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International Humanitarian Law and Sexual Violence in Ukraine

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Since Russia's invasion of Ukraine in February 2022, there have been numerous reports of sexual violence against Ukrainian civilians by Russian armed forces. It is evident that the current situation in Ukraine constitutes war, thus international humanitarian law should be invoked. However, there is a clear gap in this area of law in providing clear and direct guidelines on addressing sexual violence in armed conflict. While there has been forward progress on this subject in recent years, these small steps of acknowledgment cannot be hailed as a complete solution.

This article reviews how sexual violence is defined under international humanitarian law and the specific laws that can be applied in instances of sexual violence against civilians while also considering reports of gender-based violence in Ukraine and how they fit into this current legal framework. This article also analyzes how international humanitarian law is complemented by other international human rights laws to address sexual violence during war. Historically, international humanitarian law has done little to ease the trauma of sexual violence victims, but this does not mean it is incapable of evolving into a framework that can achieve justice. The aim of this work is therefore to identify potential paths to justice that can be implemented in Ukraine, including where current legal frameworks can be reformed.

Defining Sexual Violence

Sexual violence is not a term that is easily recognized in international humanitarian law despite its long history of occurring both in and outside of armed conflict. The lack of an international humanitarian legal provision explicitly referring to sexual violence during armed conflict is a clear obstacle to obtaining justice. There are a few key tribunals and treaties that are applicable to wartime sexual violence, but they are limited in their scope. The Geneva Convention IV Relative to the Protection of Civilian Persons directly references rape in Article 27 (1949) and Articles 76(1) and 4(2)(e) in the Additional Protocols I and II (1977) (see International Committee of the Red Cross, n.d.). This scope is

narrow because it does not apply to sexual violence outside of rape, and it also treats this violence as a crime against dignity – not as a violent crime against humanity or other mass atrocity. Rather, sexual violence is only linked to mass atrocity when it coincides with genocide or ethnic cleansing (Obote-Odora, 2005). While Theodor Meron (1993) highlights how there is a clear recognition by the international community that the systematic use of sexual violence during ethnic cleansing and genocide is a crime against humanity, its lack of stand-alone recognition is deeply problematic. David S. Mitchell (2005) notes that although sexual violence in conflict is by no means accepted by the international community, the fact it is not codified as prohibited customarily leads to little effective application of international humanitarian law for sexual violence. Beth Stephens (1999) writes that international humanitarian law is only effectively applied to instances of sexual violence when the act itself is recognized as being violent, contrary to the original "crime against dignity" that the Geneva Conventions treat it as.

Wartime produces unique power dynamics, with military presence commanding obedience and constituting a clear vulnerability to civilians. Historical national military codes, such as those under Richard II and Henry V, explicitly prohibited rape by soldiers during conflict, but there is not a modern equivalent (Meron, 1993). (Although the UN Special Rapporteur on Torture recognized rape in detention as an act of torture in 1992; Pearce, 2002). Sexual violence under current international law remains interpretable, which makes justice for victims difficult to guarantee. Consent requirements are frequently investigated under domestic jurisdiction and are seen as less mandatory in wartime (Obote-Odura, 2005). Within the context of Ukraine, it is reasonable to assume that a demonstrated pattern of violence against Ukrainian civilians will lead to greater obedience – and that sexual engagement with Russian soldiers is likely to be associated with violence and conformity, rather than consent and free will. Notably, the Office of the Prosecutor at the International Criminal Court has historically prosecuted senior military officials for acts of sexual violence committed by officers under their command, assuming they knew or ought to have known about the incidents (Ashiru, 2020). This creates a clear line of responsibility within the armed forces. Thus, senior Russian military officials could be liable to prosecution for sexual violence.

Tribunals of the genocides in Rwanda and the former Yugoslavia were key events in the development of the subject of sexual violence under international humanitarian law. As no modern provision of humanitarian law directly refers to sexual violence in explicit terms, the founding statutes of these international criminal tribunals set key precedents. The International Criminal Tribunal for Rwanda likened rape to torture using the Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment. With the *Akayesu* case,[1] it linked sexual violence to the political agenda of identity-based conflict and recognized that sexual violence and military objectives can be identical (Park, 2007). The International Criminal Tribunal of Former Yugoslavia was ground-breaking because it specifically referred to rape in its founding statute and was the first chamber to adopt the principle that rape can be a war crime, thus setting it as a precedented custom in international law (Maravilla, 2000). Tribunals in the former Yugoslavia and Rwanda establish a *jus cogens* status – that is, they establish certain fundamental, overriding principles of international law – for the prohibition of sexual violence.

Yet sadly, the only way in which human rights during conflict can be advanced or addressed legally is often after the fact. The fact that tribunals for the former Yugoslavia and Rwanda established that sexual violence is not acceptable does little to aid enforcement without an overarching treaty or framework on the subject. This leads to a situation where international humanitarian law is reliant on international criminal law and international human rights law to be able to prosecute sexual violence during conflict. Therefore, international humanitarian law cannot be individually applied if it wants to achieve absolute justice for sexual violence survivors. Without a concrete framework explicitly addressing sexual violence in conflict – one that legally defines sexual violence as a crime against humanity – international humanitarian law will remain ill-equipped to handle this situation.

The Situation in Ukraine

Despite limitations on data gathering during armed conflict,[2] ongoing reports of sexual violence against Ukrainian civilians raise serious concerns about the use of rape as a weapon of war. Ukrainian women describe rapes occurring at gunpoint and threats of harm to children, and there is evidence of Russian soldiers bringing illegal drugs and Viagra with them during the invasion (Limaye, 2022). (Given the lack of necessity for Viagra in a warzone, it could potentially be argued that Russian soldiers displayed intent to commit acts of sexual violence during the invasion before even arriving on Ukrainian soil.) In the town of Bucha, 25 females (aged 14-24) were found in a basement after being subjected to systematic rape. These assaults were possibly meant to make the women undesirable and incapable of bearing Ukrainian children. Similarly, there are numerous reports of Russian soldiers raping Ukrainian women and girls in the streets to threaten the Ukrainian military; these victims are often labelled "Nazi

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[1] In the 2001 *The Prosecutor v. Jean-Paul Akayesu case*, an international tribunal ruled for the first time that rape and other forms of sexual violence could constitute genocide. Jean-Paul Akayesu was also the first conviction of an individual for rape as a crime against humanity (International Crimes Database Project, 2013).
[2] Distinct lack of communication within conflict zones makes reporting difficult, as does the fear and trauma victims face when reporting an incident (Morris, 2022).

scum" as a Russian justification for sexual violence (Limaye, 2022). Human Rights Watch (2023) also recognizes the use of sexual violence as a weapon in Ukraine. In statements by victims and doctors who treated them, a clear pattern of this violence has emerged with victims ranging from children to the elderly.

The use of sexual violence in Ukraine may hint at a deeper culture of abuse within Russian military culture. O'Brien and Quenivet (2022) highlight that Russian military hazing rituals often lead to physical and sexual violence and that impunity for these actions is a crucial factor in the potential trials of commanders. The recent conflict in Ukraine is not the first time Russian soldiers have been accused of using sexual violence as a weapon, either; there were numerous reports of this in previous conflicts, from 1945 Germany to 2000 Chechnya. There is a belief that violence conducted in front of families can boost Russian power and humiliate Ukrainians, sending a clear message to male Ukrainians, whose masculine construct of "men" often posits them as being the protectors of women (O'Brien & Quenivet, 2022). Russia has disputed all claims of sexual violence in the current conflict and has refused to cooperate with the United Nations in investigating and addressing reports. Meanwhile, the UN recognizes that they can act on reports without having to fully verify details due to the ongoing conflict, as doing nothing does not address the scale and complexity of the issue (United Nations, 2022; UN News, 2022).

Sexual violence is strongly connected to the healthcare sector since it creates fundamental risks to public health. Such violence puts victims at substantial risk of sexually-transmitted infections, forced pregnancy, and internal injury – all while conflict zones have diminished medical capacities. There are calls to not only stop sexual violence in Ukraine, but to also stop attacking healthcare as a means of preventing the reporting of these events, which is vital for accountability (Sen, 2022). When hospitals and healthcare facilities are targeted in weapons strikes, there is a clear reduction of accessibility to medical services. The UN Special Rapporteur on Sexual Violence in Conflict emphasized that "unpunished crime is repeated crime" before sending a team of women protection advisors to Ukraine in June 2022 (Sen, 2022).

Interaction with International Human Rights Law

Although international humanitarian law is most relevant during armed conflict, international human rights law provides additional legal context for discussing sexual violence in Ukraine. In some cases, humanitarian law can be enhanced through combination with human rights – even though there are certainly gaps in both humanitarian and human rights law on the matter of sexual violence in

wartime. Notably, most human rights treaties do not contain specific bans on sexual violence (Gaggioli, 2014). Meanwhile, international legal standards are often not upheld on the national level; if Russia's views toward violence against women is permissive, there may be few domestic efforts to prevent or punish its use. And while the Council of Europe's system is applicable to Ukraine (even though it doesn't have a treaty on sexual violence or the protection of women specifically) Russia's exit from the Council of Europe means that human rights procedures for justice are now further limited.

International human rights law prohibits the use of torture. For instance, the European Convention on Human Rights prohibits torture in Article 3 (Council of Europe, 1950). The UN Special Rapporteur against Torture noted in 1986 that sexual abuse is a method of physical torture, and international law sees sexual abuse by armed forces (whether state known or not) to be a violation of the human right to integrity (Gaggioli, 2014). International human rights law is beneficial for victims when sexual violence is recognized as a form of torture, as this means there are clear rights and procedures to achieve justice that may not have an equivalent under international humanitarian law. The Geneva Conventions contend that rape is a crime against dignity but not a direct breach of the Conventions, but a UK declaration that sexual violence is recognized as a war crime and a breach of the Geneva Conventions' prohibition of torture alters that understanding. The definition of torture for sexual violence creates a clear framework, which is supported in International Criminal Law by the Rome Statute 1998. In this Statute, as well as the founding statutes for tribunals in Rwanda and the former Yugoslavia, there is recognition that rape can constitute a crime against humanity if – and only if – it is carried out as an act with the intent to destroy an ethnic group (Pearce, 2002). This definition of rape as a crime against humanity when done with genocidal intent was seen in the case of *Prosecutor v Akayesu*, as noted above, whereby a senior Rwandan military official that failed to address sexual violence occurring under his command was charged with crimes against humanity (Amann, 1999).

The human right to health, including access to healthcare, is also related to sexual violence in wartime. Only with a stable and strong healthcare system can the international community accurately gauge the severity of sexual violence in a region, which the conflict in Ukraine does not support. Therefore, the conflict allows sexual violence to occur unreported. Re-establishing access to healthcare should be a top priority for protecting the rights of women and girls.

Collaboration between international human rights law and humanitarian law can be instrumental in the evolution of international law targeting sexual violence in wartime (Gardam, 1998) – yet there is much work to be done. The appointment of Special Representatives on these specific areas of violence against women allows these issues to become more visible on the global stage. Human rights

bodies are becoming more advanced when it comes to recognizing the difficulties women and girls face in armed conflict, making this interaction between human rights and humanitarian law crucial for further progress. On the other hand, it's notable that while the Geneva Convention 1977 Protocols related to women introduces a provision against rape of women during conflict, it is not identified as a grave breach to international law (see International Committee of the Red Cross, n.d.). This means that international human rights law has yet to push international humanitarian law to equip itself with specific legislation on issues affecting women in armed conflict beyond rape despite its necessity.

Potential Paths to Justice in International Humanitarian Law

Whether Ukrainian survivors of sexual violence can access justice is an important test for the effectiveness of international humanitarian law. "Access to equal protection under humanitarian norms for women can be assessed, if not measured by the success and failures of the investigation, prosecution, and adjudication of rape," writes Patricia Viseur Sellers (2008, p. 18). Indeed, longstanding inattention to women-centered issues during war has prompted the creation of a "six pillar test" for determining when sexual violence requires UN intervention (Anderson, 2010). These pillars include when sexual violence is a war crime (torture or genocide), sponsored by armed groups or governments, targeting civilians, systematically going unpunished, has cross-border implications, or violates ceasefire agreements (Anderson, 2010). (Considering these indicating factors, it is clear to the author that at least five of these six factors are applicable to the current situation in Ukraine.) These pillars relate to the application of international humanitarian law, as they suggest a framework of obligations that can trigger international action. If these obligations were enshrined in an international humanitarian treaty, then the global community would be better equipped to address sexual violence during armed conflict.

Humanitarian law's neglect of sexual violence reflects a broader lack of attention to gender issues in international law. Sexual violence was not legally defined until the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Former Yugoslavia, which both only occurred in the late 1990s (Campbell, 2007). Our understanding of sexual violence comes from a gendered understanding of bodies and sexuality, as some objects or orifices are sexualized during an assault that normally would not be considered sexual. This understanding is based heavily on heterosexual views of sexuality. Failing to see the gendered nature of sexual violence shows how neglected the subject is in international law. The international community needs to create a model of sexual violence as a specific offense under international humanitarian law and re-evaluate the current system's limitedness since it cannot produce justice for sexual violence victims if gender is not

considered. New legal conceptions of harm stemming from sexual violence in armed conflict must factor in the gender norms/masculinization/feminization at play. This includes not defining a person by their victimhood but seeing them as a survivor capable of existing and flourishing outside of the violence they experienced. If these reforms were in place, international humanitarian law would be better equipped to address this area of violence and truly achieve justice for survivors.

Sexual integrity is customary international law under the humanitarian legal principle of "humane treatment," which includes both direct and indirect responsibilities. Direct responsibility is for those accused who have perpetrated, aided, or abetted a crime; direct liability is not always the physical perpetration of sexual violence. Indirect responsibility refers to a superior authority whose acts can be connected to them, such as commanding officers of military personnel that committed acts of sexual violence against civilians. Independent investigations may be conducted to understand what officials may be liable for sexual violence or the knowledge of its existence (Sellers, 2008). Early demands to put Russian President Vladimir Putin on trial for war crimes hint at this customary law; if there was proof that Putin had knowledge of sexual violence as a war strategy, he could theoretically be held accountable under the humanitarian principle of humane treatment.

Due to the fact there is no overall legal definition of sexual violence, there is a clear need for sexual violence to be recognized and responded to as a crime in its own right. This work is starting to be undertaken as a direct consequence of the war in Ukraine. For instance, a 2022 collaboration between the UN Special Representative on Sexual Violence in Conflict and the Ukrainian Deputy Prime Minister addressed questions of accountability and support for survivors. The United Nations has sent staff to document sexual violence in the face of gross underreporting and has also promoted survivor support by creating safe spaces for women to report sexual violence (United Nations, 2022). While these UN actions are important, they are not triggered by international humanitarian law. Historically, attention to sexual violence is an afterthought – or worse, a scenario that is considered inevitable in war. Legal frameworks for defining the problem, creating obligations, and triggering action are not yet able to address this problem.

Addressing Sexual Violence in International Tribunals

International tribunals are not just a mechanism for securing justice. They are also important in shaping how international law handles a subject. How sexual violence was prosecuted in the International Criminal Tribunal of former Yugoslavia – and in particular *The Prosecutor v. Anto Furundzija*

– is an important case to consider. The judgment of Furundzija[3] as guilty of crimes against personal dignity, including rape, clarified sexual violence as a violation of customary international law. This is a clear change in international norms, whereby sexual violence is seen as a public issue (not a private one) as it violates international legal norms. However, the liability of victims of sexual violence for acts against them was still brought into question in this tribunal; witnesses' PTSD diagnoses were used as a defense in favor of Furundzija (Campbell, 2002). What is clear here is that juridical does not equal ethical, underlining the need for ethical guidelines in relation to witness testimony that does not further victimize survivors of sexual violence.

Kirsten Campbell (2002) argues that legal courts often use a realist model of memory where the evidential model of memory constitutes legal memory as gendered memory. Stemming from the female fragility trope, female sexual violence witness testimony will be questioned as unreliable due to trauma. This means that the social constructions of legal memory are not gender-neutral and constitute legal memory in an integral relationship to gender. Historically, sexual violence during armed conflict received little attention from international lawyers – and if a wrong is not prosecuted, there is no legally binding precedent to have a tribunal address it. This is where the Yugoslavia tribunal reformed the precedent of legal responsibility in wartime sexual violence by including sexual violence support and altering the necessary evidence for the prosecution. Their mandate stated that the victim's testimony does not need to be corroborated, the argument of consent is invalid due to the power dynamics during war, and that the previous sexual relations of the victim cannot be brought up as a defense (Campbell, 2002).

Scholars respond to this argument by advocating for the inclusion and re-centering of female experiences as victims in the language of law, what could be described as a feminist re-order of the legal system (Dixon, 2002). The current legal system was not built on an understanding of gender-based experiences of injustice and therefore does not work effectively in issues rooted in gender inequality. With evidence that women are attacked during war as a form of property damage to men, they are thus not recognized as the victims. In fact, women's pain and trauma are not discussed at all in any international law, so although the patriarchal basis of sexual violence is recognized, it is not necessarily condoned within the prosecution. Sexuality, in particular heterosexuality, is a significant element of masculinity and therefore plays heavily into acts of sexual violence (Alison, 2007). At a tribunal level, female survivors need to be treated as human beings even if their trauma results from the misguided social view that they are property.

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[3] Furundzija was the local commander of a special unit of the military police of the Croatian Defence Council. See United Nations Criminal International Tribunal for the Former Yugoslavia, 1998.

Legal protections for women in armed conflict are not adequate or realistic given the prevalence of sexual violence against women and girls during war (Barrow, 2010). There is a real need for a victim-led reform of compensation awards, since rewards are a way for survivors to reclaim control of their lives and be justly recognized by the international community. Needs-based compensation that empowers survivors is necessary, as are requirements for international organizations to deliver services tailored to victims of gender-based sexual violence (Antonsdóttir, 2020). Overall, prosecutors must acknowledge that gender-based crimes cannot be prosecuted from a gender-neutral angle. By acknowledging the influence that gender politics has on the prosecution of sexual violence, as well as by implementing key reforms to address it, international humanitarian law will be better equipped to address these challenges.

International tribunals must also do a better job of prosecuting sexual violence from an intersectional approach – that is, they must consider the various identity-based factors at play. For instance, “enemy” women from different ethnic groups are often targeted for sexual violence in relation to specific cultural norms. Sexual violence is often a communication of power and masculinity, with clear distinctions in behavior toward “our” women and “their” women (Alison, 2007). It is also evident that gender binaries and stereotypes are solidified in international law and tribunals. It is imperative to reject the gender standards that have historically discriminated against women and girls. The desired outcome is having international humanitarian law and a tribunal system that recognize the realities of sexual violence in conflict, including the diverse identities of victims.

Conclusions

This paper questions whether international humanitarian law can be used to seek justice for sexual violence victims in Ukraine and elsewhere, and this analysis overwhelmingly concludes that it is not strong enough to effectively address this human rights issue. The situation in Ukraine is dire, yet sexual violence can only be clearly prosecuted in relation to instances of torture or genocide under existing international humanitarian law. Rape is also more likely to be addressed than other acts of sexual violence due to its standing in the Geneva Conventions. This framework is intensely limited in scope, and even if a crime is prosecuted, it is often without a victim-conscious approach. Only when combined with international human rights law does humanitarian law have a more concrete pathway to justice, albeit still a limited one. Despite some forward progress, the legal foundations for addressing sexual violence in war remain weak – even though there is a legal sector entirely dedicated to the wartime context. An international framework for defining and addressing sexual violence is sorely

needed – one that takes a gender-conscious legal approach and cements legal action in an international humanitarian treaty. Such a treaty must enshrine the importance of maintaining an effective healthcare system and trigger action as soon as war breaks out. International cooperation is vital for providing both the basic standard of medical/psychological care and for accurately reporting the scale of sexual violence during conflict. Only when these goals are achieved will international humanitarian law have a chance of being equipped to address sexual violence – and hopefully, this is still possible for Ukrainian survivors.

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