Sexual Violence as a Weapon of Ethnic Cleansing and Genocide in the Yugoslav Wars

HOW SEXUAL VIOLENCE IN THE 1990S YUGOSLAV WARS AND ESTABLISHING THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA SHAPED INTERNATIONAL HUMANITARIAN LAW

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Abstract

In this Master’s thesis, I study sexual violence that was committed during the Yugoslav Wars in the 1990s. The objective of this writing is to research how the incidence of wartime rape in the Yugoslav Wars, and in particular, the founding of the International Criminal Tribunal for the former Yugoslavia (the ICTY) by the United Nations to prosecute and try individuals responsible for serious violations of international humanitarian law since 1991, and the precedents of the ad hoc tribunal, shaped both the theory and praxis of international law. Of all grave breaches of human rights and war crimes, I have chosen to focus on examining the changes that the prosecuting of wartime rape in the ICTY brought about in relation to how genocide and ethnic cleansing are now understood. For this purpose, I first report how rape was used as a weapon of warfare in the Yugoslav Wars; its incidence; and, to shed some light on the motives of these atrocities, I briefly review the history of the relations of the West Balkans nations and the escalation of political tensions and racial propaganda that broke out into armed conflicts. To describe the shift in international law that the ICTY case law produced, I outline the status quo prior to the founding of the tribunal in 1993. The Bosnian War in 1992–1995 and the Kosovo War in 1998-1999 are at the center of this study, as most wartime sexual violence was reported in these conflicts, and they are therefore the scenes of the ICTY cases involving charges of sexual violence. I explore how declaring politically and militarily motivated wartime sexual violence to be ethnic cleansing and genocide – essentially, giving the crimes the names of grave breaches of human rights – reflect the reality of war, revealing how wartime rape serves macro ambitions instead of individual perpetrators’ perversions, as well as de facto victimhood in war besides fallen combatants. I will demonstrate how the ICTY prosecutions signified army and political leaders’ individual accountability for grave breaches of human rights for the first time since the Nuremberg trials in 1945-1946, and how witness statements prove that wartime sexual violence was indeed committed under the protection or even direct command of superiors. I touch briefly the critique that the shift in discourse from individual rapes during conflicts to sexual violence as a weapon of war has received in academic writing. I also assess the international political and military response to the Kosovo War in the light of the failure to prevent the large-scale atrocities in the Bosnian War. Lastly, I review the implications and shortcomings of the ICTY’s work in the eyes of different former Yugoslav ethnic groups. The approach of this thesis has been influenced by victimology and law and gender studies, and carries feminist undertones.
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Abbreviations

**ARBiH**  Army of the Republic of Bosnia and Herzegovina, Bosniak armed forces in the Bosnian War

**BiH**  Bosnia and Herzegovina

**HVO**  Croatian Defence Council [Croatian: Hrvatsko vijecé obrano], the main Croat military group in Bosnia and Herzegovina during the Bosnian War 1991-1994, also said to be an offshoot of Army of the Republic of Croatia, aiming to attach a swath of BiH to Croatia. At the beginning of the conflict, HVO sided with ARBiH against VRS, the Serb army; at later stages of the war, HVO and ARBiH turned against each other, particularly in Mostar area.

**JNA**  Yugoslav People’s Army [Serbo-Croatian: Jugoslavenska narodna armija], the armed forces of the Social Federal Republic of Yugoslavia (SFRY). Originally, the army was multi-ethnic, consisting of conscripts from all over Yugoslavia proportionally to the size of ethnic and national groups in SFRY. Of all the officers in 1990, 42.63% were Serb.¹ The composition of JNA changed as more and more nations separated from the former Yugoslavia.

**ICC**  International Criminal Court, the first independent international court of justice, where the most serious international crimes have been prosecuted since the Rome Statute by which it entered into force 1 July 2002. It is based on the Rome Statute of the International Criminal Court (the ICC Statute, the Rome Statute), an international treaty adopted by 120 states on 17 July 1998. The seat of the ICC is situated in The Hague, in the Netherlands.

**ICTY**  International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991. Usually, it is referred to as the International

Criminal Tribunal for the Former Yugoslavia. In this work, I also refer to the ICTY as the tribunal, where no risk of confusion should exist.

**KFOR** The Kosovo Force, NATO-led international peacekeeping force responsible for the area of Kosovo, from June 1999 to present day.

**KLA** Kosovo Liberation Army, an ethnically Albanian separatist armed group. Formerly, it was perceived as a terrorist organization. During the Kosovo War, the West, with the United States at the head, sided with them in their cause.

**SFRY** (Also SFR Yugoslavia) Socialist Federal Republic of Yugoslavia, the Yugoslav state that was formed after the World War II and was disintegrated in 1992 by the Yugoslav Wars. The six members were the socialist republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. Kosovo was an autonomous part of the republic of Serbia.

**VRS** Army of Republika Srpska [Serbo-Croatian: Vojska Republike Srpske], also known as the Bosnian Serb Army; military of Republike Srpske, the eastern part of Bosnia and Herzegovina.
Introduction

'-- the reality of genocide and crimes against humanity: the stench of mass graves, the empty eyes of rape victims, the desperation of uprooted millions, the nauseating sight of entire communities razed to the ground.'

Why research a topic so abominable and oppressive?

This is the most common question I have been asked while writing this thesis. It also kept arising as I immersed myself in the study. However, the recent history of Europe did not leave me alone. The questions that initially led me to the subject kept getting louder: What is it that turns neighbours against neighbours in such brutal ways, unimaginable in time of peace? While studying criminology, legal history, and international law, I have faced this puzzle time and again. I am perplexed at what turns individuals, communities and nations from their everyday business and neighbourly relations, even intermarrying, into destruction-sowing in what seems overnight. The ignition of armed conflicts appears to have common denominators, even patterns, regardless of time and place – whether the wars are fought with mallets or machine guns.

What do these patterns have to do with international law? Studying the individual and mass motivations closely falls into disciplines unknown to me such as psychology and sociology. Yet, some understanding of the human origins is essential to be able to evaluate the achievements of international law, to assess practices influential in conflict prevention, to promote the observation of international humanitarian law in conflicts, and to succeed in peace negotiating and peace-keeping.

The Balkan Peninsula, or the Balkans, is an infamously volatile part of Europe. The peninsula was ominously called a barrel of gunpowder at the turn of the 20th century. The name proved prophetic as an assassin’s shots at Archduke Franz Ferdinand of Austria – of which

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2 Carla Del Ponte, chief prosecutor for both the International Criminal Tribunal for the Former Yugoslavia and for Rwanda, on what her positions made her confront. Del Ponte 2009: 5.
the West Balkans region was a part at the time – set fire to what escalated into the First World War. However, it was not the first nor the last act in the struggle for autonomy and sovereignty between the differing ethnic groups, religions, traditions, and languages. The costly contest goes back all the way at least to the Middle Ages. As in 1914 and earlier in history, the 1990s wars in the West Balkans were about ethnic identity and influence.

My interest in the Balkans was initiated by a Kosovar Albanian co-worker who invited me to join her family vacation in Montenegro and Kosovo. I was introduced to the discordant history, the cuisine, and the intriguing Albanian language. The warmth and hospitality of the people and magnificent natural attractions made a lasting impression. The experience led me to educate myself more on the Balkan matters as well as keep returning there.

Because my initial touch with Kosovo was through Kosovar Albanians, I find myself a supporter of independent Kosovo. Nevertheless, I obviously strive to research impartially. Each West Balkans’ ethnic group has been afflicted, and all sides have blood on their hands, too. A majority of the individuals brought to justice in the International Criminal Tribunal for the former Yugoslavia have been Serbs. The international community has been blamed for painting the Serbs as the villain of the Yugoslav Wars. My studies support the claim of somewhat partial news coverage on Balkan matters. For instance, after Serbian villages in Kosovo drained empty, ethnic Albanians have vandalized Serbian Orthodox sanctuaries and religious and cultural landmarks until this day. None of this loss of cultural heritage has been reported by Western media.

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3 And, contrary to what one might assume, centuries-old events are still household words. For example, one is unable to understand current demands over the Kosovo region without the Battle of Kosovo Polje – in 1448.  
4 Now that Kosovo has declared independence and a remarkable part of the Serb population has gradually migrated over to the Serbian side of the border, the victorious Albanians have allegedly looted and vandalized abandoned Serbian Orthodox monasteries and churches. Serbia is a site of early Christianity, and given the fact that these sanctuaries include Christian artworks like statues, frescos, and paintings from the Early Middle Ages on, it is a wonder that the looting has not provoked more attention in the West. The silence maintains the already-existing image of who the offender and sufferer parties are. The vandalism against Serbian churches has been covered in Slavic media because of far-stretching tribal and lingual sympathies between the nations. The depictions in the news are obviously sided, but based on these news articles, together with victorious amateur video footage filmed by the vandals themselves that is readily found online, I estimate the revenge campaign on Serb artefacts actual. Additionally, desecration of Serb cemeteries, even digging open graves of Serb combatants, have been reported. The allegations of the destruction are repeated in e.g. US government land reports that are available online.
Another reason to study this subject is the resemblance to the history of my own people, the members of the Church of Jesus Christ of the Latter-day Saints. The religious persecution that caused the largest mass exodus of the history of the United States carries similarities to the Balkan wars, especially the ethnic cleansing in Kosovo, both in motivations and tactics. In 1846, ‘Mormons’ were forced to flee their homes on the Frontier and embark on the perilous 1,300 miles walk over the Great Plains and Rocky Mountains to what is now the state of Utah. History repeats itself: the absence of the rule of law led to propaganda-fuelled sedition and driving part of the inhabitants from their homesteads on ostensibly religious grounds. The atrocities are much the same: looting and setting aflame of homes, raping women, and destroying the basis for livelihood by burning shops and crops. The attacks are aimed at timeless core values of human existence, personal security and home. There is a timeless script for mass expulsion.

As regards law, the most relevant motivation to undertake this subject is its actuality. The International Criminal Tribunal for the former Yugoslavia (ICTY) was founded in 1993 in response to what the international community learned about the then ongoing atrocities in Central Bosnia. Its mandate is now drawing to an end, and the tribunal is about to complete its tasks. As the ICTY, together with the Rwanda tribunal, are the first of their kind to handle grave breaches of human rights, the time is opportune to assess the tribunal’s contributions to and advances in international law, as well as what critics say was left lacking. The ICTY is the foremost actor in international justice to treat sexual violence as a weapon of warfare, even genocide, instead of the traditional rhetoric of separate deeds and individual perpetrators, thus abandoning the taboo and raising the issue to popular awareness.⁵

I recognize an inclination to contemplate my subject from a refugee perspective. Current events have undoubtedly affected my thinking. I have eyed sexual violence from the angle of how it or the fear thereof has the power to dislocate communities, and also the threats that becoming a refugee poses to women. There are similarities between the Balkan Wars

⁵ The ICTR was the first tribunal to declare wartime rape as genocide in its sentence.
and the reasons behind the ongoing mass emigration from the Near East to Europe. To keep within my subject, I have merely pointed to some similarities.

**Research Questions**

The focus of my study is the change that wartime sexual violence in the Yugoslav Wars brought about in international law. I research the shift that the founding of the ICTY implied for the impunity of war crimes of sexual nature. I examine how declaring politically and militarily motivated wartime sexual violence to be ethnic cleansing and genocide – essentially, giving the crimes the names of grave breaches of human rights – reflect the reality of war, revealing how wartime rape serves macro ambitions instead of just individual perpetrators’ appetites, as well as de facto victimhood in war besides fallen combatants.

To get to this end, I first need to shed light on wartime rape as a phenomenon, to explain what it is that makes sexual violence against women such a devastating weapon against the whole community. I take a look at the beliefs and patriarchal structures typical in the West Balkans that add to the trauma and victimize the rape victims again. I outline what kind of sexual violence was committed in the different acts of the Yugoslav Wars as well as how widely these war crimes took place. I then search for the reasons why the ethnic differences flared up into open conflict and brutal violence.

As the international community reacted by founding the International Criminal Tribunal for the former Yugoslavia in the midst of conflict, I assess if the charges against individual perpetrators as well as commanders of armed troops made any difference towards the end of the 1990s, and what part the ICTY ruling that wartime rape can be an act of genocide played.

**Methods and Sources**

Under review in this work is mainly sexual violence perpetrated against women. Narrowing down the subject is partly dictated by practical reasons – the allowed scope of this work – but also a conscious choice to research the subject from a gendered violence standpoint.
As de Brouwer puts it: ‘Whilst men may also be targeted for sexual violence during conflict, it is an acknowledged fact that sexual violence primarily and disproportionately affects women, particularly when it rises to the level of genocide, crimes against humanity or war crimes. Before the Tribunals, this is particularly evidenced by the female survivors of sexual violence who constituted the majority of victim-witnesses testifying about their ordeal.’

My approach has been influenced by law and gender studies, and certainly has a feminist undertone. This focus makes me guilty of what wartime rape research has been accused of: portraying it as a women’s problem, excluding from the discussion the vast number of men who also fall victims. Sexual violence was perpetrated against men and boys in the Yugoslav Wars. While I do not wish to renew the taboo or ignore the damage to individuals and communities that wartime sexual violence on men causes, I target my scrutiny on how patriarchal traditions, attitudes and structures make sexual violence against women such a befitting weapon of attacking whole communities – including the men.

In some chapters, my approach is also influenced by victimology.

Many of my references to international humanitarian law are general principles in the particular field of law, and therefore cannot be identified as a certain legal scholar’s theories. Where possible, I have given merit to whom it is due in text or footnotes. Whenever I present a conclusion, interpretation, or opinion of my own, I strive to indicate it unambiguously.

The main sources for this work are ICTY cases and commentaries on international humanitarian law. I mostly refer to the ICTY case law, but I have also included references to the ‘sister court’ International Criminal Tribunal for Rwanda’s cases because of its precedent nature and influence on the ICTY.

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In addition to scientific legal sources, I have favoured eyewitness and victim sources whenever I have deemed them reliable enough. I have included them in the intention of providing a sentiment of the reality of war and the experiences of both victims and combatants outside of the procedural restrictions of a court hearing.

I have also quoted extensively the ICTY’s chief prosecutor Carla Del Ponte’s autobiographical book *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity*. The piece is an account of the later parts of her professional career, first as the chief prosecutor of a canton and then the whole Swiss Confederation. Del Ponte undertook bringing to justice Sicilian mafia who laundered money through the banks under her domain, thus starting her perilous quest to cease the impunity of the most high-ranking criminals. Del Ponte brings the reader along on her sudden move to the ICTY’s headquarters in The Hague. Her years 1999-2008 as the chief prosecutor was when many of the most notorious war criminals were captured and accused in the tribunal. Even if the genre of the book is an untypical source for a thesis, her writing offers an insider look on the early years of the ICTY: how it took the ICTY’s jurists’ passionate dedication to have justice served, shuttling between the legal and political spheres, and enduring threats for the tribunal to gain the necessary influence for the arrestment and extradition of the accused.

**On Choices of Wording**

I have chosen to refer to those inflicted by wartime sexual violence as *victims* rather than *survivors*. The term victim has been criticized for carrying notions of passive submission and helplessness, yet I find the word apt in the context of international criminal and humanitarian law. By contrast, the term survivor carries connotations of will-power and self-selected actions of the inflicted that I find disturbing in the context of sexual violence. The victims of wartime rape are robbed of their physical integrity as well as their personal autonomy, with little if any influence on whether they live on or not. The concept of a helpless victim may actually be accurate as acts cruel and premeditated enough to constitute a war crime are being discussed. Furthermore, victim is the ICTY’s term of choice.
Another terminological question arose while vacationing in Bosnia and Herzegovina. My thesis half written by then, I had used the term *Bosniak* to refer to Bosnian (Slavic) Muslims. As I used the word in conversation, a local remarked that in Bosnian language, *Bosniak* refers to any Bosnian citizen, despite ethnicity or religion. However, the term is used consistently in all but one book in my source literature to mean Bosnian Muslims. Only in *Crimes of War*\(^7\), Bosnian Slavic Muslims are simply called Muslims. In places, that term feels misleading because it implies to primarily religious motives. As the enmity between the Croats and the Serbs evidences, the Yugoslav Wars were never a battle between Islam and Christianity. The conflicts were instigated on more complex ethnic grounds, and religion was more of a principal building block of the identity of communities rather than the root cause. For want of a better term, I have decided to stick with *Bosniak*, thus following research tradition. However, I point out that the use of this Bosnian word in English is disconnected from its local meaning.

When possible, I have consciously opted to use terms as descriptive as suitable for scientific text. For instance, instead of referring to NATO bombings in Serbia in 1999 as an ‘aerial campaign’, I have chosen to call the events bombings or air strikes. The purpose of my choices of wording is not to take stance or sound emotional. On the contrary, I try to choose terms that describe reality precisely. A written recount of atrocities can relay just some aspects thereof, which is only expedient for scientific writing; however, I wish to avoid terms that conceptualize reality to such extent that it blurs the fact that the lives of real persons are being discussed.

The state of Bosnia and Herzegovina is often referred to as Bosnia. This is the case in some of my source material, too. I call the state Bosnia and Herzegovina, to be exact, and Bosnia or Herzegovina only when referring to that specific part of the country. The border between them indistinct, Bosnia covers about four fifths of the state, the higher lands with the cold winters of continental climate. The southern coastal lands are Herzegovina. Post-war political division into the Federation of Bosnia and Herzegovina and *Republika Srpska* is more

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\(^7\) Gutman, Rieff, and Dworkin (eds) 2007.
relevant. An exception from my terminological choice is the Bosnian War, an established term to comprise all stages of the armed conflict in the new-born state in 1992-1995.

I have chosen to refer to Kosovo and Serbia separately even before Kosovo’s 2008 declaration of independence. Most of the time in this work, it is necessary for clarity.
1. Background

1.1 The Major Ethnic Groups of the West Balkans

‘In Bosnia, nothing is certain.’

In the Yugoslav times, ethnically distinctive peoples that spoke different languages and worshipped in their own ways lived relatively harmoniously for decades. The ethnic groups of the West Balkans have intermingled through centuries, yet even more during the Yugoslav era when the relations between the groups were kept normalized under the iron rule of General Tito.

Traditionally, most of the Slovenes and the Croats are Roman Catholic, the Serbs Eastern Orthodox, while the Albanians and the Bosniaks are Muslim. The Serbs, the Slovenes, the Croats, the Bosniaks and the Montenegrins speak mutually intelligible dialects of a Slavic macro-language generally known as Serbo-Croatian. This is where the name Yugoslavia comes from: it literally means South Slavs, and refers to the common ethnic, cultural and lingual background. The Serbs write predominantly in Cyrillic alphabets, the Slovenes and the Croats favour the Latin spelling, and the Bosnians use them both. Language distinguishes the Albanians from the other West Balkan peoples. Albanian is not related to any other language but is thought to derive from ancient, fabulous Illyrian. The Albanians have their own cultural features alien to other West Balkan ethnic groups.

The Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics: The Socialist Republic of Bosnia and Herzegovina, the Socialist Republic of Croatia, the Socialist Republic of Macedonia, the Socialist Republic of Montenegro, the Socialist Republic of Slovenia, and

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8 Excerpt from a discussion with my young Bosniak guide in Mostar, Bosnia and Herzegovina, August 2012.
9 ‘I had ... many girlfriends. At that time [1950s-1960s] we didn’t think who was of what ethnicity. Today, when I look at their names, I see that they were mainly Serbian or Muslim.’ Calling the Ghosts, from 4:02 on.
10 Serbo-Croatian can also be largely understood by Russian speakers, which partly explains past political inclinations towards east somewhat similarly as Spain and Cuba today have trade connections.
11 The original heading for this chapter was ‘The Yugoslav Nations’, but the word nation felt less than satisfactory. The term ‘ethnic group’ is not fully descriptive either, as not even a local can distinguish between e.g. Bosniaks and Serbs by their appearance. Nevertheless, this is the term I have settled with, as I find the alternatives even less apt.
the Socialist Republic of Serbia. The Republic of Serbia, in turn, consisted of two independent provinces – Vojvodina and Kosovo. Yugoslavia and, within it, especially Bosnia and Herzegovina were regarded as a textbook example of mutual tolerance and intermingling of ethnic groups.12 13

By the 1980s, nationalist sentiments and political movements had increased. The narrative of peaceful socialist coexistence of the ethnic groups became gradually superseded by accenting the heroic pasts of one’s own folk, demanding autonomy and separation from the other Yugoslav nations. This, together with increasing mudslinging in the media, made common people more aware of their ethnic background as well as their religion, differences that in the golden age of Yugoslavia were less prominent and did not determine relations such as friendships and marriages.

Rising fever for nation-states, financial crisis and, as the final catalyst, the disintegration of the Soviet Union eventually led to the dissolution of the Socialist Federal Republic of Yugoslavia during the 1990s. Slovenia and Croatia became the first successor states when they declared independency on 25 June 1991. Macedonia followed suit after a referendum on 8 September, and Bosnia and Herzegovina on 1 March the next spring. The region of Serbia, including Kosovo, and Montenegro remained undivided, still bearing the name Yugoslavia14 until renamed the Federal Republic of Serbia and Montenegro to better correspond the altered reality. Serbian-led troops in the Balkans’ conflicts may be called the Yugoslav army, which name I also use in this work.

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13 It is worthy of remark that even though the Albanians play a significant part in the history of the Balkans in the 1990s, as well as in this work, the state of Albania was never a part of Yugoslavia and must not be confused. The history of Albania dates to the 12th century. The state has seen periods ranging from kingdoms to occupations by foreign powers such as the Ottomans, Italy, or Nazi Germany. Since the World War II, Albania existed as a communist state. The regime was changed to the current Republic of Albania in 1991.
The second wave of declarations of independence took place in a very different West Balkan reality. Montenegro separated from Serbia following a referendum in 2006.\textsuperscript{15,16} Kosovo declared independence in February 2008.

The Serbs hold a sentiment of Kosovo as the cradle of Serbian nation and culture, a view of it as their holy land. The notion has its roots in the hundreds of Eastern Orthodox churches and monasteries dating back even to the Middle Ages, filled with early Christian artefacts such as paintings, sculptures, and frescoes.\textsuperscript{17}

1.2 The Yugoslav Wars

To outline the time and place in history of the war crimes that the ICTY’s mandate covers and that I study in this work, I will now briefly describe the events and the parties in what came to be known as the Yugoslav Wars. The timeframe we are looking at is the last decade of the 20\textsuperscript{th} century.

In the aftermath of the dissolution of Yugoslavia, armed conflicts broke out in several corners of the new-born states. Even though these conflicts took place between different ethnic groups, there is parallelism in the ideological backgrounds of the war as well as in how political aspirations fed violence. I focus on Bosnia and Herzegovina and Kosovo in this

\textsuperscript{15} This was not the first referendum on sovereignty in Montenegro. In March 1992, a referendum was held following a propagandist state campaign, led by the then Prime Minister of Montenegro. The supporters of independency were misrepresented and the option of continuing the Federal status quo was wildly pushed.

\textsuperscript{16} The nationhood of Montenegro remains contested to this day.

\textsuperscript{17} As I did research for my transitional justice –themed Law and Sociology course in April 2015, I encountered surprising information about current Kosovo. After the NATO bombings in 1999, and all the more after Kosovo’s declaration of independence, as the Albanians have started to win dominion, and Serb population has mass migrated out of large areas of Kosovo, attacks on the now-dormant sanctuaries have swept the region. This vandalism is, apparently, performed in revenge for the former misdeeds of the Serbs, and to wipe their cultural landmarks out of the local memory. Perform is the exact verb here; footage on churches burning and crosses thrown from rooftops in front of a cheering crowd, or material shot by the culprits themselves of looting a monastery, are readily available online. These easily-found footage findings are what convinced me to trust some Russian media sources on this matter even if the angle of the news is highly biased for the Serbs. I found several news reports of looting and vandalism in sanctuaries and Serb graveyards, even exhuming and disgracing Serb combatants’ graves. The newest of them were recent, so the spiral of retaliation is still ongoing. Why these events have not entered the Finnish, or, apparently, any Western news is perplexing. After all, it is early Christian relics and in that sense, common European heritage that has been set ablaze.
work. There, the conflicts escalated into full-blown wars where grave violations of human rights, including wartime rape, were committed.

The first episode of war followed the declarations of independence of Slovenia and Croatia on 25 June and Macedonia on 8 September 1991. In Slovenia, a blitzkrieg broke out and lasted from 27 June until 7 July 1991. The actual fighting died down at a ceasefire on the night of 3 July; thus, the names the Ten-Day War or the Weekend War. The Yugoslav People’s Army tried to suppress the Slovenian pursuit for independence, with Slovenian Territorial Defence Force, formerly part of the Yugoslav defence system but secretly reorganized as a national army in preparation of the independence declaration, fighting back.

The Slovenian success has been merited to its Territorial Defence Force’s superior morale compared to its counterpart: The Slovenes widely supported the independence claim, whereas many of the Yugoslav People’s Army’s soldiers were draftees with little motivation to resist Slovenia’s cause. The new-born state also deployed the knowledge that the Yugoslav central government was in the hands of Serbs under Slobodan Milošević, and therefore less interested in ethnically homogenous Slovenia than retaining under its command neighbouring Croatia with a remarkable Serb minority. Even though the Yugoslav army leadership was unwavering in its plan to replace the Slovenian government by a massive military campaign, the Minister for Defence ordered a more restrained approach. The Slovenian Territorial Defence Force was also assisted by the fact that some strategically central targets were occupied by Slovenes to start with. Slovenia painted a picture to the media of themselves as David against Goliath, which would have been the case had the Yugoslav People’s Army with its superior firepower been fully employed against it, thus winning over international sympathies and helping the independence cause.

As I have not encountered allegations of gendered war crimes committed in the Ten-Day War, I exclude further remarks on Slovenia from this work.

The next episode of the Yugoslav Wars was fought in the new-born state of Croatia. If there were hopes of a swift detachment from Yugoslavia, they were violently crushed: The war lasted from 1991 until 1995, although military action was intermittent towards the later years. The war harmed Slavonia, the eastern part of Croatia, and Dalmatia, the coast, the worst. As the JNA forces retreated from Slovenia during the end of the ceasefire, making
way for the official recognition of its separation, they were already being reassigned to Croatia. The presence of a prominent Serb minority is said to have aroused the interest to keep Croatia in the federation.\textsuperscript{18, 19}

A vision of Greater Serbia, whose region was to comprise parts of Croatia and Bosnia in addition to Montenegro and Serbia itself, had been increasingly fed since the 1980s.\textsuperscript{20} It is noteworthy that both in Croatia and Bosnia and Herzegovina, the JNA involvement shrunk as the wars dragged on, and domestically formed armies took over. The most significant forces in the Bosnian War were divided according to nationality lines as follows: The Army of the Republic of Bosnia and Herzegovina (ARBiH) of the Bosniaks, the Croatian Defence Council (HVO), and the Bosnian Serb Army (VRS). The local armies’ or their so-called special units’ combatants have turned out to be predominantly responsible for the violations of the laws or customs of war in their areas.

The Serbs were not the only one peering over the borders of the former republics, but Croatia sought to expand by attaining cuts of Bosnia and Herzegovina where ethnic Croat presence was prevalent. At the beginning of the Bosnian War, the Croats sided with the Bosniaks against the Serbs. Later, a war within the war was fought between the Bosniaks and the Croats, especially in Herzegovina, most famously in the city of Mostar.

Bosnia and Herzegovina declared independence 29 February 1992. The referendum had been boycotted by the Serb representatives, and they rejected the outcome. The Bosnian Serbs had already created their own armed forces, later called the Army of Republika Srpska (VRS), and reacted by mobilizing them to achieve an ethnically uniform territory in eastern Bosnia. VRS was commanded by a former JNA general Ratko Mladić, and it received

\textsuperscript{18} According to the prevailing narrative, JNA served Serb interests. However, as JNA was heterogeneously constructed of draftees from all six republics by the SFRY law, I find the claim that JNA would have been a tool for Serb nationalistic agenda in July-August 1991 disputable. More believably, at this point, there was a power struggle going on about what the role of JNA should be in the unfolding disintegration. Then, more republics detached from the federation and became internationally recognized as independent, the situation in Croatia escalated into war, and Serbia and Montenegro claimed to the succession of Yugoslavia (rejected by most UN member states). The JNA that thus came to be was significantly different and patently driven by Serb nationalistic agenda. Yet, in July 1991, the number of officers from other Yugoslav nationalities was so high that it puts the predominant narrative in somewhat simplistic light.

\textsuperscript{19} One demonstration of the heterogeneousness of the JNA in 1991 is, for example, the fact that as Slovenia fulfilled its threat to employ missiles to shoot down JNA helicopters bringing special forces 27 June 1991, one of the deceased was Slovene pilot Toni Mršak.

\textsuperscript{20} More on the rise of nationalism and the incitement of ethnic hatreds to pursue political goals, both indirect causes behind wartime sexual violence, is presented in chapter 4.1.
support from Milošević’s Serbia from the beginning. The area of Republika Srpska was not ethnically as homogenous before the war. The present-day conspicuous Serb majority there is partly the result of ethnic cleansings that soon ensued. The best-known chapters of the Bosnian War are the almost four years’ siege of Sarajevo, the longest in the history of modern warfare, and the massacre of Srebrenica in 1995, where the Serb army systematically killed over 8,000 Muslim men and boys notwithstanding the presence of the UN peacekeeping forces in the area. The war was characterized by shelling and sniping of besieged towns as well as ethnic cleansing by the means of sporadic violence and mass rape, including so-called rape camps. Military action was distinctly targeted at civilian population. The Bosnian War gained a plenty of news coverage, not least because it was televised by international reporters present in the war zone. The 1984 Winter Olympics in Sarajevo had also brought the region to public awareness.

Kosovo became the seventh independent state to emerge out of the former Yugoslavia. The conflict in Kosovo, too, was long brewing. Historical roots go further than one would imagine, as Kosovo has been a battle scene at least since the time of the Ottoman Empire’s bloody expansion up the Balkan peninsula. The Battle of Kosovo Polje on 15 June 1389 was a remarkable turning point at the time, but it still plays a significant role in Serbian folklore and national identity: notions of noble defence of the Christian Europe against the infidel conqueror have been cemented on the narrative.21

The Serbian-ruled government suspended the autonomy of Kosovo in 1989. Any discretion in the discrimination against the Kosovar Albanians was cast aside: public servants were laid off, and local police forces replaced by units from the Serbian Ministry of Interior. Kosovo Liberation Army (KLA) was formed by some ethnic Albanians in response to the oppression. In 1995, KLA initiated attacks on uniformed military and police forces. Arms were smuggled in through Albania and looted from police stations. In the following years, the strikes accelerated. This led to increased presence of Serb forces, including paramilitaries, who in turn took to retaliation campaign. KLA members and their suspected supporters

21 Reliable information – numbers of the Serb-led army with the Bosnian and Croat reinforcements, numbers of the Ottoman invader, and the events and losses of the battle, are impossible to come by. However, the battle resulted in a gradual shift of power in the region so that Serbian principalities one by one became Ottoman vassals. By the end of the 19th century, the mostly Muslim Albanians had become the majority in Kosovo.
were killed, some along with their whole family-clans. By 1998, the conflict had escalated into a full-blown war.

Diplomatic peace efforts failed. NATO made a unilateral resolution on a military intervention. Bombing of selected targets in Yugoslavia, including its capital, Belgrade, ensued in the spring of 1999. The purpose was to urge Slobodan Milošević to pull back the Serb troops and surrender the province to international forces. The attack was justified on a humanitarian basis. Ironically, both violence and the number of Kosovars fleeing their homesteads further accelerated during the months of NATO’s bombing campaign. The total number of people who were killed or went missing during the Kosovo War is about 13,500, of which roughly 1,500 were KLA insurgents and 8,500 civilians. The Serb side suffered the loss of almost two thousand persons, too, including some 500 civilians that were killed in the NATO bombings. The war caused an unprecedented mass exodus: of the two million Kosovars, at least half became refugees or internally displaced. In June 1999, Milošević and the national parliament finally succumbed to the plan for peace after heated contention. The NATO-led peace-keeping Kosovo Force (KFOR) entered the country a week later. The international troops were greeted jubilantly.

Some armed conflicts of the Yugoslav Wars died down as the international intervention grew and shifted the focus of the conflict. International pressure led to the Dayton Peace Agreement that ended the Bosnian War by the end of 1995. For this reason, there are no distinct winners and losers in the wars. This gives a peculiar side effect to the judgements of the International Criminal Tribunal for the former Yugoslavia. To say the least, the ICTY delivers interpretations of the conflicts: prosecution and sentencing, in placing guilt on one side of the conflict in each individual case, implicitly offer victim status and justification to the opposing side. Kutnjak Ivković and Hagan go as far as stating 'This may make the International Tribunal a substitute for military conflict, with court outcomes symbolically cali-

22 The exact number of the NATO bombing victims, along with most other figures concerning the Yugoslav Wars, remains disputed.
23 Kosovar Albanians flooded Albania, but 150,000 also fled to Macedonia, and some to Bosnia and Herzegovina, Montenegro, Turkey, and all over Europe, the US and Canada. Some sources suggest that up to 90% of Kosovars became displaced. After the war, 230,000 Serb and other non-Albanians left the region.
24 These occupiers were, indeed, welcomed as liberators. To this day, the capital Pristina parades a statue of Bill Clinton as well as a main street named after him. He was the President of the United States at the time, and his influence was pivotal in NATO’s decision to intervene militarily.
brating who are considered the “victors” and “vanquished” through the sentencing of defendants representing former warring parties.\textsuperscript{25} It is not enough for the ICTY to judge dispassionately. This reality-creating strand of tribunal proceedings highlights the strong influence of how who is prosecuted affects the perceived impartiality. While individuals from all sides of the Yugoslav Wars have been brought before the court, a majority of the accused have been Serbs.\textsuperscript{26} \textsuperscript{27} Accordingly, the Serbs report the deepest mistrust towards the ICTY of all the former Yugoslav nations.\textsuperscript{28} \textsuperscript{29} Without trust in the objectivity of the tribunal, the objectives of building lasting peace and contributing to reconciliation cannot be attained.\textsuperscript{30}

In some contexts, the Yugoslav Wars have been wanted to be seen as conflicts between religions. As the majority of the citizens of Bosnia and Herzegovina are Muslims\textsuperscript{31}, and the Serbs opposed the separation from Yugoslavia, battle lines in parts of the Bosnian War were indeed drawn over religion. The same pattern of Muslims versus Christians recurred in Kosovo and Macedonia. In Serb nationalist propaganda, the West Balkan Muslims are presented as the gate where Islam infiltrated into Europe. Similarly, some fundamentalist Muslims interpreted the Yugoslav Wars as European jihad.\textsuperscript{32} While it holds true that the Bosniaks received military and humanitarian support from Muslims overseas, the causes of the Yugoslav Wars were more complex as well as local. As in so many conflicts before and after, religion was harnessed as a pretence to serve political hungers.

\textsuperscript{25} Kutnjak Ivković and Hagan 2011: 14.
\textsuperscript{26} The disproportion is shown e.g. in the fact that 34 out of 50 people whose cases were processed by 2005 were Serbs. Quantitatively, the Serbs committed most violations of international humanitarian law; but this fact is not generally received in Serbia’s heartland where the atrocities of ethnic cleansing never became too conspicuous to deny. Kutnjak Ivković and Hagan 2011: 36.
\textsuperscript{27} None of the KLA were convicted: charges could not be substantiated. The highly contradictory case Haradinaj et al. was largely about alleged war crimes against ethnic Albanian collaborators. Haradinaj himself was the Prime Minister of Kosovo at the time of his indictment, and assumed the office again now in 2017. The prosecution of the ICTY lamented over the extreme arduousness of finding anyone willing to testify in the Haradinaj case. Witness intimidation was suspected, yet not established. Trial Judgement, Prosecutor v. Haradinaj et al. (IT-04-84-T), Trial Chamber I, 3 April 2008, and Retrial Judgement, Prosecutor v. Haradinaj et al. (IT-04-84-A), Trial Chamber II, 29 November 2012.
\textsuperscript{28} The image of the ICTY that the Serb national media pushes may explain part of the result, too.
\textsuperscript{29} Kutnjak Ivković and Hagan 2011: 6-8, 14-15, 29, 41.
\textsuperscript{30} Kutnjak Ivković and Hagan 2011: 5.
\textsuperscript{31} According to a 1991 census, 43.5% of the citizens of Bosnia and Herzegovina were Muslims, 33.5% Serbs, and 18% Croats. Suomalainen in Kouros and Villa (eds) 2004: 297.
\textsuperscript{32} Suomalainen in Kouros and Villa (eds) 2004: 296.
The Montenegrins and the Serbs were still united under the stump of Yugoslavia and then the State Union of Serbia and Montenegro until 2006. That is when Montenegro held a referendum, and passed a formal declaration of independence 3 June.
2. Chapter: Sexual Violence as a Weapon of Warfare

2.1 What Wartime Sexual Violence Is

“The world watches coldly while everything passes through women’s bodies. Destroying a woman is destroying the essence of a nation.”

Rape and other sexual assaults are seldom sexually motivated. Instead, they are acts of violence, committed to demonstrate power, superiority, and loathing. While this applies to most of sexual violence, it is especially correct about wartime rape. During armed conflicts, sexual violence is often committed together with other atrocities such as torture. The lines between these violent crimes are blurred; they are different demonstrations of similar apprehensions and motives.

Sexual violence as a weapon of warfare has at least as many manifestations as sexual assaults in general. There is no commonly acknowledged, exhaustive definition of rape in international law. Most national legislations share the notion that a coerced intercourse constitutes a rape. However, there are variations as to what counts as coercion: In some countries, an involuntary sexual act is only regarded as a criminal offence when physical force has been used. In other states, mental compulsion such as intimidation when physical force has been used. In other states, mental compulsion such as intimidation when physical force has been used. In other states, mental compulsion such as intimidation when physical force has been used.

33 Jadranka Cigelj in Calling the Ghosts, from 52:30 on.

34 ‘The Tribunal [the ICTR] considers that rape is a form of aggression ... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ Akayesu Judgement, para. 687.

35 However untrue, the sentiment that sexual violence would be sexually motivated is often reinforced, also in the intention of denying such a crime. As Roy Gutman, European correspondent for Newsday at the time, heard Jadranka Cigelj’s testimony, he asked Banja Luka Press Center for a response from Omarska camp commander Zeljko Mejakic. He claimed, ‘I don’t know why I would have done that: she is 45 years old and I am 26, especially since the woman in question is bad and unattractive. The way she was, I would not have leaned my bicycle against her, let alone raped her.’ Cigelj named the man as her main torturer.

36 Isolated sexual offences committed in other setting than armed conflict, as well as sexual offences committed during an armed conflict but that must be viewed as isolated acts, are sometimes called domestic crimes or national crimes to point out the distinction between crimes that belong to the jurisdiction of sovereign states and must thus be prosecuted under domestic i.e. national law, as opposed to severe breaches of international humanitarian law.
In addition to non-consensual intercourse, rape can be committed by penetrating into a person’s sexual organs or bodily orifices with sexual organs, which includes oral and anal acts as well as penetration with fingers or objects. The ICTY Trial Chamber issued the following definition in Furundžija case:

(i) The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any object used by the perpetrator; or (b) 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.\(^{37}\)

Serial rape of one person committed by several individuals in a row is typical for wartime sexual violence. Women are forced into sexual slavery for the armed forces, either in brothels or as so-called bush wives\(^{38}\), personal sexual and domestic slaves. Furthermore, wartime sexual violence can be forcing captives to perform sexual acts on each other – even to break the strongest taboos in the society, e.g. impel men to perform sexual acts on other men, or family members on each other. Wartime sexual violence may be committed in forms that leave no physical injuries, such as forcing women to perform household duties\(^{39}\) or gymnastics\(^{40}\) in the nude. At the other end of the spectrum are extremely violent rapes, some of them performed with objects such as gun barrels or broken bottles, evidently done in the purpose of causing extreme damage and leaving victims with fatal injury. The forms of sexual violence in conflicts are boundless, and some of them macabre imaginative. Common factors are the lack of consent and breach of sexual autonomy as in any sexual violence criminalized in domestic law; yet, armed conflict predisposes women for violence

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\(^{37}\) Judgement, Prosecutor v. Anto Furundžija (IT-95-17/1-T), Trial Chamber, 10 December 1998, para. 185.

\(^{38}\) Bush wife is a name for typically a young girl snatched by or for a combatant for sexual and domestic servitude. Tens of thousands of bush wives have been taken by guerrilla troops in e.g. in the Democratic Republic of Congo, Sierra Leone, and northern Uganda conflicts. Faint upside is only being victimized by one perpetrator, instead of prostituted for large numbers of abusers. But since the practice has nothing to do with legal matrimony, the kidnapped girls can be abandoned at will; for instance, in case pregnancy. The initially violent and involuntary nature of becoming a bush wife naturally predisposes these women to further violence. After being abandoned, the women often cannot return to their native community, but typically end up in prostitution.


\(^{40}\) Akayesu Judgement, para. 688.
with frequency unknown for peacetime, and make female bodies battleground through which whole communities are attacked. These aspects are elaborated later.

The notion of sexual violence can be mechanical or conceptual. The lack of definition of rape or wartime sexual violence can be seen as a legality issue for a good reason. Yet, forceful arguments advocate the conceptual approach. As evidenced above, the forms of sexual violence are manifold to the extent that criminalizing all possible scenarios is impossible. Secondly, procedural and victimological arguments advocate the conceptual notion of rape: Requiring minute details of criminal acts burdens victims heavily. Cultural norms may make discussing sexual organs and actions in detail altogether unthinkable. The ICTR took a clearly conceptual approach, describing rape as ‘... a physical invasion of a sexual nature, committed on a person under circumstances that are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.’ The ICTY observed the definition of rape and sexual violence issued in the Akayesu case in its Čelebići case trial judgement. For the most part, however, the ICTY’s notion of rape has been more conservative and male-normative than the ICTR’s, basing it on the idea of illicit penetration in the victim’s body, so from the perpetrator’s viewpoint.

What are the criteria that differentiate war crime from so-called domestic crime? It is not unequivocal to discern when wartime sexual violence is an isolated criminal act and when it should be treated as a grave breach of human rights under international law. The acts themselves can bear close resemblance. Two identical deeds can be deemed individual

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41 ‘The Tribunal (the ICTR) also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured.’ Akayesu Judgement, para. 687, clarification in parentheses added.
42 ‘The Tribunal [the ICTR] considers that ... the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.’ Akayesu Judgement, para. 687.
43 Judgement, Akayesu, para. 688.
45 de Brouwer 2005: 105-108.
46 Crime under national law.
crimes or severe breaches of human rights based on the surrounding realities: armed conflict as the setting, and often, but not necessarily, combatant and civilian statuses of the perpetrator and the victim.

The ICTY took a stand on the distinction early on, in its first sentence Erdemović in 1996. According to the argumentation of the sentence, ‘With regard to the crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.’\textsuperscript{47} Maier clarified the ICTY’s argument as follows: ‘The Erdemović judgement states that the core element of a crime against humanity is the attack on humanity. Humanity is set above the individual, meaning that not every assault against individuals is a crime against humanity. But in order to attack humanity, an individual has to be attacked.’\textsuperscript{48}

It is the context of sexual violence that determines whether the act constitutes ‘war crimes, crimes against humanity or a constitutive act with respect to genocide’\textsuperscript{49,50} Social reality gives rape meanings that are not present when the question is about a single assault. The perpetrator and the victim’s belonging to opposing parties, for instance, may indicate a war crime, but cannot be deemed as a determining factor alone. The nexus of crimes required to an armed conflict and, for that reason, the applicability of Art. 3 of the ICTY Statute was considered in the Kunarac et al. appeal judgement. The appellants disputed that an armed conflict ever took place in some municipalities where they committed crimes.\textsuperscript{51} The ICTY explained the connection as follows:

\begin{quote}
57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to
\end{quote}

\begin{flushright}
\textsuperscript{47} Judgement,\emph{Prosecutor v. Erdemović} (IT-96-22-T), 29 November 1996, Trial Chamber, para. 19.
\textsuperscript{48} Maier 2011: 153.
\textsuperscript{49} SC Res. 1820 (2008).
\textsuperscript{50} Campbell 2003: 509.
\textsuperscript{51} ‘There are two general conditions for the applicability of Article 3 of the Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict.’ Judgement,\emph{Prosecutor v. Kunarac, Kovač and Vuković} (IT-96-23 & 23/1-A), Appeals Chamber, 12 June 2002, para. 55.
\end{flushright}
the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace ... A violation of the laws and customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.

58. What ultimately distinguishes a war crime from a purely domestic crime is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, it can be established ... that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. ...

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of an opposing party; the fact that the act may be said to serve the ultimate goal of the military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.52

For instance, in the Kunarac case, the Appeals Chamber states in its judgement that

The armed conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population in the wider area of the municipality of Foca. The campaign was successful in its aim of ‘cleansing’ the Foca area of non-Serbs. One specific target of the attack was Muslim

women, who were detained in intolerably unhygienic conditions in places like the Kalinovic School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. The Appellants were aware of the military conflict in the Foca region. They also knew that a systematic attack against the non-Serb civilian population was taking place and that their criminal conduct was part of this attack.\textsuperscript{53}

The occurrence of wartime sexual violence is by no means a modern phenomenon, limited to some part of the world, nor can it be associated with some specific country, culture, ideology, or religion. On the contrary, it seems regrettably universal. Japanese troops forced hundreds of thousands of women into sexual slavery as so-called comfort women as they proceeded to occupy regions in China, the Dutch East Indies, Korea, the Philippines and Taiwan in the Second World War. The Soviet Army, supposedly the liberator from the Nazi regime, has been estimated to have left two million rape victims in its wake in 1945.\textsuperscript{54} The massive scale of these examples defies understanding. Sexual violence continues in today’s conflicts. Similar abhorrent reports have recently sounded from Syria, Iraq, Central African Republic and Myanmar.\textsuperscript{55}

The reasons for the use of rape in conflicts have not changed over the course of history. It is a powerful weapon of terror against civilian population. What has changed, though, is the recognition of its repeated occurrence in conflicts. Traditionally, war was perceived to threaten mostly the soldiers who fought the battles. The atrocities that civilians suffered was a side note in the masculine history of wars.


\textsuperscript{54} The fate of the women raped by the Soviet Union soldiers demonstrates the problematics of the division into victims and perpetrators. The same people that were morally accused, as a collective, of human rights violations previously unknown, suffered greatly. But, since the Germans were supposed to be the instigators of the war, there was no forum for them to voice their suffering and have it acknowledged by the international community. In East Germany, the Soviet army was supposed to be seen as a liberator from the Nazi regime. In the West, people shared the guilt for the indescribable atrocities that happened to people from their very towns and neighbourhoods. Only recently, the time has become ripe for recognizing the German victims of the Soviet Union army in Germany. In Russia, the Red Army remains glorified.

\textsuperscript{55} Fear of sexual violence was one of the most common reasons to flee Syria at the early stage of the war in 2012. 54.17\% of the interviewed reported that the fear that female family members would be raped as one of their reasons for leaving Syria. Palestinian Human Rights Organization, ‘A Research on Palestinian Refugees Fleeing Syria to Lebanon’, March 2013, p. 21.
The 20th century saw a profound change in how wars are fought. Duels of two distinctive armies were left on the pages of history. The replacement of trenches by guerrilla attacks and urban war blurred the lines between combatants and civilians. The venue shift of modern warfare has tangled non-combatant population in the conflicts irrevocably. As a result, death and injury rates of civilians were on the rise throughout the past century, and have long exceeded those of actual soldiers.56

**Isolated sexual offences during conflicts.** Even if large-scale sexual violence is typical of armed conflicts, non-systematic criminal acts are also committed during war. Conflicts bring about conditions that predispose women to sexual assaults committed even by individuals on the victim’s own side.57 Poverty and becoming a refugee are such factors. Women lack the normal social and physical structures of peace-time society and the safety of their home, while poverty predisposes to abuse from the people they seek help such as food, shelter, or medical attention from.58 These factors that add to vulnerability to sexual violence are elaborated on in the following chapter.

Isolated sexual offences pale in comparison to the scenes of sexual violence as a weapon of war, sometimes inhumane in brutality. In violent surroundings, crimes with one perpetrator and one victim may seem trivial. Regardless, non-systematic sexual assaults cannot be shrugged off because even more abhorrent crimes have been committed. Suffering of the victims should be similarly acknowledged by prosecuting and punishing. From the victim’s point of view, whether the crime was a part of a systematic campaign or not may not make much difference. Furthermore, the attitudes that allow individual sexual assaults and sexual violence as a weapon of war are partly similar; so, also the perpetrators can be the same individuals. Before the ICTR and the ICTY’s praxis shifted the legal status in the 1990s, all blame was shoved on individual law-breaking combatants’ uncontrollable lust, ignoring

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56 Losses of combatants versus civilians are measured by the so-called civilian casualty ratio (civilian death ratio, civilian combatant ratio), which describes the number of deaths of civilians. From the 1980s on, a claim that 90% of the victims of modern wars are civilians has been heard. I do not wish to dispute the estimation, but note that what has been calculated varies: for instance, the number of ‘casualties’ may include victims of famine and epidemics that result from an armed conflict, and in some reports, displaced persons. This makes figures change drastically compared to an analysis of the number of death and physical injuries only.

57 See chapter 2.2.

the systematic and strategic use of sexual violence in conflict and the liability of commanders.

However large-scale wartime sexual violence in a conflict may be, it can seldom be demonstrated to have been specifically ordered.\(^59\) It stems from de-humanizing attitudes to the opponent in the conflict. In Kosovo, for instance, even the Serbian state radio was deployed to broadcast derogatory propaganda on the ethnic Albanian population. But, even if sexual violence is not specifically ordered, it is seldom prevented, investigated, prosecuted, or condemned by armed forces. The terror it causes among civilian population serves the goals of an armed conflict all too well. The threat of sexual violence is such a powerful intimidation that e.g. in ethnically motivated conflicts serves the pursuit to drive away the unwanted part of population from the conflict area. Furthermore, the right to sexual gratification has been seen as an unofficial trophy for the soldiers that risk their lives in conflicts.

*Trauma from wartime sexual violence.*

‘*Most women are silent about what happened. It is very difficult to make them speak.*’\(^60\)

Victims of wartime rape may suffer a range of physical and emotional injuries as well as social stigma. The extent of injuries varies greatly depending on the abuse, the age of the victim, and the context of the violence. Immediate risks of a rape are external and internal injuries. Wartime rape is often connected with beating or torture of the victim. Obviously, sexual intercourse inflicts a threat of pregnancy and venereal diseases. In the Bosnian War, wartime rape took genocidal forms as Muslim and Croat women were captured, raped repeatedly in a purpose to impregnate them and confined beyond the point in pregnancy when abortion would have been possible.\(^61\)

\(^{59}\) However, as is discussed later in this study, this was not the case in at least the Serb side of the Yugoslav conflict. There are documented cases of superiors giving their subordinates particular orders to perform acts of sexual torture.

\(^{60}\) Nusreta Sivac in *Calling the Ghosts*, from 34:05 on.

\(^{61}\) Serb women suffered similar atrocities in the hands of the Army of Bosnia-Herzegovina: ‘... he [Hazim Delić, the Bosniak Deputy Commander of the Čelebići prison camp in central BiH in 1992] bragged that 60 Delić girls and boys will be born because that is how many women he raped.’ Witness Grosdana Ćeće’s full testimony in ICTY case *Mucić et al.*, p.147.
The victims of wartime rape, and among them, especially the forcefully impregnated, suffer all kinds of further short and long term psychological and social consequences that predispose them to self-destructive behaviour and raises the risk of suicide. Possible symptoms of mental trauma include post-traumatic stress disorder, insomnia, inability to take to anything, fear of being touched, and sometimes completely a changed personality.

Some women held in the so-called rape camps in the Bosnian War were later divorced by their husbands.

Even the women who seem to have come through the tribulation least affected, like the calm-appearing Omarska camp survivor Nusreta Sivac who later became an ICTY activist, says she has wished not having survived. Some victims describe what was committed against them as having been killed, but left living.

Despite the obvious threat of pregnancy, wartime rape campaigns also cause opposite effects. Violent sexual abuse causes infertility, both temporary and permanent. Victims suffer internal damage that may cause them not to menstruate for years. Or, the victims may suffer such internal damage that they become permanently unable to conceive or bear a child. On a population level, the phenomenon may easily go unnoticed. Since victims often keep silent about their experiences, infertility may be labelled as an individual problem. But, doctors recognized post-rape infertility in 1950s Germany.

2.2 Factors Predisposing Women for Sexual Violence during Armed Conflicts

Armed conflicts inflict sexual violence on women in all parties to the conflict. Several factors contribute to its incidence. Next, I take a brief look at some factors that reduce inhibitions to commit crimes on both societal and individual levels, as well as wartime circumstances that incite and normalize acts of violence.

Who perpetrates and who falls victim to wartime rape is not necessarily obvious. Typically, women in an invaded area are victimized by conquering troops. The truth is more complex:

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62 Calling the Ghosts, from 31:50 on.
armed conflicts cause crime levels to peak in general. While the focus of this work is war-time rape as a weapon of war, it is crucial to note that not all sexual violence during armed conflicts is committed by enemy combatants, or any combatants, for that matter, nor ethnically motivated – crimes where the perpetrators and victims would be ‘rhetorically convenient’.63 ‘In short, to assume that wartime rape is always “rape as a weapon of war” is to ignore the majority of cases.’64 Women are assaulted by men of the same nationality, ethnic group, or whatever the party of an armed conflict. Even during war, intimate partner is the most likely perpetrator of sexual violence.65

Notwithstanding the foregoing, the greater part of wartime rape is perceptibly gender-based. That part is what I have chosen to address in this work.

First, armed conflicts erode the rule of law. Normal operation of the police force and judicial system in peacetime prevent crimes by posing a threat of investigation, accusation and punishment for crimes. Armed conflicts cause a flood of criminal acts that exceeds the capacity of the judicial system. Controlling institutions may cease functioning altogether, leaving anarchy and the survival of the strongest to prevail. Even if no changes are made in the laws, the lack of the risk of punishment makes potential perpetrators bolder and the state of armed conflict hostile to women’s sexual self-determination.

An incident quoted by Kelly Dawn Askin in War Crimes against Women: Prosecution in International War Crimes Tribunals exemplifies this phenomenon. A young woman was raped on her visit to the local tax office by a soldier who had started following her on the street. After the victim had been able to collect her strength and exit the office, she heard her rapist tell an oncoming comrade about having had ‘a sugary treat’, which the other soldier applauded. As Askin points out, this is the type of an assault that could have happened in peacetime, too. However, the arrogance with which the rapist boasted about his crime demonstrates that he had no fear of public blame or punishment.66

63 As put in the article ‘Wartime sexual violence is not just “a weapon of war”’, The Washington Post, 24 September 2014.
64 ‘Wartime sexual violence is not just “a weapon of war”’, The Washington Post, 24 September 2014.
66 War Crimes in Bosnia, p. 179-180, according to Askin 1997: 288-289.
Secondly, there are psychological factors that make individuals tolerate more violence and act more violently than in peacetime. Armed conflicts normalize violence; some degree of it becomes banal. The survival of combatants through wartime necessitates thinking in terms of fighting the enemy. This is also true in internal armed conflicts. Propaganda, started way before the conflict escalates, dehumanizes the counterparty.

In the Yugoslav Wars, the propaganda was sexually charged and revolved around masculine pride. In short, Serb propaganda abused the actually higher birth rates among the Albanians and rumours of the Albanians raping Serb women for ethnically motivated reasons. Muslim men were presented as primitively virile, and while their supposed qualities were portrayed as repulsive, they were also presented as a threat. The propaganda implied to Serb men that they are sexually weak in comparison, and offered violence as a remedy to the allegedly shameful situation.

Fourthly, an armed conflict may offer a smoke screen for combatants’ personal retaliation, or retaliation against women as representatives of their own sex. It is characteristic to the Yugoslav Wars that combatants fought not only the official enemy, but also their personal enemies. So close were some relations between perpetrators and victims that part of the atrocities had little to do with politics, but were personal retaliations for previously experienced humiliations. Rejected men raped their former love interests, or teachers assaulted their former students. This partly explains the peak of raping women of the ‘own’ side, as in the Yugoslav case, women of the same ethnicity as the combatants.

The ICTY took a stand on this phenomenon, stating the following in the Prosecutor v. Kunarrac et al. judgement:

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67 The difference in birth rates can be banally explained by the difference in the women’s level of education among the Serbs and the Muslims. The gap was especially distinctive in Kosovo.

68 Askin 1997: 282: ‘In this conflict, neighbours have raped neighbours, friends have raped friends, and teachers have raped students. This is not a group of foreign soldiers invading an unknown territory. The conflict is one such that the “enemy” might be a prior acquaintance who knows how many people live in a home, what their professions are, where their political commitments lie, where the “prettiest” young women live. Members of opposing forces may have gone to school together, may have been rivals, one might have been denied of a loan by the other, or rejected for a date by another.’
For criminal liability pursuant to Article 5 of the Statute, ‘the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.’ Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.  

Yet another factor is the use of intoxicants. Excessive alcohol use and consumption of drugs among combatants is a commonly known fact. Intoxicants lower personal restraints and magnifies reactions such as hate and retaliation. Some victims witnessed their captors using intravenous drugs. Especially paramilitaries seem to have committed attacks under the influence of drugs. 

Finally, armed conflicts cause people to retreat from their homes. Refugee position makes women more vulnerable, not only when having to flee across state borders but also when the question is about internal displacement. Patterns of sexual abuse that refugees face from their helpers, landlords and potential employers have been detected. Here, the risk factor is not belonging to a certain ethnic group, religion, or nationality, but the overall poverty and vulnerable position displaced people are in.

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71 However, Zoran Raskovic, a former member of a paramilitary group ‘Jackals’ denied any use of intoxicants in his group in the Kosovo War in 1999: ‘They were experienced veterans who had been through wars before; experienced in Bosnia, and in Croatia. Those kind of soldiers. Not drunk, nor on drugs, but just crazy at the time.’ Life in Kosovo: War Crimes, from 18:00 on.
72 ‘Wartime sexual violence is not just “a weapon of war”’, The Washington Post, 24 September 2014.
3. Chapter: Wartime Rape in International Law Prior to the ICTY

3.1 From *Jus in Bello* to International Humanitarian Law

*‘Crimes of this magnitude are never local affairs.’*\(^73\)

Even if public international law seems at first glimpse like a modern phenomenon, rules or policies of war have, in fact, been written down in different cultures since the ancient times. For instance, Torah and Quran contain laws of war. Some of the rules sound familiar to the modern-day reader, as the objective is immutable: The destruction caused by a conflict was to be restricted to the means relevant to the primary target of the army, e.g. winning a battle, or getting a city to surrender. The purpose of the central rules is to restrict military action to the individuals directly involved in warfare and protect individuals who do not participate in the battle as well as the environment. Modern international humanitarian law and customs of war make the same distinction between combatants and civilians. Medieval Christian writers\(^74\) elaborated on these ideas, creating doctrines of *jus ad bellum* and *jus in bello*: the doctrines of legitimate engagement in war, and justifiable conduct in war. Particularly the latter is about limiting the destruction and suffering caused by war. *Jus in bello*, or law of war, has evolved into international humanitarian law in the modern times. The terms are approximately synonymous.

International treaties and conventions are at the core of regulating the means of warfare. These interstate contracts are the hard law of *jus in bello*. Other sources of laws of war include the so-called customs of war, as well as principles referred to as the general principles recognized by civilized nations.

\(^73\) Del Ponte 2009: 5.
\(^74\) Such as Saint Augustine of Hippo (354-430 AD) and Thomas Aquinas (1225-1274 AD).
The foundation of modern laws of war are to be found in the Geneva Convention. It took its current form in 1949, in the aftermath of the Second World War. It consists of four Conventions and three additional Protocols, but the compilation as a whole is referred to as one. The Conventions date back to 1864, 1906, 1929, and 1949, respectively.\textsuperscript{75}

The creation of the first Geneva Convention (1864) was initiated by the eyewitness testimony of a Swiss businessman Jean Henri Dunant.\textsuperscript{76} In 1859, he travelled past Solferino, Italy, where a battle had just ended. Thousands of dead soldiers were lying in the battlefield, and wounded left to their fate in the corpses’ midst. He took to organizing residents of the nearby villages to rescue the wounded of both parties. His experience turned him into a social activist. In the following years, his propositions and promotion led to the laying of the cornerstones of international humanitarian law, as several European countries entered the cross-border agreements that instituted the Red Cross and the first of the Geneva Conventions.

Geneva Conventions include rules of warfare. They establish protections for civilian population in war zone; regulate the basic rights of prisoners of war, both civilian and combatants; as well as establish protections for the wounded combatants. Simplistically put, the Geneva Conventions can be said to be about people in war, whereas The Hague Conventions are about the limits of acceptable conduct of warfare. The 1949 Conventions have been ratified by 196 countries, either as such or with reservations. Yugoslavia was one of the signatories. Of the successor states of the former Yugoslavia, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and Slovenia considered themselves as bearers of the Geneva Convention’s obligations.\textsuperscript{77}

\textsuperscript{75} When used in singular, Geneva Convention usually refers to the 1949 form of the Convention, comprised of the four.
\textsuperscript{76} Dunant arrived in Solferino in the evening of 24 June. The battle of Solferino had been fought earlier the same day, and 23,000 wounded and dead soldiers remained lying in the battlefield. The sight, combined with the example his Calvinist parents had set of volunteer social work, made Dunant took it upon himself to organize the nearby inhabitants to help regardless of the soldiers’ side in the conflict, arrange impromptu hospitals and purchase needed medical supplies. Dunant recorded his experiences in a book \textit{A Memory of Solferino (1862)}, where he introduced the idea of a neutral organization providing humanitarian assistance in conflicts. He then travelled and promoted his ideas among many European political and military dignitaries.
\textsuperscript{77} Bosnia and Herzegovina, Croatia and Slovenia also expressly declared that they are successors the former Yugoslavia as a signatory to the 1949 Geneva Conventions as well as the 1977 Additional Protocols. Boot 2002: 239.
By the time of the Nuremberg trials, the principles of The Hague Convention of 1907 on land warfare were established enough for the tribunal to declare: ‘The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption. But by 1939 these rules ... were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter.’\(^78\)\(^79\) This is very descriptive of how international law regarding the rules of war has developed. The strides have taken place in the wake of conflicts. As time has passed, the principles, now recorded, have gradually achieved a status as part of the body of what is referred to as the laws and customs of war.

Even if there are legally binding international treaties and conventions, they are complemented by – or, they are based on – principles seen as universal. These general principles recognized by civilized nations have been used as a legal source when justifying genocide prosecutions. The International Court of Justice’s 1951 advisory opinion was quoted by the District Court of Jerusalem, as Adolf Eichmann contested its jurisdiction based on the Genocide Convention. The International Court of Justice declared: ‘The principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation.’\(^80\) The *Eichmann* trial is associated with the sources of international criminal law also because the Supreme Court of Israel had to take a stand on the allegation of the accused of exercising the Genocide Convention retroactively. The Supreme Court declared that ‘the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* [sine lege] or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives.’\(^81\) The Israeli Court also justified its jurisdiction on the protective principle, which means that it acted not only on behalf of the Jews, but at one time also for Poles, Slovenes, Gypsies, and other groups that the Nazis persecuted.

\(^78\) United States Military Tribunal of Nuremberg, Case No. 72: Trial of Wilhelm von Leeb and Thirteen Others, 30th December 1947 – 28th October 1948, part XXII, p. 87.
\(^79\) This to justify why the tribunal did not see as relevant the claim that not all parties of the Second World War were signatories of The Hague Convention of 1907.
\(^80\) International Court of Justice: Summary of the Advisory Opinion of 28 May 1951.
\(^81\) Supreme Court of Israel, A-G *Israel v. Eichmann* (36 ILR 277), 1968, para. 11.
The interpretation of the Supreme Court of Israel stretched the state of customary law in the 1960s, as it goes against the phrasing of the Genocide Convention’s premise of laying charges where the alleged crimes were committed; yet, the bold interpretation has not been contested. On the contrary, the notion of universal jurisdiction over genocide has been gradually cemented by several later court verdicts and legal literature. The claim of non-existing jurisdiction was presented as part of the appeal in the Tadić case, where the appeals chamber confirmed the principle of universal jurisdiction.82

‘Ethnic cleansing is generally understood as the systematic removal of a group or groups from an area by killing, expulsion, and/or imprisonment. A crucial concern is the policy-driven nature of the cleansing of ethnic groups.’83 It means “expulsion of an “undesirable” population from a given territory due to religious or ethnic discrimination, political, strategic, or ideological considerations ...”84 It aims to remove people by force and intimidation in order to leave the territory for solely one ethnic group to occupy.85 The practice has been confirmed by the General Assembly of the United Nations as a violation of international humanitarian law, and a form of genocide.86 When the Yugoslav Wars broke out, the term was not yet used in public discourse. However, ethnic cleansing is now a concept separate from genocide, and extends beyond it.87

82 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Duško Tadić (IT-94-1-AR72), Appeals Chamber, 2 Oct 1995, para. 62. The paragraph is interestingly formulated: ‘As a matter of fact – and of law – the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial. This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his “natural” national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter. Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.’

83 Kutnjak Ivković 2011: 2.

84 Andrew Bell-Fialkoff (1993), ‘A Brief History of Ethnic Cleansing,’ Foreign Affairs 72, p.110; according to Kutnjak Ivković, p. 2.

85 Kutnjak Ivković 2011: 2.


87 Kutnjak Ivković 2011: 2.
Despite the rules of international humanitarian law, the problem of impunity long remained. No court of law existed, motivated and influential enough to apprehend and charge those suspected of the most calamitous crimes of the humankind. A tribunal was needed whose jurisdiction over grave breaches of human rights would be sufficiently acknowledged in the international community. As the International Criminal Court was yet to be formed, the UN sought for a solution for ceasing impunity by founding the ad hoc tribunals.

3.2 On Genocide and Ethnic Cleansing

‘The best single indicator of a major war crime often is a massive displacement of civilians.’

The line between the terms genocide and ethnic cleansing is not distinct. They are partially overlapping, yet not synonymous.

In the aftermath of the Second World War, the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) was adopted in 1948 by the General Assembly of the United Nations. It came into effect in 1951. According to the convention, it is based on the declaration that the UN made in 1946 that ‘genocide is a crime under international law … and condemned by the civilized world.’

Grave violations of human rights bear the premise that no one can commit them without knowing they are committing a crime. The twofold definition of genocide is found in Article II of the Genocide Convention. There is a mental element, mens rea, the intention to destroy in whole or in part people that can be labelled as a group based on certain common

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89 GA Res. 3/260, 9 December 1948.
90 ‘Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups …’ GA Res. 96(I), 11 December 1946.
91 The opening chapter of the Genocide Convention, GA Res. 3/260, 9 December 1948.
denominators. *Actus reus*, a physical element, means the criminal acts that are listed in Art. II(a)-(e). Both elements must exist for a crime to constitute genocide.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.  

Different forms of participation in the crime of genocide are then described in Article III.

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

The echoes of the Second World War and the atrocities of the Third Reich are apparent in what forms of destruction have been included in the treaty text.  

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92 The Genocide Convention, GA Res. 3/260, 9 December 1948, Art. II.
93 The Genocide Convention, GA Res. 3/260, 9 December 1948, Art. III.
94 Rape may not be listed separately, as the Third Reich ideology stressed segregation of the ‘Aryan nation’ from the ‘lower races’, thus causing the Nazis to prefer biological genocide that prevented birth rates. Not listing wartime rape also facilitated in hushing the massive-scale sexual violence that the Soviet Army committed when occupying East Germany. The Nuremberg Trials were, after all, victor’s justice, a showcase of the Allies’ moral superiority. More on the ideological motives behind wartime rape in chapter 2.1 generally and in 4.1 concerning specifically the different Yugoslav nations.
95 Ironically, Palestinians were forcibly transferred out of the State of Israel’s way while the Genocide Convention was drafted and war crimes and crimes against humanity were condemned in the Nuremberg Trials.
As mentioned previously, three types of sexual violence can be distinguished in armed conflicts: There are isolated acts by individual perpetrators, driven by their own motives. There is sexual violence, which can be traced back as combatants seeing the opposing party’s civilians as their trophy, and sexual assaults as some deranged sport – outrages that may have several victims, numerous perpetrators, even extreme cruelty, but little political agenda. Lastly, there is genocidal rape. These rape campaigns are carried out to utterly desecrate not only the individual women but, with them, break the morale of a whole ethnic group. In essence, what differs genocidal rape from single acts of rape is the *dolus specialis*. The mental element of the crime is most apparent in Art. II(c) and II(d) as well as III(b)-(d) of the Genocide Convention, where the crime of genocide is constituted even if failure or intervention in the genocidal plan saves the targeted group from intended physical destruction.

As we can see, genocide is seemingly well defined, even with the lack of an explicit mention of sexual violence and the narrow view on biological genocide in Art. II(d) and (e) that will be further examined in the next subchapter. Ethnic cleansing, in turn, is slightly more ambiguous a term, as well as a more recent one. Paradoxically, the origin of the word is said to be in Nazi ideology: their aspiration of ethnic homogeneity translated into racial purity. The term entered public awareness as Western media adopted it from Greater Serbia supporters at the beginning of the Yugoslav Wars. To mark distance from the ideological source of the word, ethnic cleansing was at first written with the prefix so-called, or put within inverted commas. However, the news coverage on the Yugoslav Wars soon main-

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98 This is how the term is used in UN General Assembly resolution 47/121 in 1992: ‘… the abhorrent policy of “ethnic cleansing”, which is a form of genocide.’ In 1992, the General Assembly saw ethnic cleansing as a variety of genocide. The meaning differentiated over the next couple of years.
99 This was the case in UN General Assembly resolution on the situation in Bosnia and Herzegovina in December 1992: ‘… another factor which had contributed to the intensity of “ethnic cleansing” in areas under Serbian control …’ ‘… the abhorrent policy of “ethnic cleansing” …’. GA Res. 47/121, 18 December 1992.
streamed the term, and moral disapproval was built within it. The current meaning of ethnic cleansing as an autonomous crime category was established in the praxis of the ICTY, and I use the term in line with the tribunal.\textsuperscript{100}

In the context of the Yugoslav Wars, the term ethnic cleansing had a strong connection to forceful deportations. It is the \textit{dolus specialis} that mainly distinguishes ethnic cleansing, as the term is understood today, from genocide: the intent of ethnic cleansing is to force a group of people to relocate rather than annihilate it. In the Kosovo War, for instance, the aim was to drive the Kosovar Albanians to Albania. In the Greater Serbia rhetoric, not much attention was paid on what ought to happen to the non-Serbs of the Kosovo province but to have them removed from the Serbs' supposed ancestral land.\textsuperscript{101 102}

Whether ethnic cleansing constituted genocide has been a central question in several of the ICTY’s trials as well as in the international political discussion revolving around the tribunal. One episode of it was the debate on what action the international community should take in response to the worsening situation in Kosovo in the latter half of the 1990s. The threat of impending genocide became the major justification for the NATO bombings of Kosovo and Serbia in 1999.\textsuperscript{103} Largely because the definition was so politically charged, the ICTY prosecutor’s office was cautious in laying charges for genocide through the first years

\textsuperscript{100} Then again, judges of the ICTY were sometimes bolder in charging the term with blame than the prosecutor’s office, namely by referring to ethnic cleansing as a form of genocide – again diluting the line between the two terms’ contents. Schabas 2009: 229. So, the meaning of ethnic cleansing may still be changeable, and, in my opinion, must be read in the context.

\textsuperscript{101} I assume that this may, in part, explain the brutality of the actions of e.g. the VRS in Bosnia, as there was no obvious direction in which to attempt to deport the non-Serbs.

\textsuperscript{102} ‘Ethnic cleansing tolerates the existence of the group elsewhere whereas genocide may not. Hitler had the modest ambition of eliminating all Jews in Europe, but given the chance he would have extended his murderous campaign to the rest of the world. Milošević, on the other hand, wanted to drive Muslims from Kosovo, although he seemed untroubled by the idea that they might live elsewhere, in Macedonia or Albania for example.’ Schabas 2009: 234.

\textsuperscript{103} An air strike on a radio and television station in central Belgrade was probably the most controversial of the bombings. It was carried out in the spring of 1999 to press Serbia to stop human rights violations in Kosovo. The strike cost some 17 civilian lives. Later intelligence on that Milošević was notified of an imminent air raid but chose to have only part of the personnel pulled back shows a calculating propagandist, who seized the opportunity to affirm the image of the NATO as the ultimate culprit. Serbia deemed the bombings to be aggression, and insisted on the ICTY to start investigation of the legality of the air strikes. Another particularly controversial action was re-targeting a bridge whose prior demolishing had not succeeded, but left a passenger train trapped on the damaged bridge. The prosecutor’s office found that even when the states now under the focus were unexpected, the ICTY’s mandate did cover their investigation, as the claim was about a serious violation of humanitarian law. Receiving intelligence from NATO-countries turned out to be impossible, and probing them put to jeopardy ongoing arrest warrants and other crucial functions where the ICTY was in sore need of cooperation. Therefore, progression into full-scale investigation was abandoned.
of operation, using titles such as crimes against humanity, deportation and persecution instead.\textsuperscript{104}

However, ethnic cleansing must not sound less reprehensible in comparison to genocide. Both imply massive-scale violence against civilians. Individuals face similar fates in both conditions. Acts of ethnic cleansing are a warning signal of an imminent genocide, too. The ICTY pointed out in the \textit{Krstić} judgement that the Muslims in Srebrenica enclave were at first to be deported, but that the genocidal plan then escalated into the massacre.\textsuperscript{105} As William Schabas puts it: ‘Genocide is the last resort of the frustrated ethnic cleanser.’\textsuperscript{106}

### 3.3 Wartime Sexual Violence as Genocide

‘To me, crimes against women are crimes regardless of whether they are committed against Muslim, Croatian or Serbian woman. However, what the Serbs had ... was a planned strategy to systematically humiliate those women. Simply to destroy their spirit, to make those women realize that they can’t live there anymore. It was all planned, none of it was coincidental. All along the goal was ethnic cleansing. Better said, genocide: ethnic cleansing is a gentle term.’\textsuperscript{107}

Regarding wartime sexual assaults as genocide may be derived from the Genocide Convention’s Art. 2. More than one of the paragraphs can be seen to lead to the same conclusion. According to Schabas, it is undisputed that rape is covered by paragraph 2(b), ‘Causing serious bodily or mental harm to members of the group’, but he also calls the arguments for the aptitude of paragraph 2(c), ‘Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ compelling.\textsuperscript{108} However, it is measures of biological genocide in Art. 2(d), ‘Imposing measures intended to prevent births within the group’, on which the International Criminal Tribunal for Rwanda based its

\begin{itemize}
\item \textsuperscript{104} Schabas 2009: 229.
\item \textsuperscript{105} Judgement, \textit{Prosecutor v. Krstić} (IT-98-33-T), Trial Chamber, 2 August 2001, para. 619.
\item \textsuperscript{106} Schabas 2009: 234.
\item \textsuperscript{107} Nusreta Sivac in \textit{Calling the Ghosts}, from 42:12 on.
\item \textsuperscript{108} Schabas 2009: 198-199.
\end{itemize}
ground-breaking Akayesu resolution, stating that rape can be the actus reus of genocide.\textsuperscript{109} The ICTR held the following: ‘Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.’\textsuperscript{110}

Art. 2\textsuperscript{(d)} was phrased in view of the practices of the Third Reich, where people regarded as ethnically lower were subjected to forced abortion, sterilization and castration. Forced abortion and sterilization were not reported in the Yugoslav Wars; some cases of castrations were committed as a form of sexual violence against men\textsuperscript{111}. In his commentary on the Genocide Convention, Nehemiah Robinson points out that the measures intended to prevent births in a group do not need to be physical in the sense that they were understood as the Genocide Convention was written. Separating the sexes, inhibiting marriages, or otherwise hindering family life may constitute genocide as these measures similarly result in a lowered birth rate within a group.\textsuperscript{112} Separating the sexes was practiced in the Bosnian War, as men and women were taken to separate concentration camps. More men were also killed. The mass murder of Srebrenica is the most flagrant example of this policy. However, Schabas points out that charges of measures taken to prevent births among Muslim population of Bosnia were never properly argued before the ICTY.\textsuperscript{113} The tribunal used broader and more imprecise wordings in describing the macro-level effects of wartime rape: ‘humiliation and terror serve to dismember the group’.\textsuperscript{114}

Some trauma is universal for all sexual violence victims. Yet, cultural and religious conditions can multiply the devastating effect and re-victimize rape victims. In the Yugoslav


\textsuperscript{110} Judgement, \textit{Prosecutor v. Jean-Paul Akayesu} (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 507. Art. 2\textsuperscript{(d)} was later interpreted similarly in other ICTR resolutions.

\textsuperscript{111} Depiction of one such incident is found in Transcript of Hearing, \textit{Prosecutor v. Karadžić} (IT-95-5/18), 11 July 1996, p. 925.

\textsuperscript{112} Robinson, \textit{Genocide Convention}, p. 64 according to Schabas 2009: 198.

\textsuperscript{113} Schabas 2009: 199.

Wars, certain Islamic traditions and beliefs posed such conditions. Archaic patriarchal features of the Albanian culture further added to the suffering of sexual assault victims of the Kosovo War. According to Islamic law, a child’s religion is determined by that of the father. The issue is no different when pregnancy originates from rape. Thus, a Kosovar Albanian or Bosniak woman falling pregnant by e.g. a Serb or a Croat meant mothering a child who would never fully become the mother’s family. The Serbs and the Croats share the view of ethnic identity passing down through the paternal line. The ICTY noted in Karadžić that ‘the systematic rape of women ... is in some cases intended to transmit a new ethnic identity to the child.’ In the Bosnian War, women were detained in buildings turned into rape camps. They were intentionally impregnated and kept until pregnancy advanced and abortion was no longer possible. This grotesque practice was not limited to a certain party of the conflict. Shared beliefs of how ethnic identity is transmitted fuelled it.

Rape may be motivated by genocidal intent in at least two ways. According to Cherif Bassiouni, sexual assault can constitute genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction as referred to in the Genocide Convention Art. 2(c), since sexual activities outside the wedlock make women unmarriageable. Art. 2(d) may similarly apply because isolating women from the men effectively lowers the number of marriages and inevitably the number of children born. Bassiouni is discussing Muslim women in particular, but some of it applies to any patriarchal society. Art. 2(d) and (e) of the Convention make it clear that measures that interfere with reproductive self-determination are genocidal. Forceful impregnation is thus obviously comparable.

115 The exact opposite took place in the National Socialist Germany before WWII. Judaism is passed down through the maternal line, which may explain some of the course of history. Marriages and extramarital sexual relations between the ‘pure’ Germans and the Jews (‘Aryan’ and ‘non-Aryan’) were banned since 15 September 1935, when anti-miscegenation law, as part of the Nuremberg Laws, was enacted to protect ‘German Blood and German Honour’ (Gesetz zum Schutze des Deutschen Blutes und der Deutschen Ehre).


117 The revolting practice is portrayed in Grosdana Ćečez’s testimony in the Mucić case. She recounted hearing the chief of the Čelebići concentration camp boasting of having 60 children underway. Transcript of Hearing, Mucić et al. (IT-96-21), Pre-Trial Chamber, 17 and 18 March 1997, p. 147.


119 The trauma of sexual violence also broke up existing marriages. E.g. Calling the Ghosts and Smith 2000.
What, then, is revolutionary in deeming wartime rape as genocide instead of placing it in the broader category of crimes against humanity? One is the obscurity of the term *crimes against the humanity*. The umbrella term for various grave breaches of human rights leaves the sexual nature of wartime rape undisclosed. Another problem lies in the word *humanity*: calling rape a crime against humanity shifts the focus to the outrage of unaffected outsiders while fading out the actual victims, the women and girls whose bodies are violated and whose personal autonomy and safety despoiled.\footnote{This fading can be seen as an embodiment of the same line of thinking where female body is seen first and foremost as property of the family, clan, or community, and the bearer of the honour of the men who lead these units, instead of the woman’s own and subject to her sovereign decision-making and thus the principal victim and damage sufferer.}

Categorizing wartime sexual violence as genocide or ethnic cleansing can be likewise criticized for obscuring the gendered division of wartime rape. But, at least, this terminology acknowledges true motives and context of the offences. In my opinion, the merits of using the term genocide lie in two aspects that the term itself implies to: calling wartime rape genocide exposes the fact that gendered violence may serve military goals rather than individual sexual motives. It also emphasizes the destructive consequences that reach through a whole community.

However, as the ICTY pointed out in the *Krstić* judgement, *nullum crimen sine lege* is an effectual legal principle in international law, and thus customary international law limits the range of acts that may fall into the category of genocide to those that seek to physically or biologically destroy a group of people in whole or in part.\footnote{Judgement, *Prosecutor v. Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, para. 580.}
3.4 The State of Impunity before the ICTY

‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’122

Prior to the precedents from the ICTR and the ICTY, wartime sexual violence fell into the category of crimes against humanity. This was the legal status since the Nuremberg Trials. The labelling was increasingly criticised. As crimes against humanity is an umbrella term that can refer to a variety of offences, it fails to disclose the sexual nature of the crimes. This vagueness served the Allies’ purposes in the aftermath of the Second World War in 1945-1946. After all, the Nuremberg Trials were victor’s justice.

There are several reasons for the stagnation in the development of international law between the Second World War and the founding of the ICTs. The Cold War was a major cause for the delay. Virtually all the most severe violations of human rights went unpunished. ‘A person stands a better chance of being tried and judged for killing one human than for killing 100,000’,123 phrased José Ayala Lasso, the former UN High Commissioner for Human Rights. The same can surely be said of rape in conflicts.124

Impunity for war crimes has often been discussed in relation to the pre-ICTs lack of an authoritative tribunal where cases could have been tried. Even if a tribunal should be independent, the founding of an international court has everything to do with politics. One cannot help but think that massive-scale human rights violations needed to take place on the

122 A famous excerpt from a judgement of the International Military Tribunal of Nuremberg, justifying individual responsibility for war crimes when committed as part of state practice, as opposed to hiding behind the chain of command.
124 Why witnesses to crimes do not intervene was the research topic of social scientists Bibb Latane and John Darley in 1968. The phenomenon has been named bystander effect or bystander apathy. Studies have shown that the speed with which violence escalates, as well as the mixture of contradictory emotions such as fear for the victim and fear for their own safety, often leave bystanders frozen in indecision. A phenomenon called diffusion of responsibility causes that the more witnesses are present, the less likely any of them is to take to the rescue of the victim. Stigma around rape adds to the dumbfounding effect on witnesses, which makes intervening more difficult than to lesser crimes. It seems to me that, as the leaders of states and other internationally substantial entities are people, bystander apathy and diffusion of responsibility may similarly apply to crimes under international humanitarian law. In the international field, however, there are additional factors that cause inaction, such as domestic policy of states, scarcity of feasible means of intervention, and the astronomical costs thereof.
European continent, right under the eyes of the West, before the political will was found to establish such a tribunal. Media coverage was essential in forming public outrage deep enough to demand action. Yet, the international community was dumbfounded in the face of the escalating crisis on the Balkans – and then again, no one wanted to imagine the prospect of atrocities that were about to take place. After all, some of the worst human rights violations in the Balkans Wars were committed following the official founding of the ICTY.

Why, then, is an international court needed for prosecuting for war crimes and grave breaches of human rights? ‘Practically speaking, national leaders too often lack the will-power, and national courts the authority and courage, to prosecute the highest-ranking individuals responsible for these acts. International justice represents the only alternative to impunity.’ Del Ponte points to the reality of local actors lacking resources in post-conflict regions, let alone amid an armed conflict.

Tribunals in a country that is only recovering from a conflict and whose institutions are beginning to regain function cannot be expected to muster the authority to apprehend and indict suspected war criminals. Prosecutors cannot be expected to effectively lay charges and courts cannot be expected to judge impartially as long as these actions set judicial personnel in direct mortal danger, or the police forces are scattered or inclined towards one party of the conflict. In the aftermath of a crisis, forces loyal to former dignitaries are mostly still at large, and pursuits of arresting and prosecution are controversial and dangerous.

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125 Del Ponte 2009: 5-6.
126 It is interesting to notice that simply forming the ICTY did not signal enough international political will to make reluctant states cooperate, but the tribunal had to gain authority by degrees, as the number of cases, suspected war criminals taken into custody, and cooperating countries grew. The process of growing the ICTY in gravitas required persistent and unconventional efforts, and knocking on the doors of the ruling time and again. Chief prosecutor Carla Del Ponte recounts of her years of the ICTY 1999-2007: ‘Making the tribunal’s prosecution efforts effective required me and the members of the Office of the Prosecutor to summon the will to confront a loftier and thicker muro di gomma than I had ever encountered, to keep demanding that reluctant states and leaders cooperate with these tribunals, to keep demanding the hand-over of documents that incriminate powerful political and military figures, to keep demanding protection for witnesses even as they received threats, to keep demanding that the accused be arrested and transferred to the tribunal’s custody. - - Their constant repetition challenged the attention span of media organizations constantly looking for something new to report, so we could not count on them to drum up popular support. Our needs also exasperated bureaucrats and leaders who smiled and shook hands and made promises and, hunkering down behind a muro di gomma, did altogether too little. I repeated the words: arrest them, arrest them, arrest them... Milošević, Karadžić, Mladić, Gotovina, Lukić. – I exposed myself to criticism that I was out of step with political realities ... I exposed myself to the ridicule of ambassadors, ministers, and pundits, including some
A post-conflict country may lack operating judicial institutions altogether, which was the case in Kosovo. Jean Rene Ruez, investigator for the ICTY, described the conditions in Bosnia this way: ‘We had problem with access to crime scenes. We needed to enter [Bosnia’s Serb-led entity] Republika Srpska, where all the political and police and military personal was still there, and we needed to dig in their yard to gather evidence against them.’

Partial explanation for the pre-ICTY impunity for grave violations of international humanitarian law is that there were no precedents for an international tribunal. The procedures had to be created on the basis of the mandate. Not even the most important actors in the international field saw eye to eye on suitable procedures, such as what prevailing customs needed to make way in order to the ICTY to get hold of documents incriminating the suspects. The question was not so much about bending laws e.g. banking secrecy, but about a power struggle between international actors. ‘They (the tribunal’s efforts) took place among the edge of the divide between national sovereignty and international responsibility, in the grey zone between the judicial and the political.’

The ICTY personnel have been accused of allocating their energies into ‘the tasks of institution building and (that they) did not pay much attention to continual fanning of flames of ethnic hatred by regional leaders and media, who were simultaneously spewing paranoid rhetoric about the Tribunal itself.’ But, Del Ponte’s account of her time as the chief prosecutor points to the opposite direction: ‘Rumours that the tribunal was preparing indictments against KLA leaders for the killings of Serbs had angered some Albanians, and KLA leaders were whipping up popular hysteria against the tribunal, just as Milošević was doing in Belgrade.’

Considering the ICTY’s role as a precursor international criminal tribunal, blaming the personnel for concentrating on building the institution and its practices who had even profited from their relationships with such states. ... I remember receiving word from the secretary general of the United Nations to stop playing politics when I was lobbying the United States and the European Union to apply pressure on Serbia by withholding of it financial assistance.’ ‘... my team members and I strived to serve justice by obtaining cooperation from people who in too many instances did not want to cooperate and felt relatively little imperative to do so.’ – This was the reality although all United Nations member states were formally bound to cooperate. Del Ponte 2009: 6-7, 31.

127 Taušan 2015.

128 Del Ponte 2009: 7; explanation in the parentheses added.


130 Del Ponte 2009: 44.
sound futile. Seeing that the ICTY did and does not have independent power to arrest the indicted, but was dependent on diplomatic efforts in the middle of a highly demanding situation as the hostilities continued, the early victories of the tribunal were, to my mind, only achieved because of the pressure which the personnel was able to put on both UN member states and the states of the former Yugoslavia. How, then, could the personnel of the tribunal have bridled the raging propaganda?

I deem these problems to stem from growing pains that the emergent international power caused. The pecking order was forcibly rearranged, and both national and international actors were reluctant to surrender any part of their influence by observing the requests of the new-born tribunal. Del Ponte points out that ‘The Yugoslavia Tribunal and the Rwanda Tribunal, the first international war crimes tribunals convened since the final judgements were handed down at Nuremberg and Tokyo after World War II, did not enjoy the authority of their predecessors.’\textsuperscript{131}

The International Criminal Tribunal for the former Yugoslavia was founded by United Nations Security Council resolution 827 on 25 May 1993. The establishment of the ICTY was a response to the reports of ongoing atrocities, ‘including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing” including for the acquisition and holding of territory’,\textsuperscript{132} first from Croatia, then from Bosnia and Herzegovina. As the Security Council is not a legislative body, nor was it in its objective to create legislation, subject matter jurisdiction was to be drawn from existing international law. According to the report of the Secretary-General, the body of international humanitarian law, the grave breaches of which are in the core of the ICTY’s prosecuting mandate, exists both in conventional and customary law.\textsuperscript{133} ‘While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.’\textsuperscript{134} This is why ‘the formulations are based upon provisions found in existing international instruments, particularly with regard to competence \textit{ratione materiae of the International Tribunal},’\textsuperscript{135}

\textsuperscript{131} Del Ponte 2009: 7.
\textsuperscript{133} Report of the Secretary-General on the ICTY Statute, para. 34; Boot 2002: 237.
\textsuperscript{134} Report of the Secretary-General on ICTY Statute, para. 33.
\textsuperscript{135} Report of the Secretary-General on ICTY Statute, para. 17.
which means that the contents of the terms used in the ICTY Statute were derived from existing and established international instruments – such as the Geneva Convention and The Hague Conventions.

As discussed later in 5.2, there was no case law on adjudicating on wartime sexual violence prior to the ICTY. The cases where sexual violence has been prosecuted explicitly formalised the acknowledgement that it is used as a tactical weapon. Even if legal scholars had called for ending the culture of impunity in the previous decades, it was not until the ICTY and the ICTR began to accumulate case law that the policy shift in international law was solidified.

Two decades on now, no international or mixed tribunal could be imagined without prosecuting for wartime sexual violence. The International Criminal Court has continued to implement the policy shift in its legal praxis. The era of impunity is over – at least in legal theory.
4. Sexual Violence in the Yugoslav Wars

4.1 Prejudice, Propaganda and Threatened Masculinity: Fuel for Sexual Violence in the Yugoslav Wars

‘The true culprits are those who mislead public opinion and take advantage of the people’s ignorance to raise disquieting rumours and sound the alarm bell, inciting the country ... into enmity.’

The mindset that leads individuals to commit extreme violence in conflicts does not appear out of nowhere. Hatred escalates over years and then erupts as an armed conflict. This was also true in the West Balkans. Next, I intend to shed some light on the propaganda that had been brewing for at least two decades before the outburst of violence, and the societal conditions that provided an unfortunately prolific soil for sowing misinformation. I lean heavily on Wendy Bracewell’s article ‘Rape in Kosovo: Masculinity and Serbian Nationalism’ (2000). This is why my sample here is focused on the propaganda between the Serbs and the Kosovar Albanians.

Suspicious between the Serbs and the Albanians date back to more than half a millennium, at least all the way to the Ottoman era in the 14th century. The legendary Battle of Kosovo Polje in 1389 broke the Serbian predominance in the region. Thereafter, part of the Albanians, even then a group distinctive from the Serbs, incrementally converted to Islam. The Serbs viewed the shift as complicity with the conqueror. This is the background of the Serbs derogatorily calling the Albanians Turks. The imagery that is attached to the Albanians in Serb propaganda is therefore blended with prejudices towards Muslims in general as well as the actual Turks. As the propaganda was partly built on the pretence of religious difference, it was similar about the Bosniaks in Bosnia and Herzegovina.

136 Baron d’Estournelles de Constant, the chairman of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars (1912-1913), in his introduction to the commission’s report. 1914: 19.
137 ‘... The moment has arrived for us to take vengeance on the Turks in this region’, Ratko Mladić declared as he entered Srebrenica in the wake of the massacre of 7,000 Bosniak men and boys – representational of the Serb nationalist rhetoric. Transcript of Hearing, Prosecutor v. Radovan Karadžić (IT-95-5/18), Pre-Trial Chamber, 11 July 1996, page 936.
Rape as a nationalist weapon rather than individual criminality is a deep-rooted narrative in Kosovo. In the 1980s, when the tensions between the Serbs and the Albanians peaked, the Albanians were accused of wide-spread sexual assaults against Serb women in Serbian rumours – and the press. Wendy Bracewell wrote:

Defenders of the Kosovo Serb interpreted sexual violence in Kosovo as part of deliberately orchestrated Albanian campaign to terrorise and humiliate the Kosovo Serbs, encourage them to sell their lands and emigrate. The depiction of rape in Kosovo implied that sexual violence in Kosovo had a radically different character from that elsewhere in the country: that rape was an age-old weapon of Albanian nationalism; that it was an everyday occurrence; that no Serb, regardless of age, sex or status was safe from sexual assault; that the Albanian judiciary protected rapists, a policy that was either ignored or condoned by the republican and federal authorities; and that all Albanian men were actual or potential rapists. The presumption was that rape in Kosovo was committed primarily from nationalist motives. In an unconscious echo of the feminist approach to rape, nationalists described it not as a sexual crime, but as an act of violence ... ‘an act of genocide’ and ‘an attack on the Serbian nation’.

Even at the time, critics of nationalism pointed out that recorded incidence of rape was actually higher elsewhere in Yugoslavia than in Kosovo. Records notoriously understate the actual number of sexual assaults, but they are indicative to such degree that an intentional rape campaign would have been bound to make the statistics peak.

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139 Bracewell 2000: 565.
140 There are no representational statistics from Kosovo at the time. Sexual violence numbers are inaccurate, as most of it is never reported. Nonetheless, certain general tendencies are worth observing in this context: women’s level of education correlates with reporting sexual assault. Serbian women in Kosovo were, on the average, higher educated than their ethnic Albanian counterparts. The judicial system of Kosovo, accused of ignoring ‘nationalistic’ rape, adjudicated somewhat harsher on rape than tribunals elsewhere in Yugoslavia, including Serbia. These facts make the absence of any sign of the alleged rape terror campaign in the records of Kosovo in the 1980s highly implausible. Bracewell 2000: 568.
141 Bracewell 2000: 568.
It is ironic that the alleged sexual assaults were labelled genocidal. One decade later, Serb actions against the Albanian population verged on genocide. Large-scale rape terror was motivated by retaliation even though the hysteria-whipping 1980s’ rumours proved to be unsubstantial.

Irrationally, the alleged ethnically motivated rape in Kosovo did not provoke any larger-scale condemnation of sexual violence against women, an actual plague within the national communities. Women were not presented as the main victims in this propaganda; their bodies were merely the backdrop of competing Serbian and Albanian masculinities. Gender stereotypes were inherent in the patriarchal nationalistic narrative, which then further cemented them.

As is characteristic to the preludes of armed conflicts, financial recession and lack of prospects characterized the 1980s Yugoslavia. The socialist model was crumbling, bringing about societal instability and private uncertainty. In addition to the allegations of the Albanians raping Serb women, allusions to the Serbs’ virility and reproductive capacity as well as other suggestions on the decline of Serb masculinity, the lack of employment and thereby difficulties in fulfilling the traditional male role led to men being susceptible to taking baits that suggested restoring the dented honour. This was the atmosphere where Slobodan Milošević, depicting himself as ‘the protector of Serbian rights and nation’, and his kindred spirits offered militant nationalism as the answer. I quote another paragraph of Bracewell’s vividly-phrased expertise:

It was in these circumstances that the nationalist media could present the petty gangsters turned paramilitary adventurers of the early stages of the war as the very paladins of Serbian manhood; courageous desperadoes whose manly refusal to conform had put them at odds with the socialist state, but who were more attuned to the needs of the nation than were the corrupt,

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142 Bracewell 2000: 572.
143 Bracewell 2000: 572.
144 Bracewell 2000: 579.
145 ‘Laments over Serbian dignity and honour helped reinforce particular understandings of masculinity, mapping out what was and what was not appropriate behaviour for a Serb man — in particular, legitimating and encouraging violence as a way of recuperating national dignity and masculine honour.’ Bracewell 2000: 585.
146 Bracewell 2000: 569.
emasculated and de-nationalised representatives of ‘respectable’ society. But what one side presented as virility, self-sacrifice and patriotism, others would soon characterise as rape, war profiteering and ethnic cleansing.¹⁴⁷

Violence was built in the Greater Serbia scheme, presented as an inevitable means to the goal of restoring the immemorial Serb prerogatives. What was claimed in the propaganda was to justify the nationalist treatment of Kosovo. At the same time with national honour, individual manliness was supposed to be won back.¹⁴⁸ ‘It is plausible that for the men who embraced nationalist politics, asserting the rights and prerogatives of their nation also meant asserting their own claims to an embattled masculinity.’¹⁴⁹

This gender rhetoric is essential for understanding the rise of Serbian nationalism in the 1980s.¹⁵⁰ According to my assessment, the rhetoric was to be the single most influential factor in explaining why aggression took the form of sexual violence so frequently in the following decade’s wars.¹⁵¹

4.2 Sexual Violence in the Bosnian War

‘Some were tortured in their own homes in front of their husbands and children. Others suffered God knows where. In Bosnia, there were camps only for women... Many women were impregnated. Some of them gave birth.’¹⁵²

¹⁴⁸ Bracewell 2000: 567.
¹⁴⁹ Bracewell 2000: 578.
¹⁵⁰ Bracewell 2000: 578.
¹⁵¹ My quest for gaining some understanding of the situational forces that can turn previously proper citizens into war criminals took me to American psychologist Philip Zimbardo. He is known for his 1971 roleplay study on imprisonment that came to be known as the Stanford Prison Experiment. More recently, he has studied and been called to serve as an expert witness in trials concerning the atrocities that American troops committed in military prisons in Afghanistan, Cuba, and most infamously, in Iraq’s Aby Ghraib. His studies indicate that the capacity for extreme evil, as well as heroism, is something most people possess, given certain situational forces such as unlimited power. A central element in various grave violations of human rights is dehumanization: stigmatizing the enemy as inferior, a threat to national security, even cattle. The very same language that enables the progress of the humankind also carries the option for ‘rumours, lies, propaganda, stereotypes, and coercive rules.’ Zimbardo 2007.
¹⁵² Nusreta Sivac in Calling the Ghosts, from 41:25 on.
The Bosnian War is notorious for rampant wartime rape. The war made sexual violence as a weapon of warfare known for the average westerner by bringing it into news headlines. As previously discussed, this was not the first time that such sexual violence took place in twentieth century Europe. Rather, the world had changed enough since the times of massive scale rapes in the aftermath of the Second World War; the silence could be broken.\textsuperscript{153}

The fact that ‘almost half of those convicted by the ICTY have been found guilty of elements of crimes involving sexual violence’\textsuperscript{154} begins to describe the scale of wartime rape in the Bosnian War. Estimates of the number of sexual violence victims ranges from 20,000 to 60,000. The UN Commission of Experts initially identified 1,600 rape cases, and later UNHCR indicated 12,000. The Bosnian Interior Ministry has announced 50,000. The number of victims exposes but part of the criminal acts, as many women were victimized repeatedly.

Detention camps, death camps, or rape camps were especially typical of the Bosnian War. According to an UN report, there were 677 of these detention centres.\textsuperscript{155} I now use camp Omarska as an example to reveal some of the patterns of sexual violence in the Bosnian War.\textsuperscript{156} Omarska is a predominantly Serbian village situated some 20 kilometres east of the city of Prijedor in northern Bosnia.\textsuperscript{158} Some 6,000 Bosniaks and Bosnian Croats were taken to its mining facilities at the takeover and massacre of Prijedor. They were kept in

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\textsuperscript{153} Also, this time the victims could be perceived as victims, contrary to the circumstances at the end of the Second World War. As the scale of Nazi Germany atrocities hit the international consciousness, Germany was seen as the ultimate evil, which left no room for recognizing German women as victims.
\textsuperscript{156} However, all parties of the Bosnian War set up prison camps. The Čelebići prison camp, discussed elsewhere in this work, was run by Bosniak and HVO forces and existed at the same time with Omarska. Accounts of summary imprisonment, inhumane conditions, torture, and rape are parallel. Omarska camp is particularly noteworthy because the crimes committed there were some of the first brought before the ICTY. Omarska victims Sivac and Cigelj were legal professionals themselves and worked to bring their case before the ICTY by gathering witness testimonies and leading other witness-victims by their example of speaking up.
\textsuperscript{157} I have addressed Omarska camp quite extensively. Omarska also played an important role in the detection of rape camps and the international news coverage that followed, both remarkable in shaping the history and international law as well as catalysts to founding the ICTY. Ed Vulliamy, Foreign correspondent of \textit{The Guardian}, got wind of Omarska from the local women whose husbands were missing. The fact that also women were kept in the camp was only revealed the next year. ‘That surprise visit was what saved us. ... Otherwise, there was no way that anyone could live through the camp.’ And then, just as they arrested us without explanation, they told us to get ready, that we were going home. And they let us go. We didn’t know why. Later we found out that the first journalists were about to break through to the Omarska camp that day.’ Nusreta Sivac in \textit{Calling the Ghosts}, from 25:34 on.
\textsuperscript{158} In the current Republika Srpska.
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the prison camp under the pretext of being accused of paramilitary activities through the summer of 1992. Many perished from inhumane conditions and mass executions.\textsuperscript{159}

Judge and Omarska camp survivor Nusreta Sivac’s report points to the fact that even as political tensions rose before the outbreak of open violence, the risk of sexual violence never occurred to the locals. Descriptively, Sivac sent her husband out of town ahead of her, as men were considered to be seen as threats by the Serbs, and thus the primary targets.\textsuperscript{160}

The reason why someone fell victim to sexual violence varies. Expelling Bosniaks and Croats from Prijedor typifies a certain motive. Judge Sivac\textsuperscript{161} describes targeting non-Serb intellectuals: ‘I tried to put together a mosaic in my head. Why was I there? I was never involved in politics. And then I realized that there was a pattern. I am an intellectual and a Muslim. That was the reason. Muslim and Croat intellectuals were the first targets when the Serbs occupied our town.’\textsuperscript{162} According to Sivac, sexual violence was deliberately directed at non-Serb women who served in public positions at the time of Prijedor’s takeover.\textsuperscript{163} It seems that the purpose of the targeting was to change the power structure in the region. That came to be the de facto consequence.\textsuperscript{164}

It was typical of sexual violence in the Bosnian War that victims knew their rapists from some previous context. Political agenda justified old grudges, enabling personal vendetta

\textsuperscript{159} There are no exact numbers due to the chaotic conditions of the camp. As many as 145 mass graves have been located in the surrounding area. Yet, there are still people of Prijedor missing whose remains have not been found and identified.

\textsuperscript{160} ‘On April 29, 1992 the Serbs seized power in Prijedor. My husband got out on the 22\textsuperscript{nd}. I was supposed to go with him, but I returned the ticket. I said I’d come in three days after I took care of some things at work. In the meantime, all the roads were closed. I had insisted that he leave, thinking that something could only happen to the men, that no one would touch the women.’ Calling the Ghosts, 5:58 on.

\textsuperscript{161} There were 36 or 37 women held in Omarska (the number varies between sources). It was mostly a camp for detaining and killing men. Calling the Ghosts, from 10:54 on.

\textsuperscript{162} Nusreta Sivac, Calling the Ghosts, from 17:24 on.

\textsuperscript{163} The gendered patterns are once again parallel even though the national communities in question are different. Serbian propaganda in the 1980s purported the Albanian criminals’ selection of victims to be based on the standing of a woman’s family, not any personal qualities. Bracewell 2000: 573.

\textsuperscript{164} Sivac was suddenly released from Omarska camp as international media took too close an interest in the rumours that wafted therefrom. What Sivac found out upon her return to Prijedor illustrates the complete change in who held the power: While Sivac was held captive and terrorized at the camp, her former colleague had taken over her abandoned apartment, with no intention to move out. Sivac eventually relocated back to Prijedor after the war, but her office was never restored to her. Calling the Ghosts, from 27:20 on.
behind the mask of military operations. Commanders and guards in many a detention camp were local townsmen whom their victims knew by name.\textsuperscript{165, 166}

In the camps, sexual assaults were mixed with other forms of terror. The seized suffered from hunger, beatings, and psychological trauma from having to witness and fear torture – sometimes of people they knew. Sivac relays: ‘There were moments when I prayed to God to save me from a slow death. I prayed that they’d kill me with a bullet. That kind of death was rare. ... They mostly died from excruciating torture carried out on a daily basis.’\textsuperscript{167} Witness testimonies before the ICTY describe the macabre drills on the yard and ‘hearings’ that left the interrogation rooms, which doubled as women’s overnight lodging, spattered with blood, skin and hair. Drinking water was poisoned. As a result, all who survived Omarska camp suffer from kidney damage.\textsuperscript{168}

In addition to prison camps, women were detained in sports halls, schools, houses and barns that were turned into brothels and rape camps. On some occasions, the question was about relatively short-term interrogations that involved sexual harassment, intimidation or rape. At the other end of the spectrum, women suffered prolonged times of repeated rape either as sex slaves for the armed forces or rape camps, where especially young women were kept for the purpose of impregnating them. The somewhat local-political grounds of detaining a handful of mostly middle-aged women in Omarska camp represent but one of the intermingling and overlapping motives that all welled from militant nationalism.

Ejup Ganić, the president of the Federation of Bosnia and Herzegovina in 1997-1999 and 2000-2001\textsuperscript{169}, has accused the international community for turning a blind eye to the rape victims and the children born in the wake of the crimes in Bosnia and Herzegovina. ‘The international community should have been even more direct .... If 60,000 women are raped,

\textsuperscript{165} How political agenda and personal revenge got blurred in the Yugoslav Wars is discussed in chapter 2.

\textsuperscript{166} ‘Most of them [the guards] I knew personally. I knew them by their first and last names. Before the occupation, we had coffee together at work, talked... now they pretended they didn’t even know us.’ \textit{Calling the Ghosts}, from 9:45 on.

\textsuperscript{167} \textit{Calling the Ghosts}, from 14:44 on.

\textsuperscript{168} \textit{Calling the Ghosts}, from 31:15 on.

\textsuperscript{169} Also, an MIT-trained Doctor of Science, and the founder and chancellor of Sarajevo School of Science and Technology. Shares with Elisabeth Rehn the passion to rebuild the country through education. Rehn was active in founding United World College in Mostar in 2006, and still serves as the President of the school. In addition to academic training, the main purpose of the school is to bring together youth from all ethnicities of Bosnia and Herzegovina, along with the dozens of other nationalities in the international program.
Europe cannot merely allow a crime like that to pass. These crimes must be punished ...\textsuperscript{170} President Ganić’s accusation of leaving the victims aside is more understandable when one considers the numbers. Only a handful of the war criminals ever ended up being tried before the ICTY. For instance, of the sixty women that the deputy commander of the Čelebići prison camp Hazim Delić bragged about having impregnated, only two appeared in the ICTY.\textsuperscript{171 172 173}

At the outbreak of the Yugoslav Wars, sexual violence as a weapon of warfare was unthinkable. By the time of the Kosovo War, the fear of rape was the essence of terror.

4.3 Sexual Violence in the Kosovo War

‘Rape was our greatest fear. Our main goal was to get our daughters – aged twenty-five, twenty-one, fourteen and ten- out of the country.’\textsuperscript{174}

Blatant discrimination and large-scale human rights violations of the Kosovar Albanians had begun in 1989. Slobodan Milošević had revoked the autonomy of Kosovo, the local police had been replaced by Serbian Ministry of the Interior special police units, and ethnic Albanian public servants gotten fired. The Bosnian War had proved the credibility of the threat

\textsuperscript{170} Vesikallio 2014: 229. The translation is my own.
\textsuperscript{171} Mucić et al. (IT-96-21), according to witness-victim Grosdana Ćećez’s testimony, p. 147. Of course, the number may or may not have been correct in the first place; yet, unlikely nowhere near limited into the two witness-victims of the tribunal – and this is the case in a success story where the perpetrator was charged and brought to trial in the first place.
\textsuperscript{172} Delić was first sentenced to 20 years’ imprisonment for crimes including murder, torture and inhuman treatment in 1998, but the Appeals Chamber reduced the sentence to 18 years in 2003. Interestingly, Delić served his sentence in Finland. He was granted early release in 2008.
\textsuperscript{173} Elisabeth Rehn served first as the Undersecretary General of the UN from 1995 to 1999. She joined Ganić’s criticism in that the international community left the genocide victims in Bosnia and Herzegovina to fend for themselves. Rehn lived in Sarajevo for her UN assignments. Her method of working was to go to the grassroots with minimal security measures to gain people’s trust. She talked to locals and victims through her interpreter and visited all manner of locations, including mass grave excavations personally. In her biography’s chapters concerning her extensive work in the West Balkans, the ICTY is barely mentioned. This leads the reader to wonder whether that is a choice of cropping, or if this really echoes her experience of the tribunal’s relevance to her job description. Helena Ranta, a Finnish forensic odontologist who gathered evidence for the ICTY e.g. from mass graves, has mentioned elsewhere that she and Rehn barely interacted during their Balkans assignments.
of rape by the Serbian and Yugoslav forces. As the KLA and the Serbian police attacks escalated into an internal armed conflict in the spring of 1998, the fear of rape among civilians was rampant.  

According to Human Rights Watch’s report ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’, three paradigms of sexual violence that were used as military tactics in the Kosovo War can be detected. These scenarios are not unique to this conflict; rather, they depict where and when women are exposed to gender-based violence in a war-torn territory. Rape typically took place either when homes were invaded by enemy combatants, in flight, typically on roadsides, or when women were held hostage or detained.

In addition to rape itself, the fear thereof is an especially efficient weapon of ethnic cleansing. The fear mobilized 1,100,000 Kosovars, especially families with daughters in their teens or twenties. The shadow of the Bosnian War was looming over Kosovo in the sense that the Kosovar Albanians were aware about the extent of ethnic rape that was committed only a few short years ago, by the same Serb forces, also then largely against the Muslim population. The realities of the recent history made the fears all the more tangible. The fact that the same paramilitary groups that were held responsible for atrocities in Bosnia and Herzegovina were known to be active in Kosovo added to the terror sowed. Even if the number of rape did not amount to that of the Bosnian War, the effect was the same: The rumours made Kosovar Albanians flee for the safety and dignity of their families.

The dignity aspect brings us to the special features of Albanian culture and beliefs that make sexual violence particularly destructive. De Brouwer notes that shame and stigmatization are magnified in strongly patriarchal societies such as the West Balkan countries. Kosovar Albanian communities are typically even more so than their neighbouring Yugoslav ethnic groups. Islamic traditions explain patriarchy to some extent, but not entirely, which can be detected by comparing the differences to Muslim Slavs; rather, it is entwined in the culture. For the Kosovar Albanians, family honour and loyalty to the family are pivotal.

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175 Human Rights Watch, ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’, 1 March 2000, Ch. III.
176 Human Rights Watch, ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’, 1 March 2000, Ch. III.
177 de Brouwer 2005.
178 ‘...only women with no close living male relative would even consider reporting a rape.’ Sevdije Ahmeti in 5,000 Hanging Skirts: How Women Remember War Rape in Kosova by Frances Trix. Informed Comment, 15 June 2015.
The concept of family involves in-laws and several generations. Even in urban setting, it is not uncommon for three or four generations to live together to this day. Patriarchal structures are revealed in the way the women that are married in the family outline their family unit as their husband’s family. One can validly talk about clan society. Features typical of the Albanian clan culture, such as loyalty and recognizing vendetta over formal justice system, make gaining any information or co-operation extremely arduous. In 1999, no functioning government institutions, police or judicial system existed to support the undertaking.

Part of the very same rumours and propaganda that led to rising tensions between the Serbs and the Albanians in Yugoslavia since at least the 1980s, explain to some extent sexual violence in the Kosovo War. In Serbian propaganda, religion was deployed to whip up bias between the two ethnicities. Kept strictly in check during Tito’s reign, the differences were used to fuel Serb nationalistic ideals in the people. As in most propaganda, some facts were hand-picked from reality. In the nationalistic Serb propaganda, sexual themes were used in at least two ways. Firstly, an ancient sentiment of the sex drive of the Albanian men was employed. The actual birth rate was higher among the Kosovar Albanian than among the Serbs. The Albanians were depicted as virile yet bestial: their birth rate was portrayed as uncontrolled and a threat to the Serb population. The suggested high birth rate was something related to the Albanians being portrayed as solely Muslim, and this to be the cause for rapid multiplying. However, it is the women’s level of education, not religion, that has proved to influence family size the most. Secondly, the Kosovar Albanians were blamed for ethnic rape, i.e. raping Serb women not only because of their sexual appetite, but to humiliate Serb men for not being able to protect their women, and cause cross-blooded children to be born. There were a couple of widely-published cases in the 1980s, proof for which has not been found in later years’ research. Numbers of reported rape in Kosovo

179 In my own experience, e.g., a woman in her thirties, married to her husband for closer to a decade, would not invite house guests by herself but consult her husband, who in turn would bring the subject up with his parents.

180 The ICTY chief prosecutor Carla Del Ponte describes investigating the alleged war crimes of KLA as the most frustrating task the prosecutor’s office encountered: ‘Police detectives from Berne and Brussels to the Bronx know how frustrating it is to investigate Albanians involved in organized criminal activity. The Albanian language, one of Europe’s oldest, poses problems, because there are so few speakers who are not Albanian; and recruiting native Albanian translators, like recruiting Albanian informants and witnesses, is difficult because Albanian society is so tightly knit and many Albanian clans recognize only their traditional law of vendetta, which exposes family members to retaliation.’ Del Ponte 2009: 279.
were, interestingly, the lowest in the former Yugoslavia, so the allegations appear largely false in this sense, too.\footnote{Rape statistics are infamously unreliable. There are certain factors that need to be considered here, too. In this case, they are especially relevant, since they support the claim that the so-called ethnic rape did not happen. First, it is generally known that only a fraction of sexual violence is reported. The relationship between the perpetrator and the victim is a key factor in whether a rape goes reported. Most of sexual violence is committed by someone the victim knows, typically a spouse. The complex realities and emotions of a family relation such as continued cohabitation with the perpetrator, loyalty etc. often prevent the victim from reporting. However, most rape committed by an unknown perpetrator, typically in a public place, is reported; the guilt is so simple to place, and the victim is more often seen as a victim by her closest people. Report rate also has to do with the women's level of education. Kosovan Serb women were generally more educated than their Albanian counterparts. All this points to the direction that if so-called ethnic rape, Albanian men victimizing Serb women, actually took place, it could not have gone unreported.}

The propaganda was used to invoke masculine pride. It resulted in militant masculine action. In 1998, as KLA attacks accelerated, the Serbian police retaliated by raping young female family members of alleged KLA supporters.\footnote{The Kosovo War and the ongoing battle against ISIS share an interesting side effect: In both wars, factions formerly regarded as illegitimate militant organizations or even terrorists have gained legitimacy and are now viewed as valid freedom fighters in the West. In the Kosovo War, KLA’s cause got validated. In the recent years, Kurd militants have been promoted from a gang of bandits to freedom fighters. The turn of the public opinion has, in both cases, also meant receiving military support and legitimacy for their cause. The storyline is ancient; the difference between a terrorist and a freedom fighter can only be the viewpoint, and most countries that have separated from another state bear their own history of Schaumans. Except for the Estonians – they just sang their way to independence.}

Gathering documentation of sexual violence in the Kosovo War has been particularly arduous. Cultural stigma caused that victims were unwilling or literally unable to speak.\footnote{It is telling that being forced to ‘make coffee’ is believed to be the euphemism for sexual assault. Information detailed enough was hard to obtain. Human Rights Watch: ‘Rape as a Weapon of Ethnic Cleansing’, Ch. III: ‘Gender-Based Violence against Kosovar Albanian Women’.} Another aspect that complicated verification was the fact that women were raped in flight. Kilometres-long columns of refugees were halted at roadblocks. Combatants extorted money, valuables and identity papers from fleeing families by threatening to take their daughters. Women were hand-picked out of the line and ordered in the woods or even raped on the roadside in broad daylight.\footnote{Human Rights Watch, ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’, 1 March 2000, Ch. III, subchapter ‘Attacks in Flight’ contains descriptions of verified rape accounts. The crimes were typically carried out on the roadside, on lorries, or in the woods nearby.} It is hard to verify accounts later, as crimes were committed in disorderly situations, among crowds of unfamiliar people. Witnesses scattered around the Balkans and all over Europe. Human Rights Watch described the number
of internally displaced people as a geographical chaos.\textsuperscript{185} Many of the verified reports of rape came from hospital sources.

For the described reasons, the actual number of rape cases and individual victims in the Kosovo War is disputable. Human Rights Watch was able to verify 96 cases.\textsuperscript{186} This fact is eagerly reminded by those who want to belittle the occurrence of sexual violence in the Kosovo War. An estimation of 20,000 de facto rape victims appears in dozens of articles.\textsuperscript{187}

The menace of large-scale sexual violence is the part of ethnic cleansing that drew attention to Kosovo. Fresh in the memory of the international community were the horrors exposed in the Bosnian War. It is undisputed that an ethnic cleansing was taking place in Kosovo. Yet, to what extent was the NATO intervention based on what was actually taking place? It has been speculated that the mere potential of the situation of escalating into Bosnia-scale horror story, and the regret for the international community’s lethargy in the face of genocide and utter failure to intervene and protect Bosnian Muslim population played a significant part in launching the NATO bombings. To say the least, sexual violence and the fear thereof played a significant role in both driving the Kosovar Albanians from their homes, as well as the Western intervention. Sadly, some brutal attacks to western Kosovo villages in the spring of 1999 happened after the NATO bombings had already started in Serbia.\textsuperscript{188}

In my estimation, there were three ways in which sexual violence as a weapon of ethnic cleansing or genocide in Kosovo differed from that in the Bosnian War. The escalation of the conflict caused an imminent fear of sexual violence, as the Bosnian War had introduced the threat of wartime rape to this generation of the West Balkans. The fear of rape was strategic in causing the mass exodus. Unlike in the Bosnian War, victims and witnesses were not able to identify assailants; the armed forces and paramilitaries had come to Kosovo


\textsuperscript{186} Most of the 96 were gang rapes involving two or more perpetrators, which, again, points to the fact that sexual violence was a methodical pattern of action instead of a series of individual whims. Human Rights Watch: ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’.

\textsuperscript{187} Academics cite this estimation, too. However, I was not able to track the source of this number.

\textsuperscript{188} The NATO bombings began on 23 March 1999 and lasted until 10 June. Massacre in Qyshk/Cuška took place in 14 May 1999.
from the outside, and many were victimized in flight instead of in places of their residence.\textsuperscript{189} The disorderly mass exodus paired with the utmost taboo nature of rape has left most of the war criminals unidentified.

4.4 Dogs of War

\textit{‘The paramilitary said to us - You are in our hands, and until we fulfil our obligation to steal and take your women, we will not let you go.’}\textsuperscript{190}

In the context of the Yugoslav Wars, at least two kinds of combatants have been called \textit{dogs of war}. The name refers to mercenaries, with a built-in hint of ethics on sale. Dogs of war can also mean paramilitaries with no restraint in their tactics of destruction. Next, I take a look at both domestic and foreign irregular forces in the Yugoslav Wars.\textsuperscript{191} Paramilitary groups were primary agents in the criminal violence and wartime rape that launched the ethnic cleansings.\textsuperscript{192}

Paramilitary forces are defined as ‘a legal armed formation that is not integrated into a regular armed force.’\textsuperscript{193} Paramilitary can refer to militia, volunteer units domestic or foreign, or even police forces that are acting as combatants in armed conflicts. Paramilitary is not a legal term. Even so, irregulars are regarded as lawful combatants under international law provided that they are ‘under responsible command, carry distinctive signs, [and] carry arms openly.’\textsuperscript{194} As such, they are bound by the laws and customs of war as well as the Geneva Conventions, and protected by them should they become prisoners of war. Consequently, they can also be tried for war crimes like any other combatants.

\begin{itemize}
\item \textsuperscript{189} ‘I want to tell your people [Kosovar Albanian] and be heard by Albanians. I want to explain that it wasn’t the Serb neighbours who did this. This was done by mercenaries coming from different corners of this place.’ Life in Kosovo: War Crimes, from 19:40 on.
\item \textsuperscript{190} Human Rights Watch interview, B.B., Mitrovica, 16 July 1999. Human Rights Watch, ‘Kosovo: Rape as a Weapon of Ethnic Cleansing’, 1 March 2000, Ch. III.
\item \textsuperscript{191} Many paramilitaries, foreign as well as former Yugoslavia citizens, were mercenaries in some way. Some of them received a pay from the government they were fighting for. Others sought riches by looting homes of the killed or expelled, or by extorting refugees at roadblocks.
\item \textsuperscript{192} Amanpour in Gutman, Rieff, and Dworkin (eds) 2007: 314.
\item \textsuperscript{193} Amanpour in Gutman, Rieff, and Dworkin (eds) 2007: 312-313.
\item \textsuperscript{194} Amanpour in Gutman, Rieff, and Dworkin (eds) 2007: 313.
\end{itemize}
By foreign fighters, I mean combatants outside the successor states of the former Yugoslavia. E.g. numerous Kosovar Albanians fought for the Croat side in 1992. Montenegrin involvement was manifold in the Serb troops through the 1990s, but they not only identified themselves with the Serbs, but were part of the JNA under Milošević’s command at the time.

The Yugoslav Wars attracted combatants from all manner of backgrounds. Most of the foreign additions to the Croat forces arrived from other Catholic countries. There were Italian and French battalions, as well as a multi-national, English-speaking brigade. A documentary film ‘Inside Story: Dogs of War’ parades a mixed bunch of self-nominated soldiers of the Croat army. Some of them were British soldiers absent without leave from the army. The commander of the First International Company introduces himself as a Spanish journalist who arrived in Croatia to report but lost his impartiality by the second week. Like the commander, part of the combatants seemed to be motivated by ideas that roughly translate into just war, whereas others confessed borderline sociopath musings such as being roused by the opportunity to kill ‘legally’. Obviously, these motley forces cannot have been in the direct chain of command of the Croat army, starting from the language barrier.

The Bosnian War, too, drew foreign involvement. Several Muslim countries provided humanitarian aid for the Bosniaks, and Iran alone supplied two-thirds of their weaponry. Both Sunni and Shia fighters joined the Bosniak party motivated by ideas of holy war. The number of these mujahideen is controversial, from a few hundred to six thousand. The volunteers demonstrated the Muslim world’s support to the Bosniaks’ cause, but they soon became a liability. The existence of the mujahideen served Serbia’s anti-Muslim propaganda.

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195 The Croat army drew involvement all the way from the Nordic countries, including Finland. The only convicted war criminal of the Yugoslav Wars is a Swedish neo-Nazi Jackie Arklöv.
196 The interviewed combatants described their motives for joining a foreign war as following: ‘I want action. … Now that I came along, you live with people for a while, you really wanna kill for them … you see what’s been done to them and I just wanna kill to take revenge for these people. That’s why I want to go to war as quick as possible, you know, to get in there and take some of these people out. … Cause as much pain to the enemy.’ Another young combatant’s mother had been led under the impression that her son was working at Euro Disney. Some of the interviewees had a cheerful air of venture, the others a soberer presence of someone who had fought wars for too long to know how to lead civilian life.
Croatia, too, justified their involvement in Bosnia and Herzegovina by foreign Islamist fighters. Allegedly, the mujahideen diverged from the Bosniak command early on to fight their own cause.

The Serbs both in the VRS and the Serb Army received foreign support mostly from other Orthodox Christian countries. In the Bosnian War, there were a hundred Greek combatants fighting under Serb command. According to unconfirmed allegations, the Greek flag flew in Srebrenica when it fell to the Serbs. There were also three units, some 500 or 600 Russian fighters. Joint military exercises demonstrate that the military ties between Serbia and Russia remain close to this day. ‘Slavic brotherhood’ is also evidenced in the monument that was recently revealed in Visegrad, Republika Srpska to honour the Russian volunteers’ contribution to the VRS cause.

Foreign fighters of all sides of the Yugoslav Wars are blamed for grave human rights violations. As none of the foreign fighters have been indicted by the ICTY, I leave discussing them here.

Christiane Amanpour states that ‘... paramilitaries are routinely deployed by governments to preserve plausible deniability and to cloud the issue of command and control. ... They often operate in subordination to the regular army. Too often, paramilitaries provide a cover for governments’ intent on violating international law.’

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197 Milan Milutinović served as the Ambassador of the FRY to Greece in the early 1990s before becoming Yugoslavia’s Minister of Foreign Affairs and then the President of Serbia. The ICTY tried Milutinović, together with Nikola Šainović and Dragoljub Ojdanić, for war crimes on the basis of command responsibility in the Kosovo War, but he was acquitted in 2009. His case is one indication of the close ideological association of the Serbian and Greek leadership at the time.


200 None were charged, but a few foreign fighters were called as witnesses. Bosnian Army officers Amir Kubura and Enver Hadžhasanovic were tried based on command responsibility, but acquitted on most counts by the Appeals Chamber. Judgement, Prosecutor v. Enver Hadžhasanovic and Amir Kubura, Appeals Chamber (IT-01-47-A), 22 April 2008.


202 ‘The Jackals were “war dogs”. The kind of dogs every army ... have: a group that takes care of things. They don’t care about religion or nationality. They do the dirty work that no other can do or wants to do.’ Interview with Zoran Raskovic, a former member of ‘Jackals’, a paramilitary unit in the Kosovo War. Life in Kosovo: War Crimes, from 8:09 on.

203 According to the testimony of Zoran Raskovic, he began his military service in the Serbian army at the age of 19 and was appointed to the ‘Jackals’. (Life in Kosovo: War Crimes, at 8:09) ‘This man [the commander of the paramilitary unit, Nebojsa Minic] had a lot of influence. He had influence over the police, over mayors.’
The founding of the ICTY in 1993 and the indictments and arrests that gradually ensued signalled that the era of absolute impunity was over. A loop around political and military leadership was slowly tightening by the time of the Kosovo War. It was reflected at the grassroots: Fellow townspeople did not perpetrate violence in the Kosovo War like in the Bosnian War. Paramilitaries wore masks or smeared their faces. The supporters of violent agenda would not want responsibility for atrocities to be directly traceable to them.

Arkan’s Tigers\(^{204}\) started with what came to be known as ethnic cleansing from Bijeljina in eastern Bosnia in April 1992. They blocked the roads and started their progress from door to door, arresting civilians, raping and pillaging and randomly killing unarmed men, women and children. 20,000 Muslims fled or were deported to camps or killed. It is telling that this paramilitary unit was originally called Serbian Volunteer Guard.\(^{205}\) The divide et impera tactic was repeated in previously addressed Prijedor as well as dozens of other towns and villages.

According to reports received by Human Rights Watch, some of the same paramilitary groups that wreaked chaos in the Bosnian War were also active in the ethnic cleansing of Kosovo.\(^{206}\) By the time of the Kosovo War, rumours of paramilitaries’ rape had reached civilians: ‘Some of them were dressed like soldiers and some were dressed in black with head scarves. I had heard that those men with head scarves were very dangerous.’\(^{208}\) Vic-

\(^{204}\) Some paramilitary groups were known by grandiloquent, heroic names such as Arkan’s Tigers, White Eagles, or Tsarist Wolves (a Russian monarchist unit). Amanpour in Gutman, Rieff, and Dworkin (eds) 2007: 312.

\(^{205}\) Amanpour in Gutman, Rieff, and Dworkin (eds) 2007: 312.


\(^{207}\) Zoran Raskovic also mentions that the commander of the paramilitary unit ‘Jackals’ had previously participated in the Bosnian War. [Showing a photograph to the interviewer and the camera] ‘The Jackal commander, Nebojsa Minic – “Mrtvi”.’ ‘Why is he called “Mrtvi” (Death)?’ ‘That’s his nickname. He brought it from a previous war, Prekajla, Bosnia.’ Life in Kosovo: War Crimes, from 15:45 on.

\(^{208}\) ‘Elife’ describes the band of Serb men who ambushed her group of about 50 women and children on a mountainside on 3 April 1999. The group had separated from a column of refugees walking towards Albania as rumour had it that there was a road block and beatings ahead. ‘Elife’ was selected from the group and
tims and witnesses alike struggled with discerning between the police, army and paramilitaries in their accounts. While members of all of them committed sexual violence, all the accounts of raping and killing point to dogs of war.209


5. How the Yugoslav Wars and the ICTY Changed International Law

5.1 On the Discourse on Sexual Violence as a Weapon of War

The term sexual violence as a weapon of war spread from the sphere of international law during the Yugoslav Wars\(^{210}\) and the founding of the ICTY. News coverage on the wars cemented it in public awareness.\(^{211}\)

The charging of war criminals with wartime rape before the ICTY (and before the ICTR) as a separate crime was applauded as the long-awaited and most meaningful advance in international humanitarian law since the Nuremberg trials. The ICTY has been credited for debunking the notion that wartime rape is an inevitable side effect of armed conflict, caused by individual combatants’ perversions, and changing the discourse to correspond the reality where wartime rape is committed under the protection or even direct command of superiors. Nonetheless, calling wartime rape a weapon of war is neither unanimously accepted nor without consequences. In this subchapter, I examine some possible effects, as well as critique, of the terminology that has been given to wartime sexual violence. I analyse what the values are that the nomenclature protects and regenerates, and how categorizations of sexual violence reflect, in turn, back into lines of thinking. My focus here is the relevance that is attributed to the suffering of individual victims.

One problematization of calling wartime rape a weapon of war or a war crime is said to be the reality-creating nature of the terms. Critics believe that the discourse may, in fact, worsen conflicts by adding to the tactical relevance of sexual violence and the perpetrators’

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\(^{210}\) As well as, simultaneously, the genocide in Rwanda.

\(^{211}\) The 1990s Yugoslav Wars have been called the first information war because they were closely followed by Western media. Some factors were: The proximity and accessibility of war zone, as the wars were fought on European soil. The public interest that partly originated in the Sarajevo Winter Olympics only a few years earlier in 1984. Because camcorders had become available to ordinary people, footage was filmed by civilians and combatants alike at a previously unseen volume.
strategic position.\textsuperscript{212} After all, rape in war has become highly politicized since the 1990s when the discourse on wartime sexual violence became more known.\textsuperscript{213}

The problem of this line of critique seems to be that belligerents are expected to be aware of the developments of human rights discourse to then be incited by it. I am inclined to think that the shock value of rape does not remarkably vary according to what names it be given; the damage that results from crimes that infringe personal safety and autonomy to this degree are universally and instinctively recognized. My claim is based on the fact that wartime sexual violence has, as noted, occurred anciently and universally.\textsuperscript{214} I find the nexus between the discourse on sexual violence and the incidence of wartime rape in recent conflicts implausible. Take the so-called Islamic State, for example: Would the Salafi jihadists have treated women under their rule any better if it were not for the discourse on wartime rape?

From the Nuremberg trials all the way to the 1990s’ advances, wartime rape fell under the category of crimes against humanity, and was not specifically prosecuted. A question has been posed if the crime category ‘crimes against humanity’ refers to crimes against individual women at all, or if the implied contents of the offence was de facto crimes against patriarchal community. Some see the discourse on sexual violence as a weapon of war a mere continuum. In this line of critique, the prevalent narrative is accused of depriving the actual victims of their victim status by misdirecting the focus on a community. Talking about wartime rape as a weapon of war draws attention to symptoms instead of causes.\textsuperscript{215} The real reason for women’s bodies being such appropriate targets against whole communities lie in the circumstances and beliefs that define and constrict the general status of women in a society.

The whole discourse on sexual violence in war has been accused of presenting partial truths, as main lines of the discussion are intertwined with women’s issues, and the discourse is thus personalized in women. Critics blame the discourse for not having proceeded

\textsuperscript{212} “Wartime sexual violence is not just a “weapon of war””, The Washington Post, 24 September 2014.
\textsuperscript{213} The politicization of rape is also manifested in the debate across Europe since the beginning of the refugee crisis in 2015.
\textsuperscript{214} Whereas the human rights discussion, including the discourse on wartime sexual violence, started from the West.
\textsuperscript{215} “Wartime sexual violence is not just a “weapon of war””, The Washington Post, 24 September 2014.
to acknowledge the victimhood of men, and completely excluding LGBT victims.\textsuperscript{216} While I
do not mean to belittle the suffering of any victim or group, I want to point out the fact
that women are vulnerable to sexual abuse and violence in a variety of conflict-related ways
that generally do not threaten men, and by a variety of offenders, also those from the same
side of the conflict as the victim. Some of the destructiveness on women is purely biological,
too. Forcibly impregnating a woman is an act of violence that the nature sustains and
prolongs long after any sign of the perpetrator has vanished.

Furthermore, the discourse on sexual violence as a weapon of war has been blamed for
representing the matter of sexual abuse in war simplistically and preaching from a false
moral pedestal. Evidence of sexual abuse near UN peace-keeping forces’ stations
abounds,\textsuperscript{217} and the US forces are irrefutably perpetrators of wartime sexual violence
themselves.\textsuperscript{218} While it is correct that the West has no moral superiority from which to
address the subject or justify interference in conflicts, I do not think this could equal incom-
petence to discuss wartime rape. Besides, the ICTY, a remarkable contributor to the dis-
course, is not a solely Western project, but its personnel represent all continents and legal
traditions.

Yet another point of criticism is the use of the discourse on sexual violence in war to justify
political decisions. According to these critics, the NATO bombings of Kosovo and Serbia
were in the USA’s interest and might have been launched even in the absence of the polit-
ically convenient excuse of a genocide danger. Sexual violence and the threat of its escal-
ation into what was seen in the Bosnian War was presented as the reason for the military
intervention. The West has also been accused of patching their aching conscience after the
utter failure to act on the Geneva Convention’s responsibilities to protect Bosnians from
genocide by taking summary action in Kosovo.

\textsuperscript{216} Among others, Stemple, Lara: ‘Male Rape and Human Rights’.
\textsuperscript{217} ‘Wartime sexual violence is not just a “weapon of war”’, The Washington Post, 24 September 2014. The
question is not necessarily of accusations of violent sexual attacks, but grossly exploiting women and girls in
a vulnerable position, e.g. exchanging food for sex.
\textsuperscript{218} US soldiers notoriously tortured and sexually abused and humiliated prisoners in Abu Ghraib prison in
Baghdad. Suspicious deaths in US run prisons also became public. The birth of the ISIS has been claimed to
date back to the US atrocities during the Iraq war. To say the least, Islamists were treated to ample propa-
ganda material.
It was obviously too late to mend the fatal failure in Bosnia and Herzegovina. I find this line of criticism fruitless as the option was to see if history would repeat itself in Kosovo. I also think that comparing the number of victims between Bosnia and Herzegovina and Kosovo is speculative to the point of being futile: in Bosnia and Herzegovina, international intervention was procrastinated and the UN efforts infamously failed, whereas the NATO bombings in Kosovo and Serbia did ultimately pressure Serbia to interrupt military action in its former autonomous region.\textsuperscript{219} Seeing the bloodshed and rape in Bosnia and Herzegovina and the Serbian rhetoric openly aimed at ethnic cleansing of the Kosovo province, it is no wonder that some 1,100,000 Kosovar Albanians fled their homes. The danger of recurring genocide was imminent. It is proper to be aware of the political motives behind the NATO bombings of Serbia, but as the price of inaction is incalculable, this line of criticism appears to be of little value.

To sum up, the critique of the discourse on sexual violence as a weapon of war seems to target the fact that the discussion does not capture every aspect of the complex truth. However, the discourse must have started somewhere to bring forth any progress in prosecuting and convicting for sexual crimes in war. I see intrinsic value in breaking the silence on the subject, in however incomplete a manner and with imperfect terminology. It is also the responsibility of an enlightened recipient to take into consideration that nomenclature affects reality. War crimes are hardly a topic that one should expect to exhaustively analyse.

5.2 Sentencing for Sexual Crimes in the ICTY

\textit{`Every trial is related to an injury, a trauma for which it compensates and that it attempts to remedy and overcome.'}\textsuperscript{220}

\textsuperscript{219} Certain sources also present the argument that the victim numbers of Kosovo were severely underestimated or even downplayed on purpose in order to subdue the chaotic mass exodus from the region.

\textsuperscript{220} Felman 1999: 36, according to Campbell 2003: 507.
Sentencing is addressed in the ICTY Statute’s Articles 23 on judgement and 24 on penalties. The guidelines for sentencing are brief:

**Article 23 – Judgement**

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

**Article 24 – Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.\(^\text{221}\)

The tribunal has been blamed for inconsistent sentencing practice. The disapproval is apprehensible, especially from the viewpoint of Romano-Germanic legal tradition with its predetermined penalties. The lack of any hierarchical list of crimes and accompanying sentences in the Statute means that the ICTY judges exercise broad discretionary power. This sets a great responsibility and emphasis on the argumentation of each sentence. Meticulous argumentation not only does right by the accused, but is also a matter of credibility.

\(^{221}\) UN Security Council Resolution 827 (1993), ‘The ICTY Resolution’.
for the tribunal itself. The brevity of the Articles on sentencing means that there was little more than the Yugoslav penalty practice to start from.

In my opinion, the lack of a fixed scale of penalties and the discretionary nature of sentencing is an understandable feature of the ICTY for at least two reasons. The ad hoc tribunals were not founded on some previous model. As explained previously, it is by no means exaggerated to state that the ICTY and the individuals working in the court had to struggle in the borderlands between the judicial and the political to establish sufficient influence among the national and international actors to have even the first of the accused apprehended. Thus, prosecution had to be focused on initially. Secondly, as the former Yugoslavia and Rwanda tribunals are precursors in the attempt to cease the impunity of grave breaches of human rights, no previous model existed at the time of drafting the ICTY Statute with its articles on sentencing. Criticizing the ICTY for inconsistencies in its sentencing practice seems unreasonable, since built in the fault-finding is the expectation that the United Nations Security Council, while drafting the statute, should have been able to anticipate the variety of the severe crimes brought before the court. In the early years of operation, the ICTY often had to conclude that ‘with regard to this question, there is neither applicable conventional law nor customary international law for its solution. National laws and practices of various States on this question are also divergent, so that no general principle of law recognized by civilized nations can be deduced from them.’ And, as the Yugoslav Wars were raging at the time of the founding of the ICTY, some of the gravest violations of human rights were yet to be committed – a sore demonstration of the confidence of political and military executives in their immunity and impunity.

There are several purposes for sentencing. These reasons originate from national criminal laws and include retribution, general and specific deterrence, and rehabilitation. As de Brouwer notes, these partly unspoken grounds can affect the length of a prison sentence notably. Views on why sentences should be imposed depends on whom one asks. Obviously, the international community, academic writers and international law practitioners emphasise ceasing the impunity for serious human rights violations, the underlying thought


\[223\] de Brouwer 2005: 324.
being general deterrence among political and military leaders around the world.\textsuperscript{224} The ICTY’s Trial Chamber has often pronounced deterrence, both general and specific, to be its motivation.\textsuperscript{225} However, the grassroots sentiment demands punishment – retribution. The opinion of a just criminal penalty is the harsher the closer its holder has witnessed the crime in question.\textsuperscript{226}

78 of the 161 accused faced charges of sexual violence in their indictments. Those that were found guilty were sentenced to jail from three up to forty years. As the sanctions are not itemized, but the verdict concerns all charges that are proven beyond reasonable doubt, it is impossible to analyse here the penalty scale for different types of acts of wartime sexual violence. Additional complexity comes from convictions under Article 7(3). Superior responsibility for wartime rape may indicate anything from agitation, contribution and personal involvement in acts of sexual violence, to less reprehensible affiliation such as failure to prevent sexual violence committed by others while acting as a guard in a prison camp.\textsuperscript{227}

The fact that sexual crimes were, at last, addressed by means of supranational criminal law in the ICTY – as well as in the ICTR – finally formalized the conception that sexual violence can be used as a strategic conduct, a weapon of warfare that serves political and military aims rather than individual appetites, and needs to be treated as such before the law. In 1998, several sexual crimes were explicitly codified in the Rome Statute of the International Criminal Court. The crimes were labelled under crimes against humanity and war crimes.

\textsuperscript{224}Representational of this sentiment within the legal sphere is that getting the top-ranking war agitators and commanders before the tribunal is the underlying theme in Carla Del Ponte’s memoir of her career as the chief prosecutor of the ICTY, and the apparent driving force for her whole career. She sees herself metaphorically as a snake hunter, according to her favourite childhood venture. Del Ponte 2009: 11-13, 378-379. ‘What I have learned, what I have tried to illustrate in this memoir’s depictions of the successes and failures of my team and me, is that defeating the culture that allows powerful persons, from the capo dei capi of the Mafia to military and political leaders, to commit any outrage and not to be held accountable is a matter of will that often demands impatience more than patience, a matter of enlisting support, a matter of applying leverage, a matter of taking risks, correcting mistakes, breaking through muro di gomma, ignoring criticism and threats, and sometimes, suffering the loss of friends and collaborators. Prosecuting war crimes is not some risk-free intellectual game.’ Del Ponte 2009: 378.

\textsuperscript{225}Kutnjak Ivković and Hagan 2011: 14.

\textsuperscript{226}Kutnjak Ivković and Hagan 2011: 14-20. The victims’ needs and their expectations of the ICTY are discussed in the next subchapter.

\textsuperscript{227}Such as Damir Došen and Dragan Kolundžija in Sikirica \textit{et al}. (IT-95-8) ‘Keraterm Camp’.
The definition of genocide was taken directly from the Genocide Convention. The term ethnic cleansing is not part of the vocabulary of the Rome Statute of the ICC, possibly due to the year of its drafting.

As was discussed above, the shame and stigmatisation often rest on the victim of sexual violence especially in patriarchal societies such as the West Balkan countries. The distance of the ICTY from the local communities causes that the impact that the tribunal sentences can have on an average Balkan’s attitudes and beliefs is limited. However, prosecuting and sentencing for wartime sexual violence in several cases demonstrates that the era of presumed impunity is over. As Carla del Ponte put it, even if only a fraction of war criminals is brought before the tribunal, the rest of them may feel the reproach on their criminal deeds and fear that their actions may one day catch up with them. The wars in the Middle East and Central Africa in the recent years do not give much hope that the general deterrent effect would have spread much wider than the West. Hopefully, the ICC will continue prosecuting for sexual violence as a weapon of war where the ICTY’s influence on the international humanitarian law left off.

5.3 Victimological Perspectives on the ICTY

‘In order to expose the crime, you violate the witness. You don’t force her, of course – but you beg her to speak, but you do make her live through it again.’

In his subchapter, I step outside of the strictly legal realm to look into the work of the ICTY from the perspective of the former Yugoslavia residents and especially the victims of wartime sexual violence. I contemplate how an international criminal court serves as a post-conflict mechanism, and if, and to what extent, it resonates with the victims’ needs. I weigh certain aspects of seeing justice done, such as the probability of individual war criminals getting caught, and the relation between expectations and realized penalties of the ICTY as well as the limitations of the tribunal’s jurisdiction.

228 Jadranka Cigelj in Calling the Ghosts, from 50:36 on.
What is it that survivors want?\textsuperscript{229} According to Julie Mertus, it is public acknowledgement of what they have lived through, recording truth as they experienced it in the collective memory, revenge and retribution, remedy for their suffering, and re-establishing of the rule of law over violent power that victims expect of post-conflict judicial mechanisms.\textsuperscript{230} Clearly, a great part of the expectations represent the therapeutic function of justice – the authoritative recognition of wrongs.\textsuperscript{231} The following reflections by Nusreta Sivac, a survivor of Omarska camp in Bosnia and Herzegovina, epitomizes some lines of thinking of victims. She thinks back to the summer of 1992 in the detention camp: ‘We always had a glimmer of hope that ... Maybe one of us will survive and one day tell all this, to the public, to the whole world.’\textsuperscript{233} ‘I always say, it's a new shock every time you talk about it. But I feel some kind of obligation toward all those women friends of mine who are now gone, who were killed in the camp.’\textsuperscript{234} ‘I wouldn’t like to take revenge, but I would like it if justice, punishment would catch up to them, so that they realize for once that what they did is at least punishable ....’\textsuperscript{235} 236

\textsuperscript{229} Subheading in ‘Telling Stories and Hearing Truths: Providing an Effective Remedy to Genocidal Sexual Violence against Women’, in Henham and Behrens (eds), p.115.
\textsuperscript{231} ‘In the beginning, I was in a state of shock. I felt the need for revenge, and the only way to get revenge was by collecting testimonies. I thought that by making them public I would be able to get revenge. Recognition of our work will come when its goal is achieved; when those who are responsible for this war are brought before a court.’ Jadranka Cigelj in Calling the Ghosts, from 48:20 on. The documentary was filmed before the founding of the ICC. Cigelj continues: ‘There is a possibility that the International War Crimes Tribunal will start functioning.’\textsuperscript{232} Campbell 2003: 510.
\textsuperscript{233} Calling the Ghosts, from 21:55 on.
\textsuperscript{234} Calling the Ghosts, from 36:47 on.
\textsuperscript{235} Calling the Ghosts, from 55:40 on.
\textsuperscript{236} I have quoted Nusreta Sivac and Jadranka Cigelj extensively. They are such interesting victim-witnesses because of who they were before the war and what they have done after. Both are lawyers, and both were active in gathering witness testimonies since 1993 when the war was continuing. Some of the first cases before the ICTY concerned crimes that happened in their former home town of Prijedor and in the surrounding region. As lawyers, Sivac and Cigelj were minutely aware of the founding of the ICTY and encouraged other victims to testify against their tormentors. The fact that they were victims themselves and broke the silence, made way to other victim-witnesses. Tadić (IT-94-1) is one of these pioneering cases. The commander of Omarska and the tormentor of Cigelj, Željko Mejakić, was originally indicted by the ICTY (Mejakić et al., IT-02-65), but the case was eventually transferred, in accordance with the ICTY’s completion strategy, to be tried in Bosnia and Herzegovina in 2006. The State Court in Sarajevo found him guilty of crimes against humanity and sentenced him to 21 years of imprisonment. Cigelj and Sivac are exemplars of the grassroots activists invaluable in launching the ICTY. The ICTY issued over 20 indictments connected with the Omarska camp including Fuštar et al. (IT-95-8/1) and Kvočka et al. (IT-98-30/1).
The critics accuse the ICTY of doing too little too late. Too little may refer either to the fewness of indicted war criminals or the perceived leniency of the tribunal’s punishments. Too late concerns the delay between criminal acts and prosecution, let alone the Appeals Chamber’s final judgement in a case. Each of these aspects is about seeing justice done.

One of the greatest breakthroughs of the ICTY has been the prosecution of political and military heads. But, this progress is far from unanimously received. What makes the tribunal so progressive in the field of international humanitarian law is its weakness at the grassroots level. Even if the first to be accused were rank-and-file combatants, the political architects and army commanders responsible for using grave human rights violations as a weapon of ethnic cleansing were who the tribunal really went after. The flipside is that as the tribunal sought to cease impunity at the tops of the command and control chains, most of the assailants have remained at large.

According to the official storyline, all the accused have been eventually faced a trial at the ICTY. The total of 161 persons were indicted. Even the most tentative estimates of individual wartime rape victims in the Yugoslav Wars rise to tens of thousands. The startling disparity between the numbers means that probably thousands of perpetrators of sexual violence have never faced criminal investigation and prosecution. By now, they can expect to live the rest of their lives undisturbed.

As a post-conflict institution, the ICTY is supposed to produce experiences of justice done, truth being brought into daylight, perpetrators suffering punishment, and victims’ suffering being publicly recognized. Not seeing justice done is a serious problem for many victims. During the Yugoslav Wars, a military court in Sarajevo handled one genocide prosecution locally. The indictment included seven murders, two rapes and one abduction. As for the

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237 The ICTY’s first steps were much criticized at the time, as it was feared that the tribunal would shrink into a court for cases menial as precedents even if the expectations were the opposite. Del Ponte 2009.
238 Descriptively, the hunt after Radovan Karadžić, Ratko Mladić, and Slobodan Milošević is almost a main theme in Carla Del Ponte’s Madame Prosecutor. Getting the top political and army policy-makers to trial was clearly the primary ambition of both the chief prosecutor and her office. This not only served to raise the profile of the ICTY remarkably, as well as pave the way for the ICC; but the charges also served the decisive blow to Milošević’s political career and thus meant the end of the era of his power in Serbia.
240 The accused, Sretko Damjanović and Borislov Herak, were sentenced to death by the District Military Court of Sarajevo on account of genocidal acts.
ICTY, single perpetrators’ cases were to be tried at local courts as they were re-established over time. Most women have not brought their cases forward. Fear is one of the main reason for their silence: they may know who their assailants were and vice versa, or be afraid that their identity and whereabouts could be easily traced. The fear is valid, as the fates of many ICTY witnesses have shown.

De Londras points out that setting up any post-conflict institutions to establish the rule of law requires compromise between contradicting party interests. One aim of transitional justice procedures is establishing the rule of law. This means that criminal proceedings may carry intrinsic value to victims and the surrounding society. Investigation and prosecution are signs of order and safety winning over violent powers. The processes signify the authoritative recognition of the wrongs they have suffered and survived.

Safety and security are, however, volatile for victims and witnesses that appear in court. That is true both for local legal action as well as in The Hague. Even if the ICTY has been seen as progressive on account of prosecuting for wartime sexual violence, the progressiveness did not fully reach the treatment of victim-witnesses. The tribunal has been criticized for uninformed treatment of victim-witnesses, the lack of understanding the nature of sexual violence and how demanding it is for the victims with that sort of trauma to speak up against their assailants. ‘On a number of occasions, it has become clear that the Tribunals did not sufficiently take into account such factors as the reality of the crimes, respectful treatment of victims of sexual violence in the proceedings, the seriousness of the crimes and the needs of victims of sexual violence.’

4,650 witnesses have appeared before the court, the majority of them in public. Most are victim-witnesses. Many sexual violence victims have wanted their identity to be withdrawn, which means that they are given a pseudonym (witness XY) for the court proceedings and legal documents, and identifying details are obscured. They may testify in closed session or via video so that their image and voice are modified. Withdrawing identity is the most common protective measure ordered by the trial chambers. Regrettably, some witnesses’ iden-

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241 de Brouwer 2005: 453.
tities only remained covered for their time at The Hague. The exposure left them un-
shielded against harassment and threats. The continued psychological stress and loss of
reputation have caused some victims to express their will to rather take their own life than
return to Kosovo after their identity has been leaked. In extreme cases, relocation to a
third country and identity alteration are offered if the witness’s life is verifiably in danger.
Sevdije Ahmeti, who worked to convince Kosovar rape victims to testify before the court,
claimed that knowing the result he would have advised them otherwise. “If the Tribunal
had understood the importance of family honour in Kosova ... at the very least, it would
have worked harder to maintain anonymity.” Sevdije Ahmeti later explained that only
women with no close living male relative would even consider reporting a rape.

The price of their testimony has been extremely high for many. The aforementioned ther-
apeutic aspects of seeing their assailants face court proceedings are the only benefits that
the victim-witnesses gin in return of their sacrifice. The mandate of the ICTY does not cover
claims to compensation. Only restitution in the narrow sense, meaning, restoring illegally
seized possessions to the victim, have been handled by the tribunal. To claim any damages,
the victim should initiate another litigation in a local court. The requirement of two sepa-
rate trials is unmerciful, and necessitates exceptional resolve and resources to back up the
victim.

Yet another problem from the layman’s viewpoint stems from the fact that the ICTY is
bound by the principles of criminal evidence. Suspects enjoy a presumption of innocence,
and their guilt must be established beyond reasonable doubt. As in national courts, verdicts
of not guilty tend to take a toll on public trust on the institution; cases where the tribunal
has not been able to impose criminal liability on those offenders that it was able to have
brought to court add to the distrust of the ICTY sceptics in the former Yugoslavia. In the
case of the ICTY, certain persons, acquitted after trial or re-trial, have been welcomed back
to their homeland as heroes, which is especially detrimental to the victims.

Interviews that have been carried out in the West Balkan countries show that the public considers there to be a disparity between the ICTY’s sentences and the severity of the crimes for which the war criminals were convicted. People outside the legal sphere often form their opinion of the justice and validity of a punishment rather reactively, based on how they perceive the punishment to correlate with the crime. The closer the interviewee had witnessed violence in the Yugoslav wars, the more severe their view of a just punishment. The victims’ opinions of appropriate sanctions were generally the harshest, which is telling of the treatment they had survived.\textsuperscript{245} In this sense, Ratko Mladić’s sentence to life imprisonment for genocide, pronounced by the tribunal 22 November 2017, is a success.\textsuperscript{246} The verdict seems like a worthwhile closure to the ICTY’s two decades’ efforts.

\textsuperscript{245} Kutnjak Ivković and Hagan 2011: 14-20.

Conclusions

‘International justice represents the only alternative to impunity.’

The using of rape as a weapon of ethnic cleansing in the Bosnian War and the Kosovo War bear resemblance. In both, it was used tactically, under the knowing and acceptance of army as well as political leadership, and, in some cases, by direct orders of local officers. In both wars, it was fuelled by ethnicity-based propaganda years before the armed conflict burst out.

In some ways, the world has changed drastically since the Yugoslav Wars. Technological environment is very different. It is unimaginable how, for instance, the besiegers of Sarajevo never found out where the now famous service tunnel was located. Yet in some other ways, phenomena similar to those that preceded the Yugoslav Wars abound.

When I started with the topic of this writing, I presumed it to be current because of the ICTY’s mandate is drawing to an end, and a review of the changes the tribunal has produced in international law would therefore be timely. As the work progressed, I began to pay closer attention to the climate that preceded the Balkan Wars. The language bears a striking resemblance to the xenophobic speech that boiled over across Europe since the refugee crisis escalated in 2015. Only instead of newspapers, the controversy has moved from newspapers to the Internet. Again, women are presented as the ‘defining other’ in the contestation of ‘domestic’ and ‘alien’ masculinities. Gender and nationalism are entwined: nationalistic rhetoric is strongly gendered. Sexual violence is profusely represented in the discussion.

Finland in the past couple of years is a textbook example of how effective a way ‘accusations of rape’ are in ‘mobilizing popular sentiment’. Rape is feared, and rumours thereof are spread for political purposes. Some men seem to view themselves as the guardians of

247 Del Ponte 2009: 5-6.
248 Bracewell 2000: 566.
249 I was introduced to the idea of ‘discursive construction of nations’ by Wendy Bracewell (2000: 566). Her approach is retrospective, since the article was written in a different climate in 2000. Now, her writing appears most current.
250 Bracewell 2000: 569.
the sexual immunity of their pureblood nations’ women, which is evidenced by street patrols. At the same time, however, rape threats to shame and intimidate dissident women into silence abound unprecedentedly. Nationalistic rhetoric is once again backdropped with financial uncertainty and unemployment: continual restructuring of production shuts down plants in the West, ruining prospects especially for those with a low level of education. Threatened masculinity is projected outwards, in need of fighting a tangible enemy.

Regarding transitional justice, one critical accusation against the competence of the ICTY concerns victor’s justice when it comes to who have been prosecuted and convicted by the tribunal. All parties are, indeed, known to have committed atrocities. Correspondingly, individuals from all sides have been prosecuted before the tribunal. Most of the known grave violations of international humanitarian law, including sexual violence, were committed by the Army of Republika Srpska and the paramilitary combatants. What else, then, should the ratio of the accused from each side have represented than a clear majority of Serbs? As strongly as I feel against any one-eyed narrative of the conflicts, I see no justified grounds for why the tribunal’s praxis should depict significantly differing proportions of blame.251 Surely, the narrative about the Yugoslav Wars is biased. The independence of Kosovo in 2008 inevitably cemented KLA’s workings, including the killings that were committed for its cause, as a fight for freedom. However, the ICTY’s mandate is restricted to grave violations of international humanitarian law, and one cannot reasonably expect the tribunal’s authority and influence to extend beyond its mandate.

Some critics say that the ICTY has not facilitated much to reconciliation in the West Balkans; either that reconciliation is not something that an international criminal tribunal could achieve in the first place, or that the ICTY has failed in this respect. Both physical and cultural remoteness from the common people of the former Yugoslavia region is an inescapable fact. Part of even the citizens of stable Western countries with long-standing legal praxis are sceptical about the court system and doubt if justice gets done. It is no wonder that these sentiments grow as the tribunal is located abroad, operates in foreign languages,

251 ‘There are some situations one simply cannot be neutral about, because when you are neutral you are an accomplice. Objectivity doesn’t mean treating all sides equally. It means each side a hearing.’ Christiane Amanpour’s well-known reply to the accusations of favouring the Bosnian Muslims when reporting from besieged Sarajevo. Her comment concerns journalism, but it points to the difference between fair trial versus similar treatment.
and in some cases, prosecutes former leaders and representatives of one’s homeland, even national heroes. The most incredulous evaluations of the ICTY’s achievements seem overly sceptical. My casual observations show that Kosovar Albanians follow news on the ICTY. They are aware of the cases that are being processed and discuss them. They also react strongly to perceived injustice such as acquittals of the ICTY. As I have picked up my observations from informal conversations in Finland, I cannot evaluate if this is generalizable, or if it applies to other West Balkan nations or even to the Albanians living in Kosovo.

The area of the former Yugoslavia now enjoys relative peace. Tourists wander across Mostar’s restored Stari Most bridge, oblivious to former front line between the Bosniaks and the Croats. At dusk, restaurants turn off the music to give way to prayer calls and church bells. They are a choir or cacophony, yet most importantly, coexisting.

The ICTY played a part in removing some of the greatest agitators from their posts as heads of state and army. Merely 2,000 kilometres away from the now serene landscapes of the West Balkans, Syria and part of Iraq are in ruins. Reports of severe human rights violations, including massive-scale rape, forced marriage, and sexual slavery have been carried therefrom. Superpower relations chilled in 2014 as Russia occupied parts of Ukraine. Power politics and opposing interests have hindered efficient interference. The USA has turned inwards, focusing on domestic politics. Europe has been occupied with financial downturn, refugee crisis and the rise that the far right has gained from the instability, shaking many a domestic political scene. The experiences of armed involvement in Afghanistan and Iraq have proved that there are no blitzkriegs to be expected. Expensive military action overseas is widely unpopular amidst expanding national debt and weak economic growth. The political leaders of the West were running low on both resolution and resources, delaying their countries involvement in a war against an unknown evil, until Russia’s interest in expanding its influence in the Middle East through the war in Syria became evident.

The Yugoslav Wars took place in the aftermath of the Cold War. The first decade of the ICTY and ICTR’s operation and the advances in international law that came from their praxis

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252 The research reported by Kutnjak Ivković and Hagan indicated that those interviewed in Pristina, Kosovo, had the most positive image of the ICTY compared to other former Yugoslav nations and ethnic groups. Kutnjak Ivković and Hagan 2011: 41.
created hope for international humanitarian law’s increasing influence. But, the execution of international law depends on world politics. Twenty years later now, the world politics has again grown too cold for meaningful cooperation. The international response is as lethargic as it was during the Bosnian War. The atrocities of the so-called Islamic State in the past couple of years were loudly condemned, yet the world stood by, oil was bought from the ISIS, and someone fattened on dealing them arms. Contradictory political intentions prevented any meaningful action in Syrian Civil War before millions had fled through the neighbouring countries and the influx of refugees reached Europe. The conflict zones are further away from the awareness of the West. Cultural and geographical remoteness makes the terror of recent human rights breaches less identifiable. Half a million Rohingya fleeing genocide in catastrophic conditions are not covered in Western daily news anymore. In this decade, the international community’s track record in acting on the Geneva Convention’s responsibilities is discouraging.

The prolonged conflicts have predisposed innumerable women to worsened and dangerous conditions, forced marriage, and other forms of gendered and sexual violence. Again, wartime rape is fuelled by ideas of lesser and superior people, either on a religious or ethnic basis. The wars and the most numerous exodus of the history predispose women for rape, whether they make it out of the war-ridden regions or stay behind. The numbers of displaced people are staggering and hint at sexual violence as a reason to flee and as one of the consequences of extreme poverty and broken social order. What remains to be seen is how the political landscape of the current conflict zones are going to form.

On a more hopeful note, the ICC is in operation and represents positive development in the field of international humanitarian law. In March 2016, the ICC delivered a landmark judgement respecting wartime rape and genocide. Jean-Pierre Bemba Gombo was unanimously convicted for genocidal acts, including rape, committed by troops under his direct command in the Central African Republic in 2002-2003.253 The verdict was pioneering because it was the ICC’s first where someone was sentenced for commander responsibility for sexual violence case. The judgement proved that the ICC has assumed the role of prosecutor

for gendered violence and picked up developing international humanitarian case law where the ad hoc tribunals left off. Now and then, accountability, justice and the rule of law catch up with some individual, shedding hope for the conflict zones that they are not forgotten by the rest of the world.
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