuse the reason of which is caused by sexual arousal of the criminal and aimed at the violation of the rights of sexual freedom and sexual inviolability of the one concrete woman. The mechanism of intent of the rape differs significantly from the rape which becomes the part of the mass aggression against a group of females or an entire female population of the particular territory.

So in the case of war rape, we can conclude that its criminal intent is a mix of sexual abuse intent and “hate crime” Streissguth (2009) intent, what is directly reflected both on the process of committing and on the mass of crimes. In a number of sources as in the writings of

feminist scholars Chesler and in the works of scientists specializing in war crimes and international criminal law) Frey (2011), Eriksson (2011) and Hasyim (2015), it has repeatedly noted that the commission of crimes of a genocidal nature against a social group, crime against women in this group will always be accompanied by rapes.

As an example, we can use the materials of Akayesu case, accused of involvement in the genocide of Tutsis in Rwanda. The ad hoc Tribunal concluded that John-Paul Akayesu was guilty in organizing and committing crimes against humanity, including mass rapes and the Tribunal decided that these rapes were committed in relation to individual woman and in relation to female groups, with objects, including steel arms and expressed in the form of systematic sexual exploitation and committed torture as well as were committed against groups of persons, selected by the nationality and gender. Moreover, in the Tribunal's texts there are indications that women's appearance and age as well as their national origin, exerted an undeniable influence on violence, systematics of rapes and rapes duration. In addition, there are no any mentions about male rapes and sexual exploitation in the materials about the genocide in Rwanda. So, we can conclude that in the Akayesu case was technically, described the crime that we can call a femicide-genocide against women.

However, we can see the first refuse of using the term "sexual act" or "sexual abuse" describing the rape, what is usually happens into the national laws but the use of term "invasion". That means international practice recognized the fact that mass war rapes have the similar nature as other war crimes what means they not only violate the right to sexual integrity and sexual freedom of the individual. They committed to express the hate against a social mass rapes of women.

Also the term "invasion in victim's body" reflects the mechanism of the rape, when sexual intercourse takes place not only by penetrating the genitals of the victim but also means penetration into the wounds on the body of the victim that can be previously deposited for this purpose. About the prevalence of this method of committing rape we can conclude by the frequency of its mention in case materials, not only in materials from Rwanda and Yugoslavia but also in a long-standing sources for example, description of this crime can be found in the documents relating to the Nanjing Massacre committed by the Japanese military against the population of Nanjing in 1937. According to the data, among more than half of a million of victims there were about 20,000 or

80,000 raped females of all ages, including raped with extreme cruelty, including-raped as described above and murdered after that.

A further confirmation of the fact that rape in international law is part of the military acts of hatred or genocide can be regarded as a formulation that is designed to identify the nature of the offense with the conditions and factors of its commitment that is to the circumstances that made it possible not only to the assault itself but also contributed to the reasons why the appearance of the motive, purpose, creation and implementation of criminal intent. It is about war actions, military aggression was massive attacks on civil population, terrorism, etc.

It is very important to note that all circumstances of war rape is an act of approval power over occupied female population and for our opinion that should be the main reason why now rape became equated to crimes such as torture DeRuiter and practitioners. The analysis of cases in which rape has qualified as war crime, approves that these kind of abuse committed only against women of the occupied or subordinated territories or against women from the ethnic, religious, cultural or any social group that subjected to genocide and these rapes are systematic. It looks like all these female victims perceived as enemies who should be subjected to further humiliation and torture because of their gender and additional social characteristics. Usually, the age or appearance does not play a big role; the victim can only be selected based on her ethnicity and her gender.

We can confirm this conclusion with one more fact: in the case of the capture of female military and male military, females, in addition to torture, usually raped with cruelty and repeatedly. The researchers describe examples when perpetrators pointed out that rapes were committed to cause the greatest moral and bodily damages for the humiliation of "the enemy" women. This surely is a kind of torture and not just sexual offense. The same is the purpose of sexual exploitation of women in the occupied territories: the approval power over the group of people.

## **CONCLUSION**

Researchers concluded that war rape has serious differences from rape which is punishable under national law. However, studies show that the war crime rape is a historically stable crime that systematically committed against the females as an act of torture for the approval authority over the occupied territory with the aim of causing more damage and because of religious or cultural

differences, what has taken place as a cause of military actions for example in Bangladesh in the mass rape of women in the country by Pakistani soldiers.

The main difference of war rape is that it is always approved by decisions of top military officers or has ideological overtones or religious justification. The most recent example of this is the actions of the members of the terrorist organization ISIS. Since this organization, in its essence, its members do not just commit sexual violence against captivated people but approve and justify governmentally mass rapes that perpetrated against women on the occupied territories. For example, the witnesses from the Yazidi people said that the first terrorists did when they occupied the new place was they raped captivated women of any age Shubert, Naik. Moreover, in summer 2015 ISIS codified sex slavery in conquered regions of Iraq and Syria: they published a manual book about religious rules of sex slavery and rapes of women Callimach. Factually, we see how the femicide is taken place and the mass war crimes are committed against the victims of particular gender.

The high social damage of this kind of rape allows us to conclude that this crime should be considered as an act of hate committed against group of particular gender. It is committed systematically aimed at causing mental and physical suffering and not directly related to the satisfaction of sexual arousal of the offender. Moreover, the latter motive is largely incidental, rather than primary.

Equating rape to torture and evaluating its social consequences as a torture in our opinion is a faithful and requires further improvement of international law that should be implemented in this field. The recognition of rape as a type of war crimes would eliminate the legal policy of withdrawal of these acts from the list of international crimes still existing for today.

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