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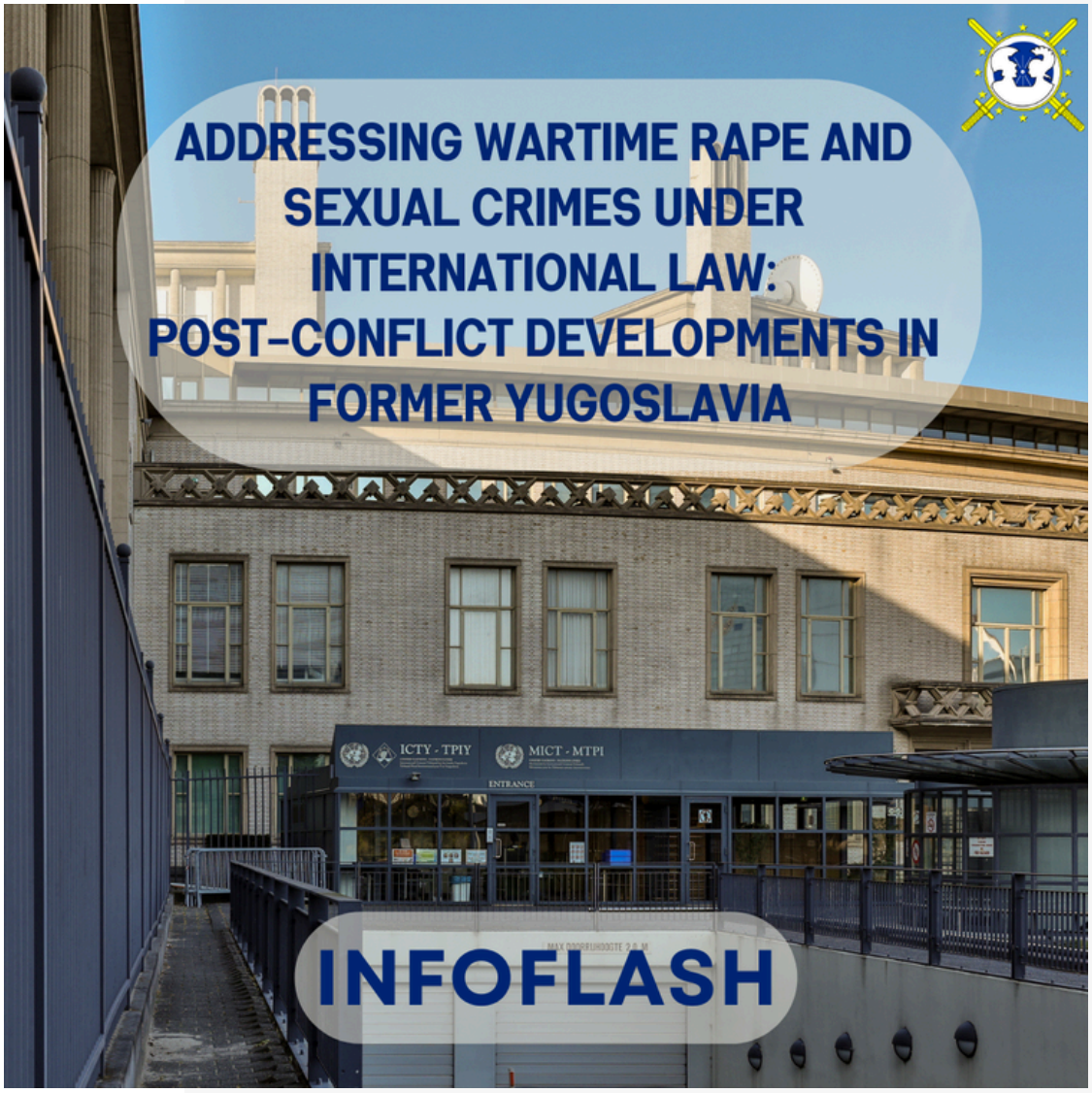

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Introduction

Rape, sexual enslavement and sexual crimes have always been intertwined with warfare throughout history. Nowadays, these atrocities are often labelled as “war weapons” when deployed as tactics in conflicts. This paper seeks to delve into the evolution of international legal frameworks concerning the crimes of rape and sexual violence, culminating with the International Criminal Tribunal for the former Yugoslavia (ICTY) contribution to the rules and jurisprudence, and offers insights into advancing the progress made thus far in addressing these grave violations.

Rape’s association with warfare is as old as war itself, it even consolidated in the common imagery through idyllic myths or legends. A well-known example is the legend of the founding of Rome, which includes the story of the Rape of the Sabine women, immortalised in sculptures and paints over the centuries (Brownmiller, 1993). However, these mythological picturings deviate from a truthful and realistic narrative. Historically, there has been a lack of comprehensive understanding regarding the prevalence and severity of rape during conflicts. This widespread unawerness on the matter has hindered efforts within the international legal community to fully recognise and prosecute rape as a war crime under international law until the 1990s (Dei, 2014).

While instances of rules condemning rape in warfare, such as Article 44 of the Lieber Code of 1863, can be identified throughout history, it was not until the aftermath of the two World Wars that international criminal law began to address the issue more systematically. This paper explores the evolution of rape and sexual violence criminalisation under international law. First it covers the period following the two World Wars, along with the basic approaches of international criminal law on the matter. Second, the analysis focuses on the evolution of the rules and jurisprudence in the aftermath of the Yugoslavian conflicts. The final section draws conclusions and discusses future developments.

The First Steps Towards Rape and Sexual Violence Criminalisation: the Two World Wars

During the two World Wars, rapes and sexual crimes were on the rise, with many reported cases supporting this argument. At the outset of the First World War, the German forces invading Belgium employed rape as a means to humiliate the Belgian populace. Similarly, during the Second World War, rape served as a strategic tool for German and Japanese forces, aimed at humiliating and destroying the minority ethnicities and imposing their own as superior (Brownmiller, 1993). Likewise, when Berlin was falling, the second wave of Red Army soldiers reportedly raped an estimated number of 100.000 German women (Thomas, 2006). Testimonies of rapes perpetrated by soldiers during both World Wars emerged alongside reports of the atrocities unfolding in concentration camps, shocking the whole world and compelling urgent action from the International Community. However, in the aftermath of World War I, the Versailles Treaty failed to establish an international tribunal, and the issue of sexual crimes went largely unaddressed (Dei, 2014). During the post-World War II period, perpetrators of sexual violence remained largely unpunished, with no specific prosecution for those crimes even in the Nuremberg trials, where numerous testimonies reporting rape and sexual violence were documented (Brownmiller, 1993).

Charters, Statutes and Tribunals at Stake

The International Military Tribunal (IMT) was tasked with prosecuting war criminals whose offences had no precise geographical location, according to Article 1 of the IMT's Charter of 1945 (Charter of the International Military Tribunal, 1945, Article 1). Despite Article 1 [c] introducing crimes against humanity, which encompassed sexual crimes under the category "inhumane acts", it notably omitted explicit provisions for prosecuting such crimes (Charter of the International Military Tribunal, 1945, Article 6). At the same time, Article 6 [c] set several requirements for inhumane acts to be considered as a crime against humanity, virtually impinging the formulation of indictments because of their impracticability (Dei, 2014).

At the time, the Nuremberg judiciary decided not to prosecute for sexual crimes, a decision that might have been grounded on two reasons. First, there could have been the perception that, since both sides committed those crimes, prosecuting one side and ignoring the other would have been impracticable and unjust. Second, sexual crimes could have been deemed less severe compared to other atrocities that happened at the time (Dei, 2014). Meanwhile, the International Military Tribunal for the Far East (IMTFE) employed a similar approach, categorising rape under "other inhumane acts" of Article 5 of the IMTFE Charter of 1946, echoing Article 6 of the IMT Statute (Charter of the International Military Tribunal for the Far East, 1946, Article 5).

A crucial normative shift occurred with the introduction of Article 2 [c] of Control Council Law No 10 of 1945, which classified the crime of rape as a crime against humanity. Despite being revolutionary, this was never used in trial indictments and remained fundamentally unimplemented (Poli, 2009). Furthermore, while Article 27 of the Geneva Convention (IV) on the protection of civilians in wartime banned rape, its scope was limited by two factors (Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1945, Article 27). First, the article considered rape as damage to honour, hence focusing on the individual as a member of the group. Second, according to Article 4, its scope of application was limited to "Persons…who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals", thereby excluding certain cases a priori (Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1945, Article 4). Despite subsequent protocols added to the Geneva Conventions, rape was never designated as a "grave breach" under Article 147 of the Geneva Convention (IV) (Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1945, Article 147). In short, notwithstanding the widespread atrocities committed during the two World Wars, the International Community failed to effectively address sexual crimes, resulting in their partial omission from legal scrutiny and accountability (Dei, 2014).

The Coveted Great Leap but at What Price?

Following World War II, the Kingdom of Yugoslavia transitioned into a Federation comprising six republics, namely Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, and two autonomous regions, Kosovo and Vojvodina. The Federation had a complex composition that was marked by intermingling ethnicities across territories and minorities that were strongly defending their ethnicity over their nationality. For instance, numerous Croats in Bosnia and Herzegovina still identified themselves as Croats, while numerous Serbs in Montenegro identified exclusively as Serbs. This demographic composition set the stage for heightened nationalism. The fall of the Berlin Wall in 1989 catalysed centrifugal forces, leading to the dissolution of the Federation, beginning with Slovenia and Croatia and spreading throughout (Bešlin, 2017).

The mixed population within each republic posed challenges during the fragmentation process. Redrawing national boundaries according to single ethnicities was nearly impossible; eventually, minorities in certain regions maintained strong ties to their ethnic identities, fueling dissatisfaction and tensions within the republics (Bešlin, 2017).

Following the declaration of independence of Bosnia Herzegovina, the Serbian minority within the government declared the Serbian Republic of Bosnia Herzegovina in the predominantly Serb-populated areas. The events ignited a brutal conflict characterised not only by atrocities and massacres but also by deportation and expulsions aimed at ethnically homogenising the territories (Bešlin, 2017).

Throughout the conflict, rape and sexual violence were tragically rampant, perpetrated by all parties to the conflict but predominantly by Serbian forces against Muslim and Catholic Croatian population. Acts of sexual violence were not isolated incidents but rather deliberate strategies of war and a policy systemically employed to humiliate and ethnically cleanse targeted communities (McDougall, 1998).

The impact of these atrocities was profound, with an estimated 60,000 women raped in Croatia and Bosnia-Herzegovina between 1991 and 2001 (European Parliament, 2013). Motivated by hate and discrimination, rape served multiple purposes: to degrade the male members of the targeted communities, to dismantle the victim's sense of self systemically, and as a tool of ethnic cleansing (Ruzza, 2014; Brownmiller, 1993). These heinous acts were not merely incidental crimes against individuals *per se* but strategic tactics of war.

Eventually, the great leap for international law regarding this issue occurred in the aftermath of the conflicts in former Yugoslavia. The atrocities committed during the conflicts left the whole world so appalled that it prompted urgent action from the international community. As T. Meron, the former President of the International Criminal Tribunal for the former Yugoslavia, theorised, "calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected, areas of law, process and institutions" (Meron, 1993). The failure of international institutions to address these detrimental practices in previous conflicts may be attributed to the prioritisation of other crimes and events which had more impact on public consciousness at the time.

In 1992, with Resolution 780 the United Nations Security Council (UN SC) requested the Secretary General (SG) to establish a Commission of Experts, pursuant to Resolution 771 of 1992 (UNSC, 1992). The Commission, comprising medical and legal experts, investigated cases of sexual violence and analysed testimonies in the context of the conflicts' dynamics and mechanisms (UN SC, 1994). The resulting report revealed a strong connection between sexual crimes, war crimes, crimes against humanity and genocide, all to be examined in the context of the "Greater Serbia" plan put into place by Serb authorities in Bosnia Herzegovina and Croatia.

In particular, the Commission found that sexual crimes would fall under Article 147, "Grave breaches", and various sources of International Humanitarian Law (IHL), such as the Additional Protocols to the Geneva Conventions and the customary law of "crimes against humanity". The Commission argued that rape and sexual assault constituted torture or inhumane treatment, willfully causing great suffering and serious injury to body or health . Furthermore, the Commission identified five patterns of rapes and sexual assaults emerging from the reported cases: crimes perpetrated to loot or intimidate targeted ethnic groups when fighting, those committed in conjunction with fighting, those carried out in detention, those done to terrorise and humiliate women often as part of the policy of "ethnic cleansing" and those involving the detention of women to sexually entertain soldiers. Last but not least, their report highlighted that men were also victims of sexual crimes (UN SC, 1994). Although sexual crimes were not exclusively perpetrated by Serbians individually or in groups, but also by certain Croatian and Bosnian Government forces, authorities in both cases publicly deplored the acts, refuting any policy of ethnic cleansing (UN SC, 1994).

Shortly after, with Resolution 827 of 1993, the UN SC established the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute individuals who committed serious violations of IHL in the territory of the former Yugoslavia since the beginning of 1991. The ICTY Statute of 1993 delineated the competencies of the Tribunal, with references to the Geneva Conventions, IHL, and customary international law (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993). Article 3 of the Statute, which listed the acts constituting violations of laws and customs of war, played a crucial role in prosecuting sexual crimes (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, Article 3). Indeed, the Geneva Conventions explicitly criminalised these conducts and stated that their interdiction could have been considered a custom under IHL (Dei, 2014). It is important to highlight that, Article 5 of the ICTY Statute explicitly included rape in the list of crimes against humanity (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, Article 5).

In response to the perceived gap in normative basis, the ICTY drafted Rules of Procedure adopted in 1994 that addressed the victims' state during the trials and developed the concept of consent. This allowed the Tribunal to define certain concepts and consider the circumstances of victims during the proceedings. The judges already defined rape in the Furundžija case finding that "the following may be accepted as the objective elements of rape: (i) the sexual penetration of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person." (International Criminal Tribunal for the former Yugoslavia para. 185, 1998).
However, that definition was considered too narrow by the Trial Chamber in the Kunarac case which delineated various pivotal concepts such as violations of sexual autonomy and lack of consent and identified the categories within which sexual crimes such as rape could fall. It then provided a comprehensive definition of the crime of rape under international law, saying that"[...]The actus reus [...] is constituted by: the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. [...]. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim." (International Criminal Tribunal for the former Yugoslavia para. 460, 2001).
The Chamber asserted that rape can be considered a violation of the Geneva Conventions and a violation of law and costumes in warfare or a genocide act (Dei, 2014).

The very last question on this issue from the criminalisation of these crimes under international law is whether rape and sexual violence could be included in jus cogens violations per se, without the need to be connected to other crimes or whether this cannot be considered a feasible option (Bassiouni, 1996). The characterisation of 'jus cogens' violations would imply that the said crimes are subject to universal jurisdiction and would decrease the risk of impunity. For this very reason, such an option could be regarded as highly desirable.

Conclusions

Sexual crimes have walked a tortuous path towards full recognition as war crimes. Notwithstanding the testimonies from the two World Wars, the International Community has long failed to deal with these crimes adequately. The sexual crimes perpetrated in the former Yugoslavia left the whole world appalled and forced the international community to act. Even before the establishment of the Commission of Experts and the ICTY, it was evident that there was a clear need to address and condemn internationally from a legal perspective.

Notably, some of the most crucial changes concerning the evolution of such crimes in international criminal law were brought by the ICTY; indeed, before the establishment of the ICTY and the International Criminal Tribunal for Rwanda, the international legal order still missed a recognised definition of the crime of rape. Eventually, the ICTY and its Statute provided for both normative and jurisprudential sources criminalising rape and sexual acts of violence in warfare. Moreover, the Tribunal asserted that systematic rape as a war tactic was a crime against humanity, second only to genocide. The ICTY Statute and the ICTY jurisprudence paved the way for further developments. The ICC subsequently consolidated the ICTY's work and was able to include rape among crimes against humanity, crimes of war and genocide (Dei, 2014).

Nevertheless, it must be acknowledged that, whilst the current rules and norms are appropriate, the ultimate and most important stage of the process lies in the in-court application, alongside jurisprudence. This approach stands as the most effective way to foster precedence, as a process to strengthen international norms and the increasing recognition of rape as a grave breach of international law.

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