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Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law

Rhonda Copelon*

Introduction

Historically, the rape of women in war has drawn occasional and short-lived international attention. Most of the time rape has been invisible, or has come to light as part of the competing diplomacies of war, illustrating the viciousness of the conqueror or the innocence of the conquered. When war is done, it is comfortably cabined as a mere inevitable "by-product," a matter of indiscipline, of soldiers revved up by war, needy, and briefly "out of control."

Military histories rarely refer to rape, and military tribunals rarely either charge or sanction it. This is true even where open, mass and systematic rape and forced prostitution have been thought to shock the conscience of the world. In the mid-1970s, an estimated 200,000 Bengali women were raped during the war of independence from Pakistan yet, in the end, amnesty was quietly traded for independence.¹ The maintenance of concentration camp brothels for the rape of Jewish and Aryan women as well as rape in the course of conquest did not figure in the proceedings against high-level Nazis before the International Military Tribunal at

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¹ See Susan Brownmiller, Against Our Will: Men, Women, and Rape 78-86 (1975).
Nuremberg, just as the mass rape of German women by Allied soldiers went largely unredressed. The response, however, to the "rape of Nanking," which refers to the brutal taking of Nanjing by Japanese soldiers through mass killings, public beheadings, looting, and rape of approximately 20,000 women in the first month, was unusual. Rape was explicitly charged against the Japanese commanders and it was discussed in the judgment of the International Military Tribunal in Tokyo. But the Japanese Army's alternative to open mass rape — the massive industrialization of sexual slavery on the battlefield — was a closely guarded secret. Only recently, the survivors from among at least 200,000 Korean, Filipino, Chinese and Dutch/Indonesian women kidnapped and detained to serve as "comfort women" to the Japanese army have begun to tell their stories and demand redress.

The fact that the rape of women in the wars in the former Yugoslavia captured world attention provides no guarantee that it will not also disappear from history, or survive, at best, as an exceptional case. The apparent uniqueness of the rape directed overwhelmingly against Bosnian-Muslim women as part of a genocidal campaign of "ethnic cleansing" is a product of the invisibility of the rape of women in history.
as well as in the present. Geopolitical factors — that this rape is being perpetrated by white men against white, albeit largely Muslim women, is occurring in Europe, and contains the seeds of a new world war — cannot be ignored in explaining the attention given to these rapes.\(^8\) By contrast, the rape of fifty percent of the women of the indigenous Yuracruz people in Ecuador by mercenaries of an international company seeking to "cleanse" the land went largely unreported. Similarly, the routine rape of women in the civil wars in Peru, Liberia, and Burma, for example, has drawn only occasional attention.\(^9\) Few in the West remember that the rape of Bengali women also had the distinct genocidal purpose of destroying their racial distinctiveness.\(^10\)

Perhaps the most telling example of invisibility came to light just as this article was going to press. In February, 1995, nine months after the news of horrific massacres in Rwanda was front-page news, the massive scope of rape in that conflict was first reported in the European press. As a result of a mission by a French child psychiatrist, it was revealed that between 2,000 and 5,000 Rwandan women were pregnant and giving birth as a result of rape. This figure, confirmed by the Rwandan National Population Office, suggests that the overwhelming percentage of women who survived the massacre had been raped. Most of the women in the massacre, were sexually mutilated and killed. Women's shame and unwillingness to speak about rape only partially explains the deafening silence.\(^11\)

Moreover, just as historically the condemnation of rape in war has rarely been about the abuse of women as a crime of gender, so the mass rape in Bosnia has captured world attention largely because of its

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\(^8\) Revising this article in February, 1995, it is difficult to know with certainty whether to use the past or present tense. Current reports suggest that with "ethnic cleansing" largely accomplished, the campaign of human rights atrocities, including rape, has resided. It is unlikely, however, that rape has been abandoned as, at least, a weapon of "conventional" war. Thus, I continue to use the present tense because the invisibility of rape is so pervasive.


\(^10\) See BROWN MILLER, supra note 1, at 78-86.

association with "ethnic cleansing" or genocide. In one week, a midday women's talk show opened with the script, "In Bosnia, they are raping the enemy's women . . . ." and a leading Croatian-American scholar, among others, insisted on the distinction between "genocidal" rape and "normal" rape. By contrast, our ad hoc Women's Coalition against Crimes against Women in the Former Yugoslavia characterized rape as a weapon of war, whether used to dilute ethnic identity, destabilize the civilian population, or reward soldiers. But for many, rape remains an inevitable byproduct of war except when it is a vehicle of genocide.

The elision of genocide and rape in the focus on "genocidal rape" as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous. Rape and genocide are separate atrocities. Genocide involves the infliction of all forms of violence to destroy a people based on its identity as a people, while rape is sexualized violence that seeks to destroy a woman based on her identity as a woman. Both are based on total contempt for and dehumanization of the victim, and both give rise to unspeakable brutalities. Their intersection in the Serbian, and to a lesser extent, the Croatian aggressions in Bosnia defines an ineffable living hell for Muslim women. They must contend with the loss of their world, with the loss of self together with loss of community, and marginalization in diaspora.

But to describe the horror of "genocidal" rape as "unparalleled" is factually dubious and risks rendering rape invisible once again. Labelling rape as "genocidal" does not necessarily increase the likelihood that, when ethnic war ceases or is forced back into the bottle, the crimes against women, the voices of women, and their struggles to survive will be vindicated. Moreover, it significantly increases the likelihood that condemnation will be limited to this seemingly exceptional case; that women who are brutally raped for domination, terror, booty, or revenge in Bosnia and elsewhere will not be heard.

The creation of the International Criminal Tribunal for the Former Yugoslavia ("International Tribunal") makes it more difficult, but not

12. The same is true in the less frequent case of rape against men, except that when a man is raped, the humiliation is accomplished through reducing him to the status of a woman. For this reason, rape, whether carried out against women or men, is a crime of gender.

impossible, to barter impunity for peace. The pressure of survivors and their advocates, together with the global women's human rights movement, makes it harder for the International Tribunal to ignore or marginalize sexual violence against women. Whether rape, forced prostitution, and forced impregnation of women will be effectively prosecuted before the ad hoc Tribunal, and whether the survivors will obtain redress, depends on constant vigilance. The situation presents an historic opportunity as well as an historical imperative, to insist on justice for the women of Bosnia and to press for a feminist reconceptualization of the role and legal status of rape under humanitarian as well as human rights law.

To do this, it is necessary to "surface" gender in the midst of genocide, and at the same time, to avoid dualistic thinking. We must critically examine the claim that rape as a tool of "ethnic cleansing" is unique, worse than or not comparable to other forms of rape in war or in peace, at the same time that we recognize that rape together with genocide inflicts multiple, intersectional harms.14 This combination of the particular and the general is critical if the horrors experienced by women in Bosnia are to be fully understood and if that experience is to have meaning for women brutalized in less-known theaters of war or in the byways of daily life.

This article examines the evolving legal status of rape (and other forms of sexual violence such as forced prostitution and forced pregnancy) in war, with attention to both the particular and the general as well as to the tension between them.15 It focuses on two central questions of conceptualization. Part I addresses whether these gender crimes are fully recognized as war crimes under the Geneva Conventions, the cornerstone of what is called "humanitarian" law — that is, the prohibitions that have made war
itself permissible. This requires examination of whether rape is viewed as a "grave breach" and whether, within that framework, it is treated as a form of torture. Part II explores whether the customary international legal concept "crimes against humanity" does or should distinguish between "genocidal rape" and mass rape for other purposes. It argues that in order to capture the multi-layered relationship between gender and ethnicity in the campaign of sexual violence against women in Bosnia, as well as the gender element in all campaigns of sexual violence, the concept of "crimes against humanity" must be interpreted to encompass mass rape apart from persecution and be broadened to encompass persecution based on gender. The conclusion suggests some connections between the recognition of rape in war and rape in the time called peace.

I. Is Rape a War Crime?

Although news of the mass rapes of women in Bosnia had an electrifying effect and became a significant factor in the demand for the creation of the International Tribunal, the leading question for a time has been whether rape, forced prostitution, forced pregnancy, and other forms of sexual abuse are "war crimes" within the meaning of the Geneva Conventions and the internationally agreed-upon norms that bind all nations, whether or not they have signed the Conventions.16 The proceedings before the Tribunal are likely to settle this question, but not necessarily all the issues it presents.

The question is not whether rape is technically a crime prohibited in war. Rape has long been viewed as a criminal offense under national and international rules of war.17 The 1949 Geneva Conventions, as well as the 1977 Protocols regarding the protection of civilians in war, explicitly prohibit rape, forced prostitution, and any form of indecent assault and call for special protection of women during war, including separate quarters with supervision and searches by women only.18 Yet it is significant that where rape and other forms of sexual assault are explicitly mentioned, they

are categorized as an attack against honor. Crimes of violence, including murder, mutilation, cruel treatment, and torture, are treated separately.

The conceptualization of rape as an attack against honor, as opposed to a crime of violence, is a core problem. Formal sanctions against rape range from minimal to extreme. Where rape has been treated as a grave crime in domestic laws, it has often been because it violates the honor of the man and his exclusive right to sexual possession of his woman as property. Thus, in the United States the death penalty for rape was prevalent in southern states and was used against African-American men convicted of raping white women or, more precisely, white man's property. Similarly, the media often refer to the mass rape in Bosnia as the rape of "the enemy's women." The enemy in this formulation is the male combatant in the seemingly all-male nation, religious, or ethnic group.

Under the Geneva Conventions, the concept of honor is somewhat more enlightened: rape is a crime against the honor and dignity of women. The Commentary explains that "[h]onor is a moral and social quality," respect for which is owed to "man because he is endowed with a reason and conscience," and describes rape as a "outrage . . . of the worst kind." But this too is problematic. Where rape is treated as a crime against honor, the honor of women is called into question and virginity or chastity is often a precondition. Honor implies the loss of station or respect; it reinforces the social view, internalized by women, that the raped woman is dishonorable. And while the concept of dignity potentially embraces more profound concerns, standing alone it obfuscates the fact that rape is fundamentally violence against women — violence against her body, autonomy, integrity, selfhood, security, and self-esteem as well as her standing in the community. This failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law.

The issue then is not whether rape is a war crime, but whether it is a crime of the gravest dimension. Under the Geneva Conventions, the most serious war crimes are designated as "grave breaches." The significance of a war crime's categorization as a "grave breach" is threefold. On the level of discourse it calls attention to the egregiousness of the assault. On

19. See, e.g., Geneva Convention IV, supra note 18, art. 27, para. 2; Protocol II, supra note 18, art. 4.
21. KHUSHALANI, supra note 17, at 39-76.
23. Id. at 205.
24. See, e.g., AMERICAS WATCH AND WOMEN'S RIGHTS PROJECT, supra note 9, at 10-16.
25. Geneva Convention IV, supra note 18, art. 147.
a practical level, it is not necessary that rape be mass or systematic: one act of rape is punishable. Finally, only crimes that are grave breaches give rise to universal jurisdiction under the Geneva Conventions. Universal jurisdiction means that every nation has an obligation to bring the perpetrators to justice through investigating, arresting, and prosecuting offenders in its own courts or extraditing them to more appropriate forums. The existence of universal jurisdiction also provides a legal rationale for trying such crimes before an international tribunal and for the obligation of states to cooperate. If rape is not a "grave breach" under the Geneva Conventions, some international jurists would argue that it can be redressed only by the state to which the wrongdoer belongs or in which the wrong occurs, and not by an International Tribunal.

The relevant portions of the Fourth Geneva Convention relating to the protection of civilians do not specifically mention rape in the list of crime that are considered "grave breaches," and the Tribunal Statute simply reiterates the Convention's list. Included are "willful killing, torture, or inhumane treatment" and "willfully causing great suffering or serious injury to body or health." Clearly these categories are generic, and broad enough to encompass rape and sexual abuse. But in addition to qualifying as simply "inhumane treatment," or even as "willfully causing great suffering or serious injury to body or health," it is important that rape be recognized as a form of torture in order to remove the ambiguity that is the legacy of sexism and to place the crimes against women on par with crimes against men.

When the Conventions were drafted, the view that torture was a method of extracting information was dominant. The crime of "willfully causing

26. Id., art. 145. It should be noted here that the concept of "grave breach" applies only to international conflict and not to civil war. Although there is debate about whether the conflict in the territory of the former Yugoslavia is international or internal, the U.N. Security Council has indicated that it is an international conflict. Report of the Secretary-General, supra note 13, at 8 para. 25.

27. The concept of "purpose" should not be understood as requiring a showing of specific intent on the part of the perpetrator. Rather it calls for an evaluation of the functions and effects of the violence. See Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence As Torture, 25 COLUM. HUM. RTS. L. REV. 290, 325-331 (1994).

28. Geneva Convention IV, supra note 18, art. 147; Protocol I, supra note 18, arts. 11, 85(3).


30. The 1958 ICRC Commentary to the Fourth Geneva Convention explains: The word torture has different acceptations. It is used sometimes even in the sense of purely moral suffering, but in view of the other expressions which follow (i.e. inhuman treatment...and suffering, etc) it seems that is must be given here its, so to speak, legal meaning—i.e., the infliction of suffering on a person to obtain from that person, or from another person,
great suffering or serious injury to body or health” was added to the list of grave breaches largely because the meaning of torture was so narrow. 31 Today, although it endures in popular thinking, the narrow definition of torture has been largely abandoned. The historian Edward Peters writes: “It is not primarily the victim’s information, but the victim, that torture needs to win — or reduce to powerlessness.” 32 Recent treaties, which reflect customary international human rights law, define torture as the willful infliction of severe physical or mental pain or suffering not only to elicit information, but also to punish, intimidate, discriminate, obliterate the victim’s personality, or diminish her personal capacities. 33 Thus, torture is now commensurate with willfully causing great suffering or injury for a broader set of purposes. 34 It is not simply or necessarily the infliction of terrible physical pain; it is also the use of pain, sensory deprivation, isolation, and/or humiliation as a pathway to the mind. Indeed, in the contemporary understanding of torture, degradation is vehicle and debilitation, a goal. 35

It is thus entirely appropriate that the implementation of the Geneva Convention today incorporate the contemporary understanding of torture rather than use the category of “wilfully causing great suffering . . . .” which, though perhaps equivalent, has no counterpart in human rights law. The Commentary to common article 3 emphasizes that progressive interpretation of the meaning of torture is intended: “However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.” 36 This Commentary also makes clear, in discussing the taking of hostages and the imposition of non-judicial punishments, that condemnation can extend to

1958 ICRC Commentary, supra note 22, at 598.
31. The 1958 Commentary defines this crime as referring to “suffering inflicted without the ends for which torture is inflicted . . . . It would therefore be inflicted as punishment, in revenge or for some other motive, perhaps out of pure sadism. . . .” Id. at 599. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering as well.
32. EDWARD PETERS, TORTURE 164 (1985).
34. Copelon, supra note 27, at 325-331.
35. AMNESTY INTERNATIONAL, REPORT ON TORTURE (1974).
practices which are both common and previously tolerated. In addition, the Commentary to the 1977 Protocol I, specifically refers to the evolving concept of torture in international human rights law. There is thus little doubt that the Conventions were intended to incorporate the evolving concept of torture in international human rights as well as humanitarian law. To remove the ambiguity surrounding the gravity of rape and similar forms of gender violence in both contexts, it is important that the category “torture” be used.

Although largely ignored until recently by human rights advocates, the testimonies and studies of women tortured by dictatorial regimes and military occupations make it clear that rape is one of the most common, terrible, and effective forms of torture used against women. Rape attacks the integrity of the woman as a person as well as her identity as a woman. It renders her, in the words of Lepa Mladjenović, a psychotherapist and Serbian feminist antiwar activist, “homeless in her own body.” It strikes at a woman’s power; it seeks to degrade and destroy her; its goal is domination and dehumanization.

Likewise, the testimonies of women raped in the wars in former Yugoslavia, whether they were attacked once or forced into prostitution, make clear that rape is both a profound physical attack and a particularly egregious form of psychological torture. Their testimonies document the intersection of contempt for and conquest of women based on their identity as women and their national or religious/cultural identity. Croatian women are raped in revenge against their “Ustasha mothers” while Bosnian-Muslim women are taunted that they should bear “Serb babies.” This frequent genocidal threat, carried out on the bodies and spirits of women, underscores the omnipresent threat, fear and/or reality of pregnancy. Genocide entrains forced pregnancy — repeated rape and detention until abortion is

37. Id. (stating that the Conventions intend to “prohibit practices which are fairly general in wartime . . . [and,] although . . . common . . . until quite recently, . . . are nevertheless shocking to the civilized mind”)

38. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, art. 75(a)(ii), at 873 (citing the General Assembly’s 1975 Declaration on Torture which expanded impermissible purposes by adding punishment and intimidation and noting the General Assembly’s 1984 vote adopting the Convention Against Torture, which it described at that time as “without binding force of law, [but] nevertheless hav[ing] a real moral value.”)

39. See, e.g., Ximena Bunster-Burotto, Surviving beyond Fear: Women and Torture in Latin America, in WOMEN AND CHANGE IN LATIN AMERICA 297 (June Nash & Helen Safa eds., 1986); F. Allodi & S. Stiasny, Women as Torture Victims, 35 CANADIAN J. OF PSYCHIATRY 144 n.2 (1990); Inge Lunde & Jorge Ortmann, Prevalence and Sequelae of Sexual Torture, 336 LANCET 289 (1990). While not the subject here, the rape of men is also a devastating crime of gender, designed as it is to humiliate through feminization.

no longer an option. The horror is only exacerbated by the fact that in Bosnia the rapists are, in many cases, former colleagues, neighbors, or even friends.41

Indeed, torturers know well the power of the intimate in the process of breaking down their victim.42 Because rape is a transposition of the intimate into violence, rape by acquaintances, by those one has trusted, is particularly world shattering and thus a particularly effective tool of ethnic cleansing. It is no wonder that local Bosnian Serbs are being incited and, in some cases, recruited to rape. The stories of some of the perpetrators, notwithstanding their self-justificatory quality, reflect the common methods of training torturers — exposure to and engagement in increasingly unthinkable violence and humiliation.43

The Statute establishing the jurisdiction of the International Tribunal largely tracks the Geneva Conventions' definition of grave breach and does not, therefore, list rape as such.44 The creation of the Tribunal was preceded by the condemnation of sexual violence against women in these wars in the Vienna Declaration of the World Conference on Human Rights as well as by the U.N. Commission on Human Rights.45 The first papers filed by the Prosecutor, however, raised serious doubt about whether rape would be treated as a grave breach.46 In February, 1995, due in no small

41. See Stiglmayer, in MASS RAPE, supra note 29 (testimonies of women raped in Bosnia).
44. Article 2 identifies as grave breaches "(a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious bodily injury to body or health." Report of the Secretary-General, supra note 13, at 10 para. 40.
46. The first public mention of rape by the Prosecutor was in an affidavit seeking deferral to the Tribunal of the Tadić case which had been previously within Germany's jurisdiction. An Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadić Also Known By the Names Dusan "Dule" Tadić, Case No. 1 of 1994 (Trial
part to the continuous monitoring of women’s human rights advocates, the Tribunal Prosecutor filed two indictments which give prominence to the charges of rape and classify it as a grave breach, a crime against humanity, and a violation of the laws and customs of war.\textsuperscript{47} Prosecuting rape as a grave breach should effectively expand the meaning of the Conventions and Protocols and obviate the need for formal amendment.

The classification of rape as a grave breach in the indictments is thus extremely significant, but it is not without problems. Although the indictments recite as applicable the broad definition of torture contained in the U.N. Torture Convention,\textsuperscript{48} the indictments charge rape as “wilful infliction of great suffering,” not “torture.”\textsuperscript{49} Despite the fact, as discussed above, that these two terms have become virtually synonymous. The failure to charge rape as torture perpetuates the ambiguity as to its status. Moreover, the use of terms particular to humanitarian law fails to make the connection with this most egregious violation of human rights.

Curiously, the Prosecutor uses the category “torture” very sparingly in his indictments. Physical brutality, commonly understood as torture by other bodies charged with implementation of human rights prohibitions against torture, is charged as “wilful infliction of severe suffering or

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\textsuperscript{47} Prosecutor of the Tribunal v. Zeljko Meakic [hereinafter Meakic]; Prosecutor of the Tribunal v. Dusan Tadić [hereinafter Tadić].

\textsuperscript{48} Meakic, at para. 14; Tadić, at para. 3.6.

\textsuperscript{49} In Prosecutor of the Tribunal v. Zeljko Meakic, the indictment charges the defendant Radić with five incidents of forcible sexual intercourse against “A” between late June and late July. \textit{id.} at paras. 22.2, 22.5, 22.8, 22.11, 22.14. It charges the defendants Gruban and Kostič with wilfully causing great suffering for repeatedly raping “F” during a two-month period. \textit{id.} at paras. 25.1-25.2 and 26.1-26.2, respectively.
physical or mental health damage." For example, the most common forms of torture include beating, kicking, and the infliction of pain with ordinary objects such as canes, knives, and cigarettes. This is true of charges involving prisoners who were severely beaten, kicked, stomped on, (often to the point of unconsciousness), left to die, forced to drink foul fluids and/or otherwise abused. Nor do the indictments appear to encompass the evolving understanding of psychological torture. In other words, these early indictments fail to charge both rape and other common forms of torture as "torture."

These indictments characterize only one offense as torture: the sexual mutilation of a male prisoner. The case is gruesome — two prisoners were forced to bite off the testicle of another prisoner who subsequently bled to death. The general problem with the Prosecutor's definition is illustrated by the fact that torture is charged only as to the mutilated prisoner; those who were compelled to enact the mutilation are viewed as having been subjected to inhuman treatment. The sex-specific problem involves the differential treatment of sexual violence. What makes this sexual mutilation torture as compared to the repeated (or, indeed, one act of) rape?

50. For comparative treatment of a charge of torture, see BURGERS AND DANELIUS, supra note 33 (discussing the legislative history of the U.N. Torture Convention and describing the most common forms of torture). See also NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1986), and cases cited therein.

51. For example, paragraph 2.6 of the Tadić indictment describes the factual basis of the charges:

Severe beatings were commonplace. The camp guards, and others who came to the camp and physically abused the prisoners, used all manner of weapons during these beatings, including wooden batons, metal rods and tools, lengths of thick industrial cable that had metal balls affixed to the end, rifle butts, and knives. Both female and male prisoners were beaten, tortured, raped, sexually assaulted, and humiliated. Many, whose identities are known and unknown, did not survive the camp. . . .

Tadić, at para. 2.6.

52. Amnesty International has laid great emphasis on the psychological component of torture. AMNESTY INTERNATIONAL, REPORT ON TORTURE 39-55 (1975). See also RODLEY, supra note 50, at 83-86; BURGERS & DANELIUS, supra note 33 at 177-78. Of particular relevance here is the finding of the Human Rights Committee that a concert pianist was subjected to "severe psychological torture" because he had been threatened for hours with amputation of his hands by an electric saw, as a result of which he lost sensitivity in his hands and arms for almost a year and suffered continuing discomfort thereafter. See Report of the Human Rights Committee, U.N. GAOR, 38th Sess., Supp. No. 40, Annex 12, paras. 1.6, 8.3, U.N. Doc A/38/40 (1983) (Estrella v. Uruguay). Applying Estrella, the threat of rape endured constantly by women in detention should be considered as a form of torture. The threat of rape, like the threat to amputate in that case, challenges bodily integrity in a way which is deeply connected to the most import aspects of personal identity.

53. Tadić, at para. 5.1.

54. By contrast, the mainstream understanding of torture recognizes that being forced to perform humiliating acts or to confess — that is, to cross the boundaries of civilized conduct — is a key method of breaking the will of the torture victim. See AMNESTY INTERNATIONAL, supra note 52, at 41-42. See also Haritos-Fatouros, supra note 43.
of women over a period of months charged in the same indictment? It is hard not to attribute it to the sex of the decision-makers; to the difficulty that men have in empathizing with the female victim by comparison to the horror that surfaces so easily when male sexual abuse is the issue and to the fact that the concept of rape as torture implicates men's sexuality and comfortable distinctions between voluntary sexual intercourse and rape. It cannot be disconnected from the fact that the damage of rape is unseen: the physical damage is largely internal and the psychological is born in silence. 55 Finally, the distinction between male sexual mutilation and rape, which could also be viewed as a form of female sexual mutilation, must be linked to their differential prevalence. Because rape is so common in war as well as peace, it loses its shock value. It is the egregious in the everyday, obscured or naturalized by the banality of evil. 56

This failure to charge rape as torture emphasizes the importance, from a practical as well as a moral perspective, of insisting that all rape, and not only mass or genocidal rape, be subject to the most severe condemnation and punishment. It is also important that the range of sexual violence, including forced prostitution and forced pregnancy, be explicitly charged as grave breaches, consisting of torture. The Vienna Declaration explicitly included forced pregnancy in its condemnation of the mass atrocities in the former Yugoslavia. Forced pregnancy must be seen as a separate offense against women as well as an act of genocide: the expressed intent to make women pregnant is an additional form of psychological torture; the goal of impregnation leads to imprisoning women and raping them until they are pregnant; the fact of pregnancy, whether or not aborted, continues the initial torture in a most intimate and invasive form; and the fact of bearing the child of rape, whether or not the child is placed for adoption, has a potentially life-long impact on the woman and her place in the community. 57 Finally, it should be noted that under the Geneva Conventions as well as the Tribunal Statute, perpetrators are held responsible, whether or not they were officially ordered to commit the acts charged, and responsi-

55. This might be inferred from the fact that the indictments charge beating as wilfully causing great suffering or serious injury to body or health, while repeated rape is only viewed as wilfully causing great suffering. Meakić, at paras. 20.2, 22.2, 24.2, 25.2, 26.2. On the other hand, a case involving kicking in the testicles, repeated beating, and kicking in the ribs, causing the prisoner to lapse in and out of consciousness, was charged as wilfully causing great suffering. Id. at para. 29.2.

56. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 93 (2d ed. 1964). This point is developed with regard to domestic violence in Copelon, supra note 27.

57. See generally MASS RAPE, supra note 29. See also ANNE TIERNEY GOLDSTEIN, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW (Center for Reproductive Law and Policy, 1993) (examining forced impregnation under the Geneva Conventions and as a means of genocide and enslavement).
bility is imputed to commanders where they knew, or should have known, of the likelihood of rape and failed to take all feasible measures within their power to prevent or repress it. 58

II. Genocidal Rape Versus "Normal" Rape: When Is Widespread Rape a Crime Against Humanity?

"Crimes against humanity" were first formally recognized in the Charter and Judgment of the Nuremberg Tribunal; they do not depend on adherence to a treaty, and they, like grave breaches, give rise to universal jurisdiction. Since crimes against humanity can be committed in times of war or peace, it is irrelevant whether war in the former Yugoslavia is international or internal.

Rape has been separately listed, and forced prostitution acknowledged, as a "crime against humanity" in the Statute of the International Tribunal. 59 This is not without precedent. After the Second World War, Local Council Law No. 10, which provided the foundation for the trials of lesser Nazis by the Allied forces, also listed rape as a crime against humanity. No one, however, was prosecuted. 60 Thus, the Security Council's reaffirmation that rape is a "crime against humanity," and therefore among the most egregious breaches of civilization, is profoundly important. It is doubly important that the Prosecutor has also charged rape as a crime against humanity. 61 But the meaning of this designation and its import for other contexts in which women are subjected to mass rape apart from genocide or "ethnic cleansing" are not clear. The danger, as always, is that extreme examples produce narrow principles.

The Commentary to the Statute on this aspect of the jurisdiction of the current Tribunal signals this danger. It explains crimes against humanity as "inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic racial, or religious grounds." 62 The Prosecutor's indictments follow suit. 63 Several aspects of this definition deserve comment.

First, on the positive side, the Statute correctly encompasses violations that are widespread but not necessarily "systematic." The law wisely does

58. Protocol I, supra note 18, art. 86; Report of the Secretary General, supra note 13, art. 7, paras. 53-59 at 14-15.
59. Report of the Secretary-General, supra note 13, art. 4, paras. 47-49, at 1171.
60. KHUSHALANI, supra note 17, at 13-38.
61. Meačić, at paras. 22.4, 22.7, 22.10, 22.13, 25.4, 26.4, 30.4; Tadić, at para. 4.4.
62. Report of the Secretary-General, supra note 13, art. 4, para. 48, at 13.
63. The indictments explain that the offense of "crimes against humanity" applies when the "alleged acts or omissions were part of a widespread or large-scale or systematic attack directed against a civilian population, specifically the Muslim and Croat population of the Prijedor district." Meačić, at para. 15; Tadić, at para. 3.7.
not require massive numbers but instead encompasses general frequency and patterns of abuse. Particularly with rape, numbers are unprovable: a small percentage of women will ultimately come forward, and the significance of rape threatens to become drowned in statistical claims. Moreover, the principle of responsibility under the Statute, as well as in the customary law, does not require that rape be ordered or centrally organized. Commanders can be held responsible where widespread violence is known and tolerated. In Bosnia, rape is clearly a conscious tool of war and genocide. While it is politically and ethically important for the Tribunal to investigate and prove the chain of command, it is likewise important that leaders be held legally responsible for acts of commission or omission, even without proof that rape was committed under orders.

Second, the Commentary on the Statute does rank rape with torture in terms of the gravity of the violence and its characterization as a crime against humanity. While this is important (and bears as well on the treatment of rape as torture under the grave breach category), it remains problematic that the Statute lists rape and torture as distinct, instead of identifying rape as a form of torture.

The third issue with the Statute’s definition of crimes against humanity, however, is its conflation of what were originally understood as two separate and independent criteria of crimes against humanity: gross acts of violence and persecution-based offenses. Under the original concept, rape, if widespread or systematic, should independently qualify as a crime against humanity because it is a gross act of violence. By merging the criterion of gross violence with persecution-based offenses, the Comm-


65. The Statute reads “torture or rape;” it could have read, for example, “torture, including rape.”

66. See KHUSHALANI, supra note 17, at 14-16. Article 6(c) of the London Charter, which established the Nuremberg Tribunal, defined “crimes against humanity” as follows: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds . . . . Agreement by the United States, France, Britain and the U.S.S.R., 82 U.N.T.S. 279, cited in KHUSHALANI, supra note 17, at 14 n.33. This clear bi-partite definition was obscured somewhat at the same time as “social” and “cultural” were added as bases of persecution by the post-war proposal of International Law Commission in Article 2 of the Draft Code of Offenses Against Peace and Security of Mankind which defines crimes against humanity as:

Inhumane acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds. . . .

tary could limit prosecution to rape which is undertaken as a method of persecution on national, political, ethnic, racial, or religious grounds. Since the Tribunal Statute lists rape and persecution separately, it is not clear, until put into practice, whether the original, broader understanding of crimes against humanity will prevail. But since widespread rape is a critical aspect of genocide against the non-Serbian populations in Bosnia, these prosecutions do not present a clear occasion for testing the sufficiency of widespread rape, apart from the recognized grounds of persecution, as a crime against humanity.

Acceptance of the conflation of rape and persecution, together with the absence of gender as a basis of persecution, would narrow the concept of crimes against humanity as well as jeopardize its application to women. This narrow view of crimes against humanity, which treats gender crimes as significant only when they are the vehicle of some "larger" persecution, is quite prevalent and requires critical examination.

The international and popular condemnation of the rapes in Bosnia tends to be either explicitly or implicitly based on the fact that rape is being used as a tactic of ethnic cleansing. Genocidal rape is widely seen, not as a modality of rape, but as unique. The distinction commonly drawn between genocidal rape and "normal" rape in war or in peacetime is proffered not as a typology, but rather as a hierarchy. But to exaggerate the distinctiveness of genocidal rape obscures the atrocity of common rape.

Genocidal rape often involves gang rapes, is outrageously brutal, and is done in public or in front of children or partners. It involves imprisoning women in rape "camps" and/or raping them repeatedly. These are also characteristics of the most common rape in war, rape for booty or to boost the morale of soldiers; and they are common characteristics of the use of rape as a form of torture and terror by dictatorial regimes. 67

The notion that genocidal rape is uniquely a weapon of war is also problematic. The rape of women is a weapon of war where it is used to spread political terror, as in the civil war in Peru. 68 It is a weapon of war where, as in Bosnia and elsewhere, it is used against women to destabilize society and force families to flee. In time of war, women are the mainstay of the civilian population, even more than in peacetime.

The widespread rape of Haitian women as a weapon not of war, but of terror, in the recent virulent political repression in Haiti shares many of these characteristics. Haitian women were routinely raped in their homes, often repeatedly and in front of their children. They were raped because

68. See generally AMERICAS WATCH AND WOMEN'S RIGHTS PROJECT, supra note 9; Swill and Giller, supra note 9, at 612.
of their active or presumed resistance to the illegal regime or that of their partners or family members; they were raped simply because they lived in poor sections which had voted overwhelmingly for Aristide and because, as women, they kept civil society functioning before and after men went into hiding. They were raped to render them powerless as well as to drive home the powerlessness of their male “protectors.” As a result of this ultimate invasion of the security of person and home, many Haitian women fled their homes and went into hiding or exile. The brutalities visited upon them as women were not in the service of war or genocide, but the pattern is familiar. Now, unlike the Bosnian-Muslim women, many Haitian women can (and some are being forced by the lack of refuge elsewhere to) return to their communities. But the suffering, estrangement, and the memory and mark of this trauma does not end with physical return. 69

The rape of women, where permitted or systematized as “booty” of war, is likewise an engine of war. It maintains the morale of soldiers, feeds their hatred and sense of superiority, and keeps them fighting. For this reason, and to prevent the public outcry that attended open mass rape, the Japanese military industrialized the sexual slavery of women in the Second World War. Deceived by false offers of employment, or taken forcibly, women were disappeared into “comfort stations” and, once there, were raped repeatedly and moved from battlefield to battlefield to motivate and reward the Japanese soldiers. Genocide was not a goal, but it is believed that seventy to ninety percent of these women died in captivity, and among the known survivors, none were subsequently able to bear children. 70 For similar reasons, the United States military in Vietnam raped Vietnamese women and established brothels, relying on dire economic necessity rather than kidnapping to fill them. 71 The testimonies of Bosnian Serbian rapists reveal a mixture of all these goals. 72

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71. BROWNMILLER, supra note 1, at 92-93.

72. See generally MASS RAPE, supra note 29.
At the same time, some aspects of the genocidal rape practiced in Bosnia are particularly tailored to the goals of driving women from their homes or destroying their possibility of reproducing within and "for" their community. When women are raped by men familiar to them, their trauma is exacerbated, as is their impulse and need to flee the community because trust and safety are no longer possible.73 This is particularly true in Bosnia, where war and propaganda have made enemies out of neighbors.

The second and more distinctive feature of genocidal rape is the focus on women as reproductive vessels. The explicit and common threat to make Muslim women bear "Serbian babies" justifies repetitive rape and aggravates a woman's terror and potential unacceptability to her community. Bengali women were raped to lighten their race and produce a class of outcast mothers and children. Enslaved African-American women in the southern United States were raped to produce babies, bartered, sold, and used as property.74 While intentional impregnation is properly treated as a separate offense, it should also be noted that pregnancy, and the fear of pregnancy, is an often unrecognized, yet common consequence and added harm of rape. In situations where women are raped repeatedly, most fertile women will become pregnant at some point. When the United States Navy took over Saipan, for example, one observer reports that virtually all the women, who had been enslaved as comfort women for the Japanese army, were pregnant.75 This appears to be true today for Rwandan women, together with the threat and reality of infection with HIV.

These distinctive characteristics do not therefore place genocidal rape in a class by itself; nor do they reflect the full range of atrocities, losses, and suffering that the combination of rape and ethnic cleansing inflicts. The women victims and survivors in Bosnia are being subjected to crimes against humanity based on both ethnicity and religion, and gender. It is critical to recognize both and to acknowledge that the intersection of ethnic and gender violence has its own particular characteristics.

This brings me to the fourth concern: the complete failure of the United Nations and the international community in general to recognize that persecution based on gender must be recognized as its own category of crimes against humanity. The crystallization of the concept of crimes against humanity in the wake of the Holocaust has meant that it is popularly associated with religious and ethnic genocide. But the concept is a broader one, and the categories of persecution are explicitly open ended, capable of expanding to embrace new understandings of persecution.

73. See id.
74. ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 172 (1983).
75. Author's personal conversation with D.B., April 1993.
Historically, gender has not been viewed as a relevant category of victimization. The frequency of mass rape and the absence of sanctions are sufficient evidence. In the Holocaust, gender persecutions — the rape and forced prostitution of women, Aryan as well as Jewish, as well as the extermination of gay people — were obscured. Gender combined with nationalistic superiority and hatred in the Japanese Army's purposeful sexual enslavement of girls and young women as "comfort women." The growing involuntary trafficking of women presents a clearer case today. Without recognition of gender as a basis for persecution, sexual slavery would escape condemnation as a crime against humanity where it was shown that nationality or ethnicity was incidental.

The absence of gender as a basis for persecution is not, however, peculiar to the concept of crimes against humanity. A parallel problem exists in the international standards for political asylum, which require a well-founded fear of persecution, but do not explicitly recognize gender as a source of persecution. The expansion of the concept of crimes against humanity explicitly to include gender is thus part of the broader movement to end the historical invisibility of gender violence as a humanitarian and human rights violation. The recognition of "social" and "cultural" persecution by the 1954 Draft Code of Offenses exemplifies this principle and should encompass gender.

Moreover, the particular goals and defining aspects of genocidal rape do not detract from, but rather elucidate, the nature of rape as a crime of gender as well as ethnicity. Women are targets not simply because they "belong to" the enemy, but precisely because they keep the civilian population functioning and are essential to its continuity. They are targets because they, too, are the enemy — because of their power and vulnerability as women, including their sexual and reproductive power. They are targets because of hatred of their power as women, and because of endemic

76. See BROWNMiller, supra note 1, at 48-78, for a discussion of the unrecognized sexual violence against women on the part of Allied as well as Axis forces. See also Erwin J. Haeberle, Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 365-79 (Martin Duberman, et al. eds., 1990) (noting the gender aspect of Nazi attacks on homosexuals reflected in the use of the pink triangle and charges of emasculation).


78. See Draft Code, supra note 64.
objectification of women, and because rape embodies male domination and female subordination.

The crime of forced impregnation, central to genocidal rape, also elucidates the gender component. Since under patriarchy women are viewed as little more than vessels for childbearing, involuntary pregnancy is commonly viewed as natural, divinely ordained perhaps, or simply an unquestioned fact of life. As a result, the risk of pregnancy in all rape is treated not as an offense, but as a sequela. Forced pregnancy has drawn condemnation only when it reflects an intent to harm the victimized race. In Bosnia, the taunt that Muslim women will bear Serbian babies is not simply an ethnic harm, particularly in light of the prevalence of ethnically mixed families. When examined through a feminist lens, forced pregnancy appears as an assault on the reproductive self-determination of women; it expresses the desire to mark the rape and rapist upon the woman's body and upon the woman's life.

Finally, the fact that the rape of women is also designed to humiliate the men or destroy "the enemy" itself reflects the fundamental objectification of women. When a woman is attacked because she "belongs" to the enemy or because of her relationship to male targets, raping her is a means to humiliate, indeed, to feminize the men who are powerless to protect her. As such she is also being attacked on the basis of gender, as man's property, lacking in separate identity, dehumanized and subservient. In this common scenario, women are the target of abuse at the same time as their subjectivity is completely denied. The persistent failure to acknowledge the gender dimension of rape and sexual persecution is thus a most effective means of perpetuating it.

In sum, the international attention focused on Bosnia challenges the world squarely to recognize sexual violence against women in war as torture. Moreover, it is not enough for rape to be viewed as a crime against humanity when it is the vehicle of some other form of persecution even though gender is, in fact, usually intertwined. Sexual violence against women on a mass scale must also be recognized as a crime against humanity because it is invariably a persecution based on gender, sometimes exclusively or primarily so. The recent recognition in international human rights law of gender violence as a form of discrimination against women as well as a violation of women's fundamental human rights supports this expansion of the persecution bases of crimes against humanity.\(^\text{79}\) This is

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\(^{79}\) See, e.g., Committee to End Discrimination Against Women, Recommendation No. 19, U.N. Convention on the Elimination of all Forms of Discrimination Against Women, 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992). "Gender-based violence ... is discrimination within the meaning of article 1 of the convention." It defines violence against women as "violence that is directed against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or
essential if the women of Bosnia are to be understood as full subjects and not simply as objects in this terrible victimization and if the international attention focused on Bosnia is to have meaning for women subjected to widespread rape in other parts of the world.

CONCLUSION

Given the formidable pressure being brought to bear by women survivors and the women’s movement globally, it may well be that some men will be indicted, subject to international warrants, or even tried before the International Tribunal or national courts, at least if impunity is not again the price of peace. This would be precedent setting in international law and it would hopefully offer symbolic vindication to the untold numbers of women this war has rendered homeless in so many senses. Unless the gender dimension of rape in war is recognized, however, it may mean little for women where rape is not also a tool of genocide. 80

Emphasis on the gender dimension of rape in war is critical not only to surfacing women as full subjects of sexual violence in war, but also to recognizing the atrocity of rape in the time called peace. When women charge rape in war they are more likely to be believed, because their status as enemy, or at least as “the enemy’s,” is recognized and because rape in war is seen as a product of exceptional circumstances. When women charge rape in everyday life, however, they are disbelieved largely because the ubiquitous war against women is denied.

From a feminist human rights perspective, gender violence has escaped sanction because it has not been viewed as violence and because the public-private dichotomy has shielded such violence in its most common and private forms. 81 The recognition of rape as a war crime is thus a critical

80. Moreover, as we discussed in this volume in Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 HASTINGS WOMEN’S L. J. 171 (1994), the effective prosecution of rape depends on “engendering” the Tribunal process in a number of ways: equal employment of women, including a substantial cadre of women and men with experience working with women traumatized by sexual violence; gender training of all personnel; and effective enforcement of procedural and evidentiary rules to prohibit prejudicial and unfair harassment and retraumatization of witnesses while preserving the defendant’s legitimate rights to a fair trial. Beyond that, women (as well as men) survivors and victims of these atrocities deserve more than symbolic recognition, they deserve a commitment from the United Nations, through the Tribunal process and otherwise, to provide compensation, albeit for the incompensable.

81. See, e.g., Charlotte Bunch, Women’s Rights as Human Rights: Toward a Revision of Human Rights, 12 HUM. RTS. Q. 486 (1990); Rhonda Copelon, Intimate Terror: Understanding Domestic Violence as Torture, and Celina Romany, State Responsibility Goes...
step toward understanding rape as violence. The next step is to recognize that rape in the presence of war or the imprimatur of the state is not necessarily more brutal, relentless, or dehumanizing than the private rapes in the so-called time of peace.

This is not to say that rape is identical in the two contexts. There are differences here, just as there are differences between rape for the purpose of genocide and rape for the purpose of booty. War tends to intensify the brutality, repetitiveness, public spectacle, and likelihood of rape. War diminishes sensitivity to human suffering and intensifies men’s sense of entitlement, superiority, avidity, and social license to rape. War and armed repression carried out against civil society attacks whatever security, social supports, and routine existed for women in daily life. They rain terror from many directions and force many into hiding and flight.

But the line between war and “peace” is not so sharp. Gang rape in civilian life shares the repetitive, gleeful, and public character of rape in war. Marital rape, the most private of all, shares some of the particular characteristics of genocidal rape in Bosnia: it is repetitive, brutal, and exacerbated by betrayal; it assaults a woman’s reproductive autonomy, may force her into hiding, to flee her home and community, and is widely treated as legitimate by law and custom. The lasting terror and shame of rape may change the psychological as well as physical landscape of a woman’s life. Violation by a state official or enemy soldier is not necessarily more devastating than violation by an intimate.82

Every rape is a grave violation of physical and mental integrity. Every rape has the potential to profoundly debilitate, to render the woman homeless in her own body and destroy her sense of security in the world. Every rape is an expression of male domination and misogyny, a vehicle of terrorizing and subordinating women. Like torture, rape takes many forms, occurs in many contexts, and has different repercussions for different victims. Every rape is multidimensional, but not incomparable.

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82. See Herman, supra note 42; Copelon, supra note 27.
The rape of women in the former Yugoslavia challenges the world to refuse impunity to atrocity and to resist the powerful forces that would make the mass rape of Muslim women in Bosnia exceptional and thereby restrict its meaning for women raped in different contexts of war, official repression, and “peace.” It thus demands recognition of situational differences without losing sight of the commonalities. To fail to make distinctions flattens reality; and to rank the egregious demeans it.83

83. As the Tribunal proceeds, you can write to United Nations Secretary-General Boutros Boutros-Ghali, to your country’s ambassador to the United Nations, and to the judges and Chief Prosecutor of the Tribunal, which is situated at the Peace Palace in The Hague. The two women judges on the International Tribunal are Gabrielle Kirk-MacDonald (United States) and Elizabeth Odio-Benito (Costa Rica); the Chief Prosecutor is Justice Richard Goldstone.