



Rape in War: A Transformative Journey in International Criminal Jurisprudence

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Abstract:

Rape has historically been employed as a strategic instrument of war, aimed at terrorizing populations, undermining social structures, and inflicting long-lasting psychological and communal harm. Despite its grave impact, early understandings of war crimes often neglected, minimized, or misrepresented sexual violence, treating it as an unavoidable by-product of armed conflict rather than a serious international offence. In recent decades, however, international law has undergone a significant transformation, with notable progress in the recognition, definition, and prosecution of rape as a war crime. This development is reflected in the landmark decisions of various international tribunals and criminal courts.

This paper explores the progressive development of jurisprudence relating to rape as a war crime. It traces the historical evolution of war crimes and critically examines the use of rape as a deliberate tactic in armed conflicts. The study further analyzes the legal framework governing rape under key international instruments, along with the interpretations advanced by international tribunals and courts. The central focus of the paper is to assess the advancements made in the prosecution of rape as a war crime, particularly through the contributions of institutions such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

Keywords: Rape, War Crime, International Criminal Law, ICTY, ICTR, ICC

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Introduction

Armed conflicts have historically been marked by extreme violence and systematic violations of human rights, among which sexual violence—particularly rape—has remained one of the most brutal and under-recognized crimes. For centuries, rape was not merely an incidental consequence of war but was often deliberately employed as a strategic tool to terrorize populations, humiliate communities, and dismantle social cohesion. Despite its widespread occurrence and devastating consequences, the legal treatment of rape within the framework of international humanitarian law remained inadequate for a long time, frequently being ignored, trivialized, or relegated to a lesser status compared to other war crimes.

The early development of international law concerning armed conflict, including instruments such as the Hague Conventions and the Geneva Conventions, failed to explicitly and effectively address sexual violence. As a result, rape was often perceived as an inevitable by-product of war rather than a punishable international crime.³ It was only in the latter half of the twentieth century, particularly following the atrocities committed during conflicts in the Balkans and Rwanda, that the international community began to seriously acknowledge rape as a grave breach of international law requiring accountability.

A significant turning point in this regard was the establishment of international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which played a crucial role in recognizing rape as a constituent act of war crimes, crimes against humanity, and even genocide. These tribunals contributed substantially to the development of legal definitions and set important precedents through their jurisprudence. Subsequently, the establishment of the International Criminal Court (ICC) further strengthened the legal framework by explicitly incorporating sexual violence within its jurisdiction under the Rome Statute.⁴

The evolving jurisprudence on rape as a war crime reflects a broader shift in international law from silence and impunity to recognition and accountability. However, despite these advancements, significant challenges persist in terms of prosecution, evidence collection, victim protection, and enforcement of international legal norms.

This paper seeks to critically examine the development of legal principles governing rape as a war crime. It explores the historical context, analyzes key international legal instruments, and evaluates the contributions of international tribunals and courts in shaping contemporary jurisprudence.⁵ Through this analysis, the paper aims to highlight both the progress achieved and the challenges that remain in ensuring justice for victims of sexual violence in armed conflicts.

Literature Review

The issue of rape as a war crime has attracted significant scholarly attention over the past few decades, particularly with the evolution of international criminal law and the establishment of international tribunals. Early literature on the laws of war largely neglected sexual violence, reflecting the broader marginalization of gender-based crimes within international legal discourse. Traditional works on international humanitarian law often treated rape as an incidental or unavoidable consequence of armed conflict rather than as a deliberate strategy of warfare.

Feminist legal scholars were among the first to challenge this neglect, arguing that the exclusion of sexual violence from mainstream legal analysis reflected deeply embedded gender biases in international law. Writers such as Catherine A. MacKinnon emphasized that rape in conflict situations is not merely

³ Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 Harv. Women's L.J. 5 (1994).

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

⁵ Geneva Conventions, Aug. 12, 1949.

an act of individual violence but a systematic tool of domination and control, often used to achieve military and political objectives. Similarly, Kelly Dawn Askin highlighted the historical failure of international law to adequately prosecute sexual violence and advocated for stronger legal recognition and accountability mechanisms.

Subsequent scholarship focused on the transformative role played by international tribunals, particularly the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, in redefining rape as a serious international crime. Legal analyses of landmark cases, such as the *Akayesu* judgment, demonstrated how rape was judicially recognized as an instrument of genocide and a crime against humanity. Scholars have argued that these decisions marked a turning point in international jurisprudence by expanding the legal definitions of sexual violence and establishing precedents for future prosecutions.

Further contributions to the literature examine the role of the International Criminal Court in consolidating these developments through the Rome Statute, which explicitly recognizes rape and other forms of sexual violence as war crimes and crimes against humanity. Researchers have analyzed how the ICC has attempted to build upon earlier jurisprudence while also addressing gaps related to victim protection, witness testimony, and procedural challenges.

In addition, interdisciplinary studies have explored the sociological and psychological dimensions of wartime rape, emphasizing its long-term impact on victims and communities. Scholars have also highlighted the challenges associated with prosecuting such crimes, including issues of underreporting, evidentiary difficulties, stigma, and lack of political will. While the legal framework has significantly evolved, many authors argue that implementation remains inconsistent and that justice for victims is often delayed or denied.⁶

Overall, the existing body of literature reflects a clear shift from the marginalization of rape in armed conflict to its recognition as a grave international crime. However, it also underscores the need for continued efforts to strengthen legal mechanisms, enhance enforcement, and ensure a survivor-centered approach to justice.

The present study adopts a doctrinal and analytical research methodology, primarily based on the examination of secondary sources. The research is qualitative in nature and seeks to analyze the evolving jurisprudence of rape as a war crime within the framework of international law.

The study relies extensively on primary legal sources, including international treaties, conventions, and statutes, particularly the provisions relating to sexual violence under the Geneva Conventions and the Rome Statute. Judicial decisions and case laws from international tribunals, especially the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, have been critically analyzed to understand the development of legal principles and interpretations concerning rape as a war crime.

In addition to primary sources, the research incorporates a comprehensive review of secondary materials, including scholarly articles, books, research papers, and reports published by international organizations. These sources have been used to provide theoretical insights, contextual background, and critical perspectives on the issue.

The methodology further involves a comparative and historical approach, tracing the evolution of legal norms from earlier neglect and marginalization of sexual violence to its current recognition as a serious international crime. The study also evaluates how different tribunals have interpreted and applied legal provisions, thereby contributing to the progressive development of international criminal jurisprudence.⁷

⁶ Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997).

⁷ Catherine A. MacKinnon, *Are Women Human? And Other International Dialogues* (2006).

The research is limited to doctrinal analysis and does not involve empirical data collection. However, it aims to present a comprehensive and critical understanding of the subject by synthesizing legal texts, judicial pronouncements, and academic discourse.

Case Law Analysis: ICTY, ICTR, and ICC

The recognition of rape as a war crime and a serious violation of international law has been significantly shaped by the jurisprudence of international criminal tribunals. The decisions of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and the International Criminal Court have played a transformative role in defining, interpreting, and prosecuting sexual violence in armed conflict.

1. Jurisprudence of ICTR

(a) Prosecutor v. Jean-Paul Akayesu (1998)⁸

One of the most significant judgments in international criminal law, this case marked the first time an international tribunal explicitly recognized rape as an act of genocide.

- The Tribunal held that rape and sexual violence constituted acts committed with the intent to destroy, in whole or in part, a particular group.
- It provided a broad and progressive definition of rape, describing it as a “physical invasion of a sexual nature committed under coercive circumstances.”
- The judgment acknowledged that sexual violence was systematically used during the Rwandan genocide as a tool of destruction.

Significance:

This case set a historic precedent by linking rape not only to war crimes and crimes against humanity but also to genocide.

2. Jurisprudence of ICTY

(a) Prosecutor v. Dragoljub Kunarac et al. (2001)⁹

This case, also known as the “Foca case,” was pivotal in establishing rape and sexual enslavement as crimes against humanity.

- The Tribunal developed a more detailed legal definition of rape based on the absence of consent.
- It recognized systematic sexual enslavement of women in detention centers.
- The judgment emphasized that rape can be used as an instrument of terror and control in armed conflict.

Significance:

The case clarified elements of rape in international law and firmly established sexual enslavement as a prosecutable offence.

⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).

⁹ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment (22 February 2001).

(b) Prosecutor v. Anto Furundžija (1998)¹⁰

- The Tribunal recognized rape as a violation of the laws or customs of war.
- It elaborated on the elements of rape and sexual assault under international law.
- The case also emphasized individual criminal responsibility, including for those aiding and abetting sexual violence.

Significance:

This case contributed to the crystallization of rape as a war crime under customary international law.

3. Jurisprudence of ICC**(a) Prosecutor v. Thomas Lubanga Dyilo (2012)¹¹**

- Although primarily focused on child soldiers, this case highlighted the ICC's approach to gender-based crimes.
- It exposed limitations, as charges relating to sexual violence were not fully pursued despite evidence.

Significance:

The case drew criticism and highlighted gaps in prosecuting sexual violence, emphasizing the need for stronger legal strategies.

(b) Prosecutor v. Jean-Pierre Bemba Gombo (2016)¹²

- The ICC convicted Bemba for crimes including rape committed by troops under his command.
- The Court recognized rape as a war crime and crime against humanity.
- It emphasized the doctrine of **command responsibility**, holding military leaders accountable for failing to prevent or punish crimes.

Significance:

This case marked a major advancement in holding superiors accountable for sexual violence in conflict.

Critical Analysis

The jurisprudence of these tribunals demonstrates a clear evolution in the legal understanding of rape in armed conflict:

- The ICTR expanded the scope by recognizing rape as an act of genocide.
- The ICTY refined legal definitions and established rape as a crime against humanity and war crime.

¹⁰ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (10 December 1998).

¹¹ *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment (21 March 2016).

¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment (14 March 2012).

- The ICC institutionalized these developments within a permanent legal framework and expanded accountability through doctrines like command responsibility.

However, challenges remain, including under-prosecution, evidentiary barriers, and inconsistent application of legal standards. Despite these limitations, the contribution of these tribunals has been instrumental in transforming rape from a neglected issue into a central concern of international criminal law.

Conclusion and Suggestions:

The evolution of international criminal jurisprudence has marked a significant shift in the legal recognition of rape as a war crime. Historically marginalized and often dismissed as an inevitable consequence of armed conflict, rape is now firmly established as a serious violation of international humanitarian law, constituting not only a war crime but also a crime against humanity and, in certain circumstances, an act of genocide. The jurisprudence developed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda has been instrumental in shaping this transformation by expanding legal definitions, recognizing the systematic nature of sexual violence, and ensuring accountability for perpetrators. The establishment of the International Criminal Court further consolidated these advancements by providing a permanent institutional framework for prosecuting such crimes.

Despite these achievements, the implementation of legal norms remains inconsistent and fraught with challenges. Issues such as underreporting, lack of evidence, societal stigma, inadequate victim protection mechanisms, and political constraints continue to hinder effective prosecution. Moreover, the gap between legal recognition and practical enforcement underscores the need for stronger institutional commitment and international cooperation.

There is a need to further harmonize domestic laws with international standards to ensure that rape as a war crime is clearly defined and effectively prosecutable at the national level. Judicial officers, investigators, and law enforcement agencies should be provided specialized training to handle cases of sexual violence with sensitivity and competence, particularly in conflict and post-conflict settings. Greater emphasis must be placed on victim protection, including witness protection programs, psychological support, and rehabilitation measures to encourage reporting and participation in legal proceedings.