



## FORFENDING RAPE – THE QUAGMIRE OF CRIMES COMMITTED BY THE MILITARY AGAINST WOMEN

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**Abstract:** In today's society, where the segmentation between the civilian and the military is clouded and often attempts of securing our own territory by the officials lead to sexual harassment of women in those areas, there arises a question of a lack of accountability from the part of the government. It is often perceived under the umbrella notion which considers rape as the most common crime against women and does not take into cogitation in particular, the torture and sexual exploitation suffered by women due to army men.

In this light, the paper seeks to analyse the vivid responses of the Indian judiciary with regard to the deterrence of rape committed by army officials in particular. The paper attempts to glance at the disturbing picture of whether the various criminal justice amendments and policies have been able to safeguard the justice in the society. Through this research paper, pivotal issues like the failure to establish a concurrent jurisprudence in accordance with the looming vehemence of crimes and the discrepancies in the existing legal regime have been explored. At last, the paper suggests recommendations and remedial measures to ameliorate the conflicts and tensions with regard to the exploitations faced by women. The paper has relied upon secondary research methodology. The study has been made by construing books, laws, bare statutes, journals, articles, websites etc. The noteworthy phenomenon of gender discrimination being increased by the propounded rules rather than bringing the violence and sexual offences to a complete full-stop is highly debated.

**Index Terms:** Impunity, Combat Tool, Wartime

—*Sexual violence in conflict needs to be treated as the war crime that it is; it can no longer be treated as an unfortunate collateral damage of war.*<sup>1</sup> — UN Special Representative on Sexual Violence in Conflict,  
Ms. Zainab Hawa Bangura

<sup>1</sup> Background Information on Sexual Violence used as a Tool of War, Outreach Programme on the Rwanda genocide and the United Nations, (Feb. 11, 2021), <http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml>.

## 1. INTRODUCTION

The logical comprehension of the term human violence is amongst the most pressing tasks of our time. In spite of the fact that violence has become a thing of common parlance, it is appalling how little is known about this topic. There appears to be no consensus among philosophers, scholars, academicians etc. with respect to a uniform definition of the concept violence. The primary reason could be that violence is understood differently by different people, communities and countries; what may be considered as form of violence by one set of people might not be the form of violence for the other. The traditional way of defining violence is that it is the excess use of force as prohibited by law. The conventional approach includes within its ambit only physical violence or physical attack but there is much more to the concept of violence. World Health Organization (WHO) defines violence as "*the intentional use of force and power either threatened or actually perpetuated against oneself or another person, or against a group or a community, which may result in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation.*"<sup>2</sup>

The women have been subjected to innumerable forms of violence by their patriarchal counterparts from time immemorial - from Draupadi to Joan of Arc each fell prey to the whims and fancies of patriarchal society. The issue of violence against women is all pervading, crossing all borders and boundaries. The quagmire of crimes inflicted on women is neither culture nor region specific. They are uniformly distributed in every society. Even in twenty first century the status of women is not so elevated. She continues to occupy the lower position in society which makes her vulnerable and susceptible to being threatened, traumatized and brutalised. This perception of fear among women is not region specific but is universal. Violence against women happens in both developed as well as traditional developing countries, but the degree and scale of intensity of violence vary. The voices of women are often silenced and society lays down rules for her. Women have always been seen through the lens of vulnerability, required to live a life of dependency, both emotionally as well as financially throughout her life time. The study conducted by United Nations reveal that 1 in 3 women have been physically or sexually assaulted at some point in their lives.<sup>3</sup> Various forms of violence committed against women are rape, domestic violence, sexual harassment, female infanticide, prenatal sex selection etc. Certain harmful customary or traditional practices such as honour killings, dowry deaths, female genital mutilation and forced marriage still continue to plague the Indian milieu. Sometimes the state is the perpetrator of violence - war rape, other forms of sexual violence such as sexual slavery during conflict, forced sterilization, forced abortions, violence by the police and authoritative personnel. —According to World Bank data women who are in the age bracket of 15-44 years are more at risk from rape and domestic violence than from cancer, car accidents, war and malaria."<sup>4</sup> According to National Crime Records bureau (2015 data) there has been an increasing trend in the incidences of rape from the year 2011- 2014.<sup>5</sup> The total number of rape cases reported under section 376 IPC during 2014 was 36,735.<sup>6</sup>

## 2. RAPE

Rape is derived from the Latin word —*rapio*” meaning to seize. Rape is —ravishment of a women without her consent, by force, fear, or fraud or the carnal knowledge of a women by force against her will<sup>5</sup> According to section 375 of IPC man is said to commit —rape upon a women if he has intercourse with a women against her will, without her consent, obtaining consent under coercion, fraud or under intoxication or if women is of unsound mind that she is unable to understand the consequence of act or if she is under eighteen years of age.<sup>6</sup>The Criminal Law (Amendment) Act, 2013 amended Indian Penal Code 1860, Indian Evidence

<sup>2</sup> Violence, World Health Organization, (Feb. 11, 2021) <http://www.who.int/topics/violence/en/>.

<sup>3</sup> Prison Statistics India 2020, (Feb. 11, 2021), <https://ncrb.gov.in/table-and-chapter-contents-of-psi-reports>

<sup>4</sup> Eliminating violence against women – it's everyone's responsibility, (Feb. 11, 2021), <https://unwomen.org.au/our-work/focus-areas/eliminating-violence-against-women/>. <sup>5</sup> STATISTICAL SECTION, Chapter -5 crime against women, (Feb. 12, 2021),

<http://ncrb.nic.in/StatPublications/CII/CII2014/chapters/Chapter%205.pdf>. <sup>6</sup> *Ibid*.

<sup>5</sup> Nelson's Pakistan Penal Code, 7<sup>th</sup> Edn., 91983) Vol. 2, p. 2014.

<sup>6</sup> PEN. CODE. § 375

Act 1872 and Code of Criminal Procedure 1973 on laws related to sexual offence aftermath of Nirbhaya gang rape case. The major drawback of earlier definition was that it considered rape to be only forcible penile/vaginal penetration. After amendment in addition to above components following acts will also amount to rape -

- If a man inserts his penis into the vagina, mouth, urethra or anus of a woman or makes any other person do it.
- Inserts any object or a part of the body other than penis into the vagina, the urethra or anus of a woman or makes any other person do it.
- Applying mouth to the vagina, anus and urethra of a woman.

The menace of rape is not only assault against individual but it is a grave human rights violation. It rescinds the entire psychology and mental status of a woman and pushes her into deep emotional crisis. The act of rape upon women creates a hopeless dent in her right and free will and personal sovereignty. It is against the spirit of Article 21 of the Constitution.

### 3. RAPE AS ORCHESTRATED COMBAT TOOL

*“To begin on a lighter note renowned primatologist Dame Jane Goodall says that when chimpanzees attack rival groups they will always fiercely attack the females.”*

The use of rape as a potent tool during wars is not a modern warfare concept but has been in practice since time immemorial. The captured women and children were often treated as spoils of war. Ancient Greeks and Romans would rape and enslave the women of the city they conquered. The classic example of former fact is the Greek epic poem *Iliad* written by Homer which begins with a situation in which there is argument between King Agamemnon and warrior Achilles over possession of captured women seized during the Trojan War. Sati though considered as an abhorrent practice among Hindus was started to forestall women to become sex slaves of Muslim invaders. The practice of raping the women of conquered group has been endemic in many world conflicts and political aggressions and is an under reported war crime. The history is replete with instances of this heinous crimes committed against women viz., World War II, American Civil War, Vietnam War etc. to name a few. The genocidal rape and other forms of violations against women are perhaps the most upsetting because they continue to occur even today viz. genocidal rape in Bosnia-Herzegovina, Croatia, and Rwanda. The major victims of armed conflict are civilians especially women and children than soldiers.

Women specifically confront most decimating outcomes in the form of sexual violence which is organized systematically and efficiently to accomplish military or political objects. Women are viewed as soft and vulnerable target. Rape is committed during war to undermine the targeted populace, break up families, destroy and destabilise communities, change the ethnic make-up of the next generation, sow terror, threaten the target group so as to suppress revolt, weaken the resistance etc. During the time of war, rape is used as an instrument of subjugation to induce fear- which can be used by soldiers to manipulate the decisions of the subordinate community. Sometimes it is purposefully used to infect women with HIV so as to render them unfit for bearing children. The most sickening form of rape is when women are held as hostages and then repeatedly raped until they become pregnant. They are not allowed to abort the foetus till it becomes too late for women to receive safe abortion. They are then discharged and compelled to bring forth a baby that prompts the dismissal of both women and child by families as well as society. These women may face intense emotional torment, psychological damage, physical injuries, diseases, social ostracism and many other consequences that can devastate their lives. They often abandon the child or even confer suicide as final resort which gives rise to new set of problems. Women captured as prisoners of war are subject to forced prostitution and human trafficking. Every human being has right over his or her body, but rape is gravest form of injustice where right to control one's own body is frequently violated and disregarded. Sexual violation of women by men in power has far reaching consequences as it erodes the fabric of a community

in a way that weapons cannot. The damage caused is devastating as pain is stamped on entire community and family. It provides the attacker with an opportunity to perpetuate as well as strengthen their social control. The State of the World's Children 1996 report takes note of that the breaking down of families in times of war leaves women and young girls susceptible to violence. Almost 80 for every 53 million individuals displaced during wars today are women and children. Whenever male members- fathers, spouses, siblings and children go to war, they leave women and elderly behind to fight for themselves. In Bosnia and Herzegovina, Myanmar and Somalia, displaced person families oftentimes refer to rape or fear of it as major reason to seek asylum.<sup>7</sup>

#### **4. CASES OF WARTIME RAPE**

##### **Kunanposhpora – Kashmir**

On 23 February 1991, personnel of the 4 Rajputana Rifles of the Indian Army cordoned the two villages in north Kashmir's Kupawara area - Kunan and Poshpora during an antiinsurgency operation and gang raped 23 women, while many Human Rights organizations including Human Rights Watch in their reports state that the number of raped women was as high as 100. The Indian Government dismisses the incident as baseless but international human rights organisations have expressed many doubts and raised questions on the manner investigations were carried out. It was sheer travesty of justice as all soldiers were cleared of charges and incident was brushed off as an incident to defame Indian army.

##### **2009 Shopian Rape and Murder Case**

This incident alleges that two women who were sisters - in - law were abducted, raped and murdered by Indian troops at Bongam, Shopian district in the state of Jammu and Kashmir. They went on missing from their orchard on the way home on 29 May 2009 and the next day their bodies were found in stream in battered condition. The allegations were first rejected on the basis that they were drowned but later Forensic Sciences Laboratory (FSL) report confirmed rape on duo.

##### **Thangjam Manorama Devi Rape and Murder Case**

Thangjam Manorama, woman of Manipuri origin was picked up from her home by the Indian paramilitary unit, 17th Assam Rifles on 10<sup>th</sup> July 2004 on accusation of being associated with People's Liberation Army. Her corpse was found next morning in a field with bullet wounds including on her genitalia. Post-mortem revealed that she had been raped and murdered. Almost 13 years have passed since the brutal rape and murder took place that shocked the entire nation and uncovered the manhandle of Armed Forces Special Powers Act in NorthEast India, yet nothing has been done by the Government to bring the culprits behind the bar even after a decade of protest.

##### **Sri Lankan Civil War**

Sri Lankan government had accused Indian Peace Keeping Force of raping women during LTTE war, even though the government deny the excesses committed by the soldiers.

##### **At International level- World war II**

The role Union of Soviet Socialist Republics (USSR) in the defeat of Nazis in Germany in World War II may be glorified by its citizens but there is another side to the story - of mass rapes by Soviet soldiers of German women in the days of war. The troops led by Stalin assaulted innumerable women as they fought their way to the German capital- Berlin. It is ironical that no books mention this.

<sup>7</sup> Sexual violence as a weapon of war, THE STATE OF THE WORLD'S CHILDREN 1996 unicef, (Feb. 12, 2021), <https://www.unicef.org/sowc96pk/sexviol.htm>.

## Rwandan Genocide

The Rwandan genocide was a genocidal mass slaughter of Tutsi population in Rwanda by the members of Hutu majority government. More than 800,000 people were killed during this hundred day period of genocide. The genocide had profound impact on Rwanda as well as on its neighbouring countries as rape was used as persuasive tool. There was an increase in HIV infection cases which spread to unborn including babies as well. In some instances genital mutilation occurred after the rape and vagina of these women were mutilated with machetes, knives, sharpened sticks, boiling water and acid. There was sexual violence against men also and their genitals were mutilated and then displayed as trophies in public.

## Bosnia

*"Women were raped so they could give birth to a Serbian baby."*<sup>8</sup> *Medecins Sans Frontieres report*

During the Bosnian genocide, the conflict assumed a gender-targeted form through the use of rape perpetrated by Bosnian Serb forces. The main motive was ethnic cleansing of Bosnian Muslim ethnic group.

## The Nanking Massacre

The Nanking Massacre was horrific episode of mass murder and rape committed by Japanese troops in the city of Nanjing which was the capital of the Republic of China during the Second Sino-Japanese War (July 7, 1937 – September 9, 1945). John Heinrich Detlev Rabe, a man best known for his efforts to stop the atrocities of the Japanese army during the Nanking Occupation in his comment mentions that —*in one of the houses beyond the garden wall, woman was raped and then stabbed in her neck with a sharp bladed weapon. I somehow managed to get an ambulance to take her to Kulou Hospital ... Last night about 1,000 women and girls are alleged to have been raped and 100 girls at Ginling College alone. One can only hear about rape. If any male member intervened, they were shot. The thing of common sight on all sides is the brutality and bestiality of the Japanese soldiers.*<sup>9</sup>

**And it still continues.....**

## ISIS and Boko Haram

The Islamic State is perpetrating horrific violence against women and girls. ISIS fighters rape women, stone them to death for allegedly —committing adultery. They condemn hundreds of Yazidi women to sexual slavery, forced marriage, kidnapping and rape. The women who have escaped ISIS reveal extreme brutality. They justify their acts in the name of religion sanctioned by references to the Qur'an, which is purely based on their radical interpretations.

Boko Haram is Nigeria based militant Islamic group which is very extreme in its ideologies. The group abducted 276 schoolgirls from Chibok (a town in Nigeria) in April 2014. The motive behind this abduction was to release some of their commanders who had been jailed.

<sup>8</sup> Laura Smith-Spark, How did rape become a weapon of war?, BBC News, (Feb. 13, 2021), <http://news.bbc.co.uk/2/hi/4078677.stm>.

<sup>9</sup> John Rabe et al., The Good Man of Nanking: The Diaries of John Rabe (Erwin Wickert ed., Knopf Doubleday Publishing Group 2000).

## 5. THE IMPUNITY

What is it about the war that seems to give men authorization to rape women? This question continues to baffle the sane persons. If the statistics have to be looked upon, never in the history of mankind have men in uniforms been convicted or punished for rape during conflicts and wars. This compels one to draw a conclusion that the state itself is party to the crime. The body of women is considered to be battle ground to meet various political ends. According to Amnesty International, the use of rape during times of war is pre-planned and deliberate military strategy and is not to be confused with by-product of war. Throughout the history of world failure of rule of law makes it unable to deal with allegations of rape by soldiers.

### Women oriented impunity

Most of times women is stigmatised so as to silence her and accused are left escort free. Many Bosnian women while narrating their incidents reiterated the uniform rhetoric that virginity is considered to be divine and extremely precious. Once it is lost the worth of women is degraded and she does not find the suitable match, remains unmarried throughout her life time or sometimes is married to a man double her age. Married women are rejected by their husbands who are not able to come to the terms that she has been violated. The strictures of a culture that esteems virginity of women indirectly shields and provides impunity to the soldiers because rape continues to be taboo, and its consequences are borne mostly by women only albeit no fault of her own. Following these things she is silenced and perpetrators are able to carry out their rape policy to wipe out other party to the conflict without the fear of being prosecuted.

### Failure of International Community

It is echoed that United Nations failed miserably in both preventing both Rwandan genocide as well as preventing the war in Bosnia and Herzegovina. Neither the sufficient peacekeeping force were deployed in conflicted zones neither the attempts to implement the peace agreements was made. Though there is long list of International treaties on the laws of war which deal with various issues during war time like declaration of war made by warring countries, surrender, laws governing the treatment of prisoners of war, military necessity and its proportionality, prohibition of certain weapons that may cause unnecessary suffering, safe guarding the fundamental rights etc. Various treaties which specifically dealt with women centric issues were:- The Treaty of Amity and Commerce (1785) specifically talked about that women and children should not be molested during wars. Article 20 of the Order No. 20 (1847) which is a supplement to the US Rules and Articles of war made assassination, murder, stabbing or maiming, rape severely punishable. The Declaration of Brussels (1874) stated that the honour and rights of the family has to should be respected. Article 27 of the Fourth Geneva Convention prohibits rapes committed during wars and forced prostitution. Due to hue and cry against grave human rights violations and wide media coverage United Nations formed International Criminal Tribunal for the former Yugoslavia (ICTY) which convicted 161 people for war crimes. The International Criminal Tribunal for Rwanda was also established by the United Nations. Even these treaties could not prevent the atrocities; justice is yet to reach victims of wartime rape. The failure of United Nations is boost for these people to continue their acts with impunity.

### ASPA (Armed Forces Special Power Act)

The unspoken aspect of the impunity also includes meeting the needs of victims who survive the disaster which includes extensive medical care, HIV treatment, psychological support, socio-economic assistance and legal reparation; basically causes lot of pressure on limited resources that post-conflict countries have.

## 6. NEED OF HOUR

What are the steps that can be taken to keep this awful attack on human rights from happening?

For those seeking justice, the obstacles remain immense. As an institution, the army has done little to correct the injustice perpetrated by its soldiers. Not a single member of the army has ever been prosecuted for any human rights violations. Even court-martials are more disciplinary than punitive. Even when court-martial is done the identity of officer is never revealed so it is again the women who suffer so the need of hour is to make changes in current form of court – martial. The another suggestion could be that bring the crimes committed by these soldiers under criminal law of country rather than having separate court – martials. Since most of the survivors don't want to go through with the legal process because of lack of evidence to prove it and also because it is very stressful and traumatic. Only way to overcome this is to remove the stigma surrounding rape, the change in attitude towards rape victims and realisation she is being punished for no fault of hers. The role of International bodies in this regard can be very crucial, by making it sure perpetrators are punished and each victim is awarded with justice and condemn wartime rapes with stricter type of punishment. International bodies as well as domestic laws should work towards rehabilitation of these victims as they are physically and psychologically vulnerable suffering from post-traumatic stress disorder, anxiety, sexually transmitted diseases, diabetes, hypertension, insomnia etc. they should be given health insurance and other free medical facilities.

