

Surfacing Gender: Reconceptualizing Crimes against Women in Time of War

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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 comes 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 of war,” 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 rape and forced prostitution are mass or systematic, as with the rape of women in both theaters of the Second World War;¹ it is even true where the open, mass, and systematic rape has been thought to shock the conscience of the world, such as in the “rape of Nanking”² or the rape of an estimated 200,000 Bengali women during the war of independence from Pakistan.³ Though discussed in the judgment of the International Military Tribunal in Tokyo, rape was not separately charged against the Japanese commander as a crime. In Bangladesh, amnesty was quietly traded for independence.

The question today is whether the terrible rape of women in the war in the former Yugoslavia will likewise disappear into history or at best will survive as an exceptional case. The apparent uniqueness of the rape of women in Bosnia-Herzegovina, directed overwhelmingly against Bosnian-Muslim women, is a product of the invisibility of the rape of women

through history as well as in the present. Geopolitical factors – that this is occurring in Europe, is perpetrated by white men against white, albeit largely Muslim women, and contains the seeds of a new world war – cannot be ignored in explaining the visibility of these rapes. By contrast, the rape of 50 percent of the women of the indigenous Yuracruz people in Ecuador by mercenaries of an agribusiness company seeking to “cleanse” the land is invisible, just as the routine rape of women in the the civil wars in Peru, Liberia, and Burma, for example, has gone largely unreported.⁴

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 and remains there largely because of its 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 blithely distinguished “genocidal” rape from “normal” rape. Our ad hoc Women’s Coalition against Crimes against Women in the Former Yugoslavia spoke of rape as a weapon of war whether used to dilute ethnic identity, destabilize the civilian population, or reward soldiers. But the public was nodding: Yes, when rape 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 thus dangerous. Rape and genocide are separate atrocities. Genocide – the effort to destroy a people based on its identity as a people – evokes the deepest horror and warrants the severest condemnation. Rape is sexualized violence that seeks to humiliate, terrorize, and 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 women. From the standpoint of these women, they are inseparable.

But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again. Even in war, rape is not fully recognized as an atrocity. When the ethnic war ceases or is forced back into the bottle, will the crimes against women, the voices of women, and their struggles to survive be vindicated? Or will condemnation be limited to this seemingly exceptional case? Will the women who are brutally raped for domination, terror, booty, or revenge – in Bosnia and elsewhere – be heard?

Whether the rape, forced prostitution, and forced impregnation of

women will be effectively prosecuted before the recently created UN ad hoc International Tribunal,⁵ whether the survivors will obtain redress, or whether impunity will again be the agreed-upon or de facto cost of “peace” is up for grabs. The pressure of survivors and their advocates, together with the global women’s human rights movement, will make the difference. The situation presents a historic opportunity as well as an imperative to insist on justice for the women of Bosnia as well as to press for a feminist reconceptualization of the role and legal understanding of rape in war.

To do this, we must surface gender in the midst of genocide at the same time as we 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 as we recognize that rape together with genocide inflicts multiple, intersectional harms.⁶ This combination of the particular and the general is critical if the horrors experienced by women in Bosnia are to be appreciated 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 chapter examines the evolving legal status of rape in war with attention to both the particular and the general as well as to the tension between them. The opening section focuses on the two central questions of conceptualization. The first is 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. The second is whether international law does or should distinguish between “genocidal rape” and mass rape for other purposes. In this regard it examines the limitations and the potential in the concept of “crimes against humanity” as well as the relation between gender and nationality/ethnicity in the crimes committed against women in Bosnia. The second section looks at the viability of the ad hoc International Tribunal as well as the gender issues presented.

Reconceptualizing Rape, Forced Prostitution, and Forced Pregnancy in War

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 an international war crimes tribunal, the leading question for a time was whether rape 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. The answer is not unequivocal.

The question is not whether rape is technically a crime or prohibited in war. Rape has long been viewed as a criminal offense under national and international rules of war.⁷ The 1949 Geneva Conventions as well as the 1977 Protocols regarding the protection of civilians in war explicitly prohibit rape, enforced prostitution, and any form of indecent assault and call for special protection of women, including separate quarters with supervision and searches by women only.⁸ Yet it is significant that where rape and other forms of sexual assault are explicitly mentioned, they are categorized as an outrage upon personal dignity, or crimes against honor.⁹ Crimes of violence, including murder, mutilation, cruel treatment, and torture, are treated separately.

The concept of rape as a crime against dignity and 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, it is 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 against rape was prevalent in southern states as a result of a combination of racism and sexism.¹⁰ Similarly, the media often refer to the mass rape in Bosnia as the rape of “the enemy’s women” – the enemy in this formulation being the male combatant and 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.¹¹ 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.¹² 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 a woman’s 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 term is “grave breach.” The significance of a war crime’s being a “grave breach” is threefold. On the level of discourse it calls attention to the egregiousness of the assault. On the 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 were not a “grave breach” of the Geneva Conventions, some international jurists would argue that it can be redressed only by the state to which the wrongdoer belonged or in which the wrong occurred, and not by an International Tribunal.¹³

The relevant portions of the Geneva Conventions do not specifically mention rape in the list of crimes considered “grave breaches.” Included are “willful killing, torture, or inhumane treatment” and “willfully causing great suffering or serious injury to body or health.”¹⁴ Clearly these categories are broad and generic enough to encompass rape and sexual abuse.¹⁵ But in addition to qualifying as “willfully causing great suffering or serious injury to body or health” or as “inhumane treatment,” it is important that rape be recognized as a form of torture.

When the Geneva Conventions were drafted, the view that torture was a method of extracting information was dominant. Today, however, this distinction has been largely abandoned, although it endures in popular thinking. 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.”¹⁶ Recent treaties define torture as the willful infliction of severe physical or mental pain or suffering not only to elicit information, but also to punish, intimidate, or discriminate, to obliterate the victim’s personality or diminish her personal capacities.¹⁷ Thus torture is now commensurate with willfully causing great suffering or in-

jury. Moreover, it is not simply or necessarily the infliction of terrible physical pain; it is also the use of pain, sensory deprivation, isolation, and humiliation as a pathway to the mind. Indeed, in the contemporary understanding of torture, degradation is both vehicle and goal.¹⁸

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.¹⁹ 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 Mladjenovic, a psychotherapist and Serbian feminist antiwar activist, “homeless in her own body.”²⁰ It strikes at a woman’s power; it seeks to degrade and destroy her; its goal is domination and dehumanization.

Likewise, the testimonies in this book of raped women, whether they were attacked once or forced into prostitution, make it clear that rape is both a profound physical attack and a particularly egregious form of psychological torture. They document the intersection of contempt for and conquest of women based on their sex as well as on their national, religious, or cultural identity. They demonstrate the significance of the threat, fear, or reality of pregnancy as well as of the fact that in Bosnia the rapists are in many cases former colleagues, neighbors, or even friends.

Indeed, torturers know well the power of the intimate in the process of breaking down their victim.²¹ 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. Their stories in this collection, notwithstanding their self-justificatory quality, reflect the common methods of training torturers – exposure to and engagement in increasingly unthinkable violence and humiliation.²²

Despite the fact that rape in Bosnia has drawn substantial international condemnation, the United Nations’ position on the status of rape as a grave breach of humanitarian law is not clear. The UN Human Rights Commission condemned “the abhorrent practice of rape and abuse of women and children in the former Yugoslavia which, *in the circumstances*, constitutes a war crime” and urged all nations to “exert every effort to bring to justice . . . all those individuals directly or indirectly involved.”²³ While this implies that rape is a “grave breach,” the limitation to the par-

ticular “circumstances” could be read as a limitation to the context of ethnic cleansing. The Declaration of the 1993 World Conference of Human Rights in Vienna, though strongly worded, is limited to “systematic” rape and abuse.²⁴

Most significantly, the Report subsequently adopted by the Security Council that constitutes the statute establishing the jurisdiction of the International Tribunal largely tracks the Geneva Conventions’ definition of grave breach and does not explicitly list rape as a grave breach or describe it as implicit in the recognized categories.²⁵ But if, as a consequence of women’s pressure, it is prosecuted as such and the various bodies of the UN begin to refer to rape as a grave breach, then this practice will effectively amend or expand the meaning of grave breach in the Conventions and Protocols. This emphasizes the importance, from a practical as well as a moral perspective, of insisting that all rape be subject to punishment, not only mass or genocidal rape. It should be noted that under the Geneva Conventions, responsibility is imputed to commanders where they knew, or should have known, of the likelihood of rape and failed to take all measures within their power to prevent or suppress it.²⁶

It is also important to point out the importance of the Vienna Declaration’s explicit inclusion of forced pregnancy in its condemnation of the mass atrocities in the former Yugoslavia. This is clearly a product of the intensive women’s mobilization that preceded the World Conference. As the testimonies in this book indicate, forced pregnancy must be seen as a separate offense: the expressed intention 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 aborted or not, continues the initial torture in a most intimate and invasive form; and bearing the child of rape, whether placed for adoption or not, has a potentially lifelong impact on the woman and her place in the community.²⁷

GENOCIDAL RAPE VERSUS “NORMAL” RAPE:

WHEN IS MASS 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 too give rise to universal jurisdiction. Since crimes against humanity can be committed in any war, it is irrelevant whether the 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 Report establishing the statute of the International Tribunal.²⁸ 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, although no one was prosecuted.²⁹ Nonetheless, the Security Council's reaffirmation that rape is a "crime against humanity," and therefore among the most egregious breaches of civilization, is profoundly important. But the meaning of this designation and its import for other contexts in which women are subjected to mass rape apart from ethnic cleansing are not clear. The danger, as always, is that extreme examples produce narrow principles.

The commentary on this aspect of the jurisdiction of the current Tribunal signals this danger. It explains crimes against humanity as "inhuman 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."³⁰ 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 not require massive numbers but specifies 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 statute does not require that rape be ordered or centrally organized. Commanders can be held responsible where widespread violence is known and tolerated.³¹ In Bosnia, rape is clearly a conscious tool of war and ethnic cleansing. It is politically and ethically important for the Tribunal to investigate and prove the chain of command, but it is likewise important that leaders can be held legally responsible without proof that rape was systematic or committed under orders.

Second, the commentary on the statute does rank rape with torture, at least where it is widespread or systematic. But it undercuts this by appearing to conflate 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 should qualify as a gross act of violence and accordingly, if widespread or systematic, would independently qualify as a crime against humanity. By merg-

ing the criterion of gross violence with persecution-based offenses, the commentary could limit prosecution to rape that is undertaken as a method of persecution on the specified grounds. Since the statute of the Tribunal lists rape and persecution separately, it is not clear, until put in practice, whether the broader understanding will prevail.

The narrow view is quite prevalent, however. 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 peace 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” or raping them repetitively. 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.³²

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. It is a weapon of war where, as in Bosnia and elsewhere, it is used against women to destabilize the society and force families to flee, because in time of war women are the mainstay of the civilian population, even more than in peacetime.³³

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. The Japanese military industrialized the sexual slavery of women in the Second World War: 200,000 to 400,000 mostly Korean, but also Philippine, Chinese, and Dutch women from Indonesia were deceived or disappeared into “comfort stations,” raped repeatedly and moved from battlefield to battlefield to motivate as well as reward the Japanese soldiers. Genocide was not a goal, but it is believed that 70 to 90 percent of these women died in captivity, and among the known survivors, none were subsequently able to bear children.³⁴ 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.³⁵ Indeed, the foregoing testimonies of the Bosnian Serbian rapists reveal an admixture of all these goals.

At the same time, genocidal or ethnic cleansing rape, as practiced in Bosnia, does have some aspects that are particularly tailored to its goals of driving women from their homes or destroying their possibility of reproducing within and “for” their community. As the preceding testimonies suggest, that women are raped by men familiar to them exacerbates their trauma and the impulse to flee the community because trust and safety are no longer possible. This is particular to the Bosnian situation, where war and propaganda have made enemies out of neighbors.

The second and more generally 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” (as if the child were the product of sperm only) justifies repetitive rape and aggravates her terror and potential unacceptability to her community. Bengali women were raped to lighten their race and produce a class of outcaste mothers and children. Enslaved African women in the southern United States were raped as property to produce babies bartered, sold, and used as property.³⁶ While intentional impregnation is properly treated as a separate offense, it should also be noted that pregnancy is a common consequence 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.³⁷

These distinctive characteristics do not 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 ethnicity and religion, and based on 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 third 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.

With respect to women, the need is to acknowledge that gender has historically not been viewed as a relevant category of victimization. The frequency of mass rape and the absence of sanction are sufficient evidence. In the Holocaust, the gender persecutions – the rape and forced prostitution of women as well as the extermination of gay people – were obscured.³⁸ The absence of gender as a basis for persecution is not 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.³⁹ The expansion of the concept of crimes against humanity 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.

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 as well as vulnerability as women, including their sexual and reproductive power. They are targets because of *hatred* of their power as women; because of endemic objectification of women; because rape embodies male domination and female subordination.

The crime of forced impregnation – central as it is 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, that the rape of women is also designed to humiliate the men or destroy "the enemy" itself reflects the fundamental objectification of women. 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 to squarely 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; it must also be recognized as a crime against humanity because it is invariably a persecution based on gender. This is essential if the women of Bosnia are to be understood as full subjects as well as objects in this terrible victimization and if the international attention focused on Bosnia is to have meaning for women subjected to rape in other parts of the world.

Seeking Gender Justice

The history of atrocities and oppression and of festering hatreds among the peoples of the former Yugoslavia underscores the necessity of the demand, articulated by feminist critics of the war, for "justice, not revenge."⁴⁰ It is troubling as well as significant that the United Nations has taken steps to establish an International Tribunal to try the perpetrators of war crimes and crimes against humanity in the former Yugoslavia. On the negative side, the choice of an ad hoc Tribunal rather than a permanent international criminal court reveals the shallowness of the international commitment to justice and opens the process to excessive politicization. At the same time, the creation of this Tribunal lessens the possibility that legal amnesty will be the price of peace. But it is no guarantee against de facto impunity; nor does it guarantee that the suffering of the women will be vindicated. This section outlines some of the problems with the Tribunal as it is at present envisaged and suggests some alternative routes, in response to Helke Sander's final ruminations in her letter to Lysistrata.

THE INTERNATIONAL TRIBUNAL

The potential efficacy of the new International Tribunal is riddled with doubt. Unless there is a radical change in the military context, this