Humanitarian Law and Gender Violence: An End to Centuries of Neglect?

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by
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International humanitarian law: “[T]he international law of human rights that is applicable in situations of international armed conflict, and . . . in some situations of internal armed conflict.”1

Humanitarian: “. . .devoted to the promotion of human welfare and the advancement of social reform.”2

Neither the abuses routinely inflicted on women during war, nor the response of domestic and international legal systems to those abuses, can be described as “humanitarian.” To the contrary, rape and other gender violence3 have been used as weapons of war

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3. The concepts of “gender violence” and “sexual violence” as used in this article refer to violence inflicted primarily, although not exclusively, on women, and involving some form of violent sexual abuse. When inflicted on men, such violence usually aims in part to humiliate them by treating them “like women.”

The Women’s Caucus for Gender Justice distinguishes between gender violence and sexual violence as follows:

By gender violence or violations, the Women’s Caucus means violence or violations which have the target or affect women exclusively or disproportionately because they are women. Gender violence also includes violence or violations which are based on or perpetuate socially constructed or stereotyped roles based on sex, or the power differential between men and women. Sexual violence, whether directed to women or men, is usually a form of gender violence, since it is an attack on one’s gender identity, whether masculine or feminine. That is, women are raped, for
in virtually all wars, by all sides. This scandalous history has been all but ignored by history books, politicians, and the rare ad hoc international criminal tribunals charged with investigating and prosecuting those who commit war crimes.

Reports of gender violence in the former Yugoslavia shocked the world and dramatically altered awareness of violence against women as a facet of war. These reports followed decades of active campaigns by various international organizations to draw attention to violence against women, the existence of women’s international human rights, and international law’s characterization of gender violence. The result has been substantial progress in the application of international humanitarian law to address accusations of rape and other violence against women. The advances are still shaky, however, and subject to backsliding. It is not clear that the recent legal changes will have any significant impact in deterring such violence during times of war or peace. Thus, it is far too soon to declare victory. Nevertheless, it is useful to take stock of the progress and to highlight areas of most critical ongoing concern.

I. Historical Background: Rape in War

The utilization of rape and other violence against women during times of war has been the accepted rule, largely ignored when they occur and even afterwards. Women have been raped, intentionally, as a tactic of war, in virtually all wars, by almost all military forces. Most armies have viewed rape as a legitimate “perk” of battle which satisfies several objectives: the enemy’s property is stolen, appropriated or destroyed, as are “their” women. Massive wartime rapes include the Rape of Nanking, the enslavement and repeated rape of 200,000 “comfort women” by the Japanese mili-
tary during World War II, the rape of hundreds of thousands of women in Bangladesh during the 1971 war. U.S. soldiers reported that Vietnamese women were repeatedly raped during routine missions.

Rape during war is often viewed as inevitable, a product of male nature and the nature of war, fulfillment of a sexual urge or need and, therefore, something that neither can nor should be controlled. Societal attitudes toward rape in war start from the premise that women who "belong" to the enemy are legitimate targets. The phrase "rape and pillage" captures the concept that women are a form of "property," available for appropriation along with the enemy's other possessions. The often prevailing belief has been that such abuse of women is the right of the victorious warrior. Women are treated as "booty."

The systematic use of rape in war also serves to destroy a society's morale: women usually play a central role as the mainstay of the family, ensuring continuity in the culture and the society.

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7. Approximately 200,000 women were kidnapped by the Japanese during World War II, held in sexual slavery and raped repeatedly by Japanese soldiers. Japan denied the existence of these so-called "comfort women" until 1993. Many survivors kept their ordeals secret for decades. Only recently have they organized, demanding compensation from Japan. See Japan Civil Liberties Union, Report on Post War Responsibility of Japan for Reparation and Compensation (April 1993); Filipina Comfort Women v. Japan (Petition filed with the U.N. Commission on Human Rights by the Center for Constitutional Rights and other organizations) (Oct. 26, 1993); War Crimes on Asian Women: Military Sexual Slavery by Japan During World War II: The Case of the Filipina Comfort Women (Dan P. Calica & Nelia Sancho eds., 1993).

8. After Bangladesh declared independence from Pakistan in 1971, Pakistani soldiers raped 200,000-400,000 Bengali women. Many survivors were ostracized by their families and society. Brownmiller, supra note 4, at 78-87.


10. Stalin is quoted as having responded to a man who complained about rapes by Russian soldiers by questioning whether the man understood "human suffering and the human heart": "Can't he understand it if a soldier who has crossed thousands of kilometers through blood and fire and death has fun with a woman or takes some trifle?” Brownmiller, supra note 4, at 70, quoting Milovan Djilas, Conversations with Stalin 89, 95 (1962).

11. See Copelon, supra note 9, at 259-60.
Destroying women’s ability to fulfill that role results in the destruction and destabilization of the society. The rapes in Bosnia-Herzegovina, employed as a tool of genocide and ethnic cleansing, clearly were designed in part to destroy Bosnian Muslim society by attacking one of the pieces that held the society together: attacking women as an intentional tactic to destroy the enemy.

Although reports of rape and other abuses have often been used to whip up public support for fighting a war, little or nothing has been done to prevent or punish such crimes. After the war is over, women’s reports of rape become suspect: men begin to doubt that they even took place, and the rapes fade from the history books. There have been occasional moments of high visibility, when one side or the other has sought to demonize the enemy by publicizing the outrages against “our” women. Usually, however, the abuses are covered up afterward, by the survivors as well as by the perpetrators. Women, and the men in their lives, have been embarrassed and ashamed by what they have suffered. Blaming the victim is another reaction. Most cultures treat rape as a shame to the woman; they ostracize her and derail her future. The only recourse is to try to hide what happened.

The so-called “comfort women” of Asia, who were forced into rape camps by the Japanese to “service” their soldiers, provide one of the most salient and tragic examples. Many hid what they had suffered for decades, from their families, as well as their friends and acquaintances. One Filipina woman told of watching a news program about the “comfort women” with her children and grandchildren just a few years ago. When her family exclaimed at the

12. Id.; Swiss & Giller, supra note 9, at 612-613.
13. See Thomas & Ralph, supra note 9, at 85 (detailing use of rape and other sexual assault to force the population to flee, in Bosnia-Herzegovina and elsewhere).
14. Sensationalized allegations of rape were used to drum up support for U.S. involvement in World War I. Brownmiller, supra note 4, at 37-43. When a few of the reports were later shown to have been exaggerated, the minor inaccuracies were later used as justification for ignoring all of the rape reports, including the thousands that did occur. Id. Inflated numbers in the former Yugoslavia have also been seized by opposing forces to discredit hard evidence of widespread abuses. See Thomas & Ralph, supra note 9, at 93; See also Stephens, supra note 5, at 147 & n.14.
15. After decades of insisting that the women had voluntarily engaged in prostitution, the Japanese government has only recently acknowledged that they had in fact been forced into sexual slavery. T.R. Reid, Japan to Apologize to “Comfort Women,” WASH. POST, July 13, 1995, at A18.
shocking report, she told them for the first time that she herself had survived sexual slavery as a "comfort woman."¹⁶

Systematic employment of gender violence as a tool of genocide in the former Yugoslavia from 1992-93 brought new attention to the age-old practice. Horrifying reports indicated that women had been intentionally targeted for mass and repeated rapes, forced to serve in "brothels," and even intentionally impregnated and detained until abortion was no longer feasible.¹⁷

Rape of women, including minors, has occurred on a large scale. In Bosnia-Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing. In this context, rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in front of a whole village, designed to terrorize the population and force ethnic groups to flee.¹⁸

One human rights group monitoring the situation in Bosnia-Herzegovina, reported that women were "gang-raped, taunted with ethnic slurs and cursed by rapists who stated their intention to forcibly impregnate women as a haunting reminder of the rape and an intensification of the trauma it inflicts."¹⁹

¹⁶. Interview with the author.
¹⁸. See Report on Situation of Human Rights, supra note 17, at §§ 84-85.
¹⁹. HELSINKI WATCH II, supra note 17, at 21. Despite the widespread publicity, the rapes continued. In June 1993, for example, one human rights investigator reported:

Since my last visit in February, the situation has become worse for women in Bosnia-Herzegovina. In response to the international outcry against rape, the Serbian military forces in Bosnia have made efforts to diminish the visibility of rape. The strategy has not changed, only the tactics. Rather than several hundred women
The genocide in Rwanda in 1994 also involved the utilization of widespread violence against women, including rapes, sexual slavery and sexual mutilations. Propaganda leading up to the genocidal attacks, in which 500,000 to one million Rwandans were killed, included repeated demonization of Tutsi women as a particular threat to the Hutus. However, despite the worldwide attention to sexual violence in Yugoslavia, initial reports from Rwanda ignored and overlooked the rapes and other sexual assaults that were a central tactic of the genocide.

During a similar time period, and under the military regime which terrorized Haiti after a military coup forced President Jean-Bertrand Aristide out of power, paramilitary forces allegedly raped both women and girls. The mass rapes were a part of the campaign in one rape camp, now there are much smaller groups of women in many more rape camps.


Many women who told their traumatic stories in an attempt to halt the abuses and bring the rapists to justice, were bitterly disillusioned by the response to their disclosures:

I sensed shame turning to anger, as women realize that although the atrocities they suffered have been exposed internationally, no action is being taken to stop these crimes against humanity. The women feel betrayed and abandoned. Id.

The negative impact experienced by some survivors after interviews with journalists, human rights workers and even health care professionals, has been documented as including "attempted or actual suicides, severe clinical depressions, and acute psychotic episodes. Survivors require an environment that feels safe and contains adequate social support systems. The need to maintain control over when and where they talk about their experiences of abuse." See Shana & Giller, supra note 9, at 614.


21. Id. at 12.

22. Id. at 15-19.

23. In an article published in early 1995, Rhonda Copelon notes the discrepancies of victims' reporting of sexual assaults:

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. . . [I]t was revealed that between 2,000 and 5,000 Rwandan women were pregnant and giving birth as a result of rape. This figure. . .suggests that the overwhelming percentage of women who survived the massacre had been raped.

Copelon, supra note 9, at 245.
against Aristide supporters. Women who organized in opposition to the military rule were raped as punishment for their activities and as a warning to other women and men. Others were assaulted in retaliation for the activities of the men in their families. Members of paramilitary groups supporting the regime were given free reign to rape women as they pleased, as a form of reward for their activities, particularly in certain largely poor communities known to support Aristide. "Sexual abuse against Haitian women was carried out in various ways, but with a single aim: to create a climate of terror among people supporting Aristide."  

II. THE RECHARACTERIZATION OF GENDER VIOLENCE UNDER NATIONAL AND INTERNATIONAL LAW

The response to the rapes and other gender violence in Yugoslavia, Rwanda and Haiti in the 1990s drew upon the foundation built by decades of organizing and activism by international organizations on the issue of gender violence during peacetime. Domestically, this involved the recognition that rape is a violent assault, not merely a sexual act, which constitutes a crime.

Law enforcement, the judicial system and society at large began to treat a woman’s accusations of rape as the report of a violent crime, rather than an implausible allegation of an unreliable

25. *Id* at 40.
27. Recognizing that rape and other sexual assaults involve violence, the use of force to impose an unconsented physical act upon the victim is an important step in “disentangling rape from sex, and therefore harm from pleasure, in the minds of many.” Lynne Henderson, *Rape and Responsibility,* 11 *Law & Phil* 127, 156 (1992). The distinction, however, should not be carried so far as to negate the uniqueness of sexual violence.

Radical feminists assert that it is a mistake to characterize rape as violence rather than sexualized violence. As a practical matter, prosecuting rapes that may lack physical violence, such as date and marital rape, is more difficult under a characterization of rape as simply violence. Moreover, to categorize rape as a violent assault obscures the unique meaning and understanding of the indignity and harm of rape. To label rape as merely assault denies the reality of what rape, as opposed to other physical assaults, does — rape is an objectification and denial of the basic humanity of the victim.

female seductress. Special rules that had focused suspicion on the victim and made prosecutions difficult were gradually repealed.28

At the same time, a parallel movement internationally pressed for recognition of women's rights — including the right to be free from gender violence — as a fundamental aspect of human rights. Historically, women's rights had been relegated to the specialized area of gender discrimination, and had received little attention from international human rights scholars and organizations.29 This theoretical and practical separation produced shocking results, given the enormity of the human rights abuses associated with gender.

Significant numbers of the world's population are routinely subject to torture, starvation, terrorism, humiliation, mutilation, and even murder simply because they are female. Crimes such as these against any other group other than women would be recognized as a civil and political emergency as well as a gross violation of the victims' humanity. Yet, despite a clear record of deaths and demonstrable abuse, women's rights are not commonly classified as human rights.30

28. See Patricia Searles and Ronald J. Berger, The Current Status of Rape Reform Legislation: An Examination of State Statutes, 10 WOMEN'S RTS. L. REP. 25 (1987); Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 796-800 (1988); Torrey, supra note 27, at 30-40 (summarizing legal reforms). As Chamallas notes, however, "the law on the books often differs markedly from the law in action." Chamallas, supra, at 777-778. Torrey is harsh in her critique of the impact of the reforms:

Ironically, we now know that the legislative changes have not made any difference in the arrest, prosecution and conviction of rapists. Empirical studies of rape reforms... were remarkably identical — there was virtually no change in the criminal justice response following reform... Maybe there is no "model statute" solution to rape law because the problem is not the words of the law so much as our interpretation of those words. This interpretational problem is rooted in a society in which one group (the perpetrators) has economic, political and social power over the other group (the victims).


30. See Bunch, supra note 29, at 486. Internationally, women's concerns have traditionally been handled by special bodies focusing on discrimination against women, which have limited powers. The U.N. Commission on the Status of Women (the Women's Commission), established in 1947 by the United Nations Economic and Social Council, is responsible for promoting women's human rights, while the Committee on the Elimination of Discrimination Against Women (CEDAW) monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women, which entered into force in 1981 (G.A. Res. 34/1980, U.N. Doc. A/Res/34/180 (1980)). Within the United Nations system,
However, during the past decade substantial progress has resulted in the recognition that abuses suffered predominantly by women constitute violations of internationally protected rights. In particular, the international community has recently begun to categorize violence against women, not as an issue of family or domestic law, but as a violation of international law. More significantly, in the past few years we have seen increasingly powerful condemnations of violence against women.

One of the consequences of the new conception of violence against women as a human rights violation has been the recognition that rape is torture, and is thus prohibited by existing international law norms. An act constitutes torture, as defined by international law, if it (1) intentionally causes severe physical or mental suffering, (2) is committed with the intent to obtain information, for punishment, intimidation or coercion, or for any discriminatory reason, and (3) is committed by someone associated with the government...
or official authority.\textsuperscript{34} Rape entails as the intentional infliction of severe physical and mental pain and suffering. When inflicted by or with the acquiescence of a government agent,\textsuperscript{35} it meets one or more of the intent requirements: punishment; intimidation of the victim, her family and friends, and women in general; or gender-based discrimination. When rape committed by a person acting under governmental authority is properly recognized as a crime of violence which involves physical and psychological abuse, it necessarily meets the definition of torture.

Over the past 10-15 years, international human rights monitors and governments have come to acknowledge that rape constitutes torture. In a key advance, the United Nations Special Rapporteur on Torture in 1992 defined rape in detention as an act of torture.\textsuperscript{36} In 1995, the Inter-American Human Rights Commission recognized rapes in Haiti as torture.\textsuperscript{37} In 1991, the U.S. State Department

\begin{quote}
[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or humiliating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering 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. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.
\end{quote}


\textsuperscript{35} In general, torture is considered an international human rights violation (as opposed to a crime punishable under local law) only when inflicted by a public official or under color of state law. Some analysts, however, assert that even rape committed by private actors should be considered an international human rights violation, holding the government responsible because it encourages a system of male domination which includes tolerance of male violence against women. See, e.g., Blatt, \textit{supra} note 29, at 859-60; Rhonda Copelon, \textit{Intimate Terror: Understanding Domestic Violence as Torture}, \textit{HUMAN RIGHTS OF WOMEN} 116 (Rebecca Cook ed., 1994); Celina Romany, \textit{State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law}, \textit{supra}, at 84.


\textsuperscript{37} Inter-Am. C.H.R., \textit{supra} note 24, at 43, 44-45.
included rapes in detention as incidents of torture in its annual country-by-country human rights report. Amnesty International has also listed rapes committed while the victim is in the custody of the rapist as a form of torture.

The recognition of rape and other gender-based violence as torture triggers a range of human rights and humanitarian law protections. Torture is prohibited by all of the major human rights instruments, including regional agreements, and is barred by the constitutions of many countries. No government claims the right to torture its own or another nation's citizens. The prohibition against torture rises to the level of customary international law, and applies with equal force during war as well as peace. Finally,

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38. U.S. DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1991 (1992) (characterizing rape by government agents as a form of torture); Cable from Secretary of State to All Diplomatic and Consular Posts Re: Instructions for 1991 Country Reports on Human Rights Practices, P 211857Z (August 1991) (rape and other sexual abuse during arrest and detention or as a result of operations by government or opposition forces in the field constitutes torture and other cruel, inhuman, or degrading treatment or punishment). See also International Human Rights Abuses Against Women: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 142 (1990) (testimony of Paula Dobriansky, Deputy Assistant Secretary, Bilateral and Multilateral Affairs, Bureau of Human Rights and Humanitarian Affairs) (rape in detention is a form of torture).


41. Torture was prohibited by the constitutions of over 55 countries as of 1980. SeeFilartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

42. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702 com. a (1986) (stating that torture violates customary international law).

the Torture Convention obligates its signatories to extradite or prosecute accused torturers found within their territory.\textsuperscript{44}

Other types of gender-based violence, such as forced prostitution and forced impregnation, have also been classified as torture. These acts inflict severe mental and physical pain and suffering, and are likewise committed with the intent to punish, intimidate, and discriminate against women. Specifically, forced impregnation has been defined as "an impregnation that results from an assault or series of assaults on a woman perpetrated with the intent that she become pregnant."\textsuperscript{45} Although a forced impregnation probably results from one or more rapes, the intentional impregnation of a woman constitutes a separate violation of her rights:

[F]orced impregnation makes the humiliation of rape more complete, more prolonged, and more inescapable. For at least the duration of the pregnancy, and for a lifetime if she keeps the child, the woman may be unable to put the rape behind her and move on with her life. Forced impregnation [also] subjects the victim to the certainty of physical pain and to a risk of death or serious injury not present at the time of the original rape.\textsuperscript{46}

Forced prostitution — better described as sexual slavery — also prolongs the agony of rape, forcing a woman to submit to repeated rapes. Cultural condemnations of prostitution may also make it far more difficult for the victim to recover from her ordeal.

While recognizing that gender violence triggers the protections of international law, it is important not to lose sight of the distinct nature of gender-based human rights violations. The U.N. and O.A.S. efforts to define violence against women as an independent international human rights violation reflect the need to recognize the distinct characteristics of abuse that affects half the world’s population, specifically because of their gender.\textsuperscript{47}

\textsuperscript{44} See Torture Convention, supra note 34, art. 5, § 2.


\textsuperscript{46} Id. at 17.

\textsuperscript{47} See Copelon, supra note 31, at 602-604, discussing the importance of "surfacing gender" in discussions of war crimes and genocide.
III. HUMANITARIAN LAW: THE LEGAL STRUCTURE

When word about rape camps and gender violence as a form of ethnic cleansing first hit the international press in 1992, commentators expressed concern that existing legal structures would be inapplicable. Early articles argued that rape and other forms of gender violence constitute war crimes, but authors were worried that restrictive interpretations of international law norms would lead to inadequate characterization of such violence.48

Uncertainty about the status of gender violence under humanitarian law resulted from the failure of major humanitarian law instruments to address such abuses. In fact, rape by soldiers has been prohibited since the 14th century.49 However, the first modern compilation of humanitarian law, the 1907 Hague Convention, makes no mention of rape,50 while the 1949 Geneva Conventions mention rape only once, as a crime against honor, stating, “Women shall be especially protected against any attack on their honor, in particular, against rape, enforced prostitution, or any form of indecent attack.”51 None of the provisions addressing gross violence mention rape.52

48. See, e.g., Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 AM. J. INT’L L. 424, 426 (1993) (noting that the major humanitarian law instruments do not mention rape, but concluding that “the hesitation to recognize that rape can be a war crime or a grave breach has already begun to dissipate.”) (citation omitted); Stephens, supra note 5, at 13 (noting the “growing, but still tentative, recognition” that rape violates humanitarian law); Thomas & Ralph, supra note 9, at 94 (criticizing newspaper article that suggests that the international norms must be amended before rape and other gender violence can be included within their reach).

49. Professor Meron cites the national military codes of Richard II (1385) and Henry V (1419) as prohibiting rape by soldiers, as well as the Lieber Instructions (1863), which formed the basis for 20th century efforts to codify the rules of warfare. Meron, supra note 48, at 425. See generally R. Bierzanek, War Crimes: History and Definition, 3 INT’L CRIM. L. 29-31 (M. Cherif Bassiouni ed., 1987), for historical development of humanitarian law.


51. Fourth Geneva Convention, supra note 43, art. 27. The Hague Convention of 1907, contains a reference to respect for “family honor and rights” that may entail a euphemistic prohibition of rape.

52. See, e.g., Fourth Geneva Convention, supra note 43, arts. 3 and 147 (listing prohibited forms of violence such as torture). The failure to address rape and other sexual assault reflects the historic absence of women and women’s concerns from the international sphere: Given the long history of rape as a weapon in warfare and tool for oppression, it may seem surprising that the relevant human rights documents have not addressed gender violence more explicitly. This omission is much less surprising, however, when one considers the virtual exclusion of women from international lawmaking
Nevertheless, these agreements contain language that clearly applies to rape, if it is properly considered a crime of violence. Several decades of work by analysts of gender violence occurring during peacetime, as well as the work to gain recognition of “women’s rights as human rights,” laid the necessary groundwork. Rape is increasingly recognized as an act of violence, not sexual gratification. Moreover, rape is also viewed as violence against women, which is a violation of human rights, not a question of family honor or a private offense. This background spurred a new look at humanitarian law norms. Commentators quickly concluded that existing international law norms criminalize gender violence committed during war.

The Genocide Convention prohibits what is, perhaps, the most egregious human rights violation: the attempt to destroy a people. Genocide consists of certain acts of violence committed “with the intent to destroy, in whole or part, a national, ethnic, racial or religious group as such . . .” The enumerated acts include killings, inflicting serious bodily or mental harm, imposing conditions of life calculated to destroy the group, and imposing measures designed to prevent births within the group. Rape and other gender violence constitute acts of genocide when committed with the requisite intent. Most important, rape inflicts serious bodily and/or mental harm; therefore rape committed with the intent to destroy the targeted group is an act of genocide. In addition, rapes often are part of a calculated plan to impose unsustainable living conditions, by attacking the family unit through the destruction of the woman’s ability to maintain social cohesion. Finally, rape is often designed to destroy a woman’s fertility, preventing future births, either by

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bodies. In a recent interview, [then] U.S. Ambassador to the United Nations Madeleine K. Albright . . . was asked if rape would have been labeled a war crime earlier if there had been more women in foreign policy. She responded: “Absolutely. No question. Male diplomats have a hard time with this issue. At the U.N., when I would bring up the evidence about rape as a war policy in Bosnia, they just didn’t want to talk about it.”


54. Id. art. 2.
55. Id.
56. See discussion, supra note 52.
rendering her undesirable in the eyes of her society, by inflicting physical damage, or by forced impregnation by the rapist.

The concept of crimes against humanity crystallized after World War II, in response to Nazi Germany’s massive human rights violations inflicted upon its own citizens. As defined by the Statute of the International Tribunal for the Former Yugoslavia, crimes against humanity are inhumane acts “of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”57 The Statute of the ICTY specifically mentions rape as one of the enumerated acts, although rape would also fit within the catchall of “other inhumane acts” articulated in earlier formulations of the definition.58

Specific war crimes are defined in the Geneva Conventions, a set of four international agreements which establish a legal regime governing armed conflict.59 The Conventions bar a range of conduct, classifying certain violations as grave breaches, which each State party to the Conventions are bound to punish.60 As noted earlier, the Conventions prohibit rape as an offense against the


58. The Charter of the International Military Tribunal for the Trial of the Major War Criminals defined crimes against humanity as:

[M]urder, 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 in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 39 AM. J. INT’L L. 257 (1945) (Supp.).


60. See Fourth Geneva Convention, supra note 43, art. 147.
woman's honor; thus rape is a violation of the Conventions and is a war crime. Since rape is not enumerated specifically as a grave breach, a closer inquiry — and a full understanding of the violent nature of rape — is necessary to understand that rape also constitutes a grave breach of the Conventions.

Grave breaches of international law include "torture or inhumane treatment" and "willfully causing great suffering or serious injury to body or health." The outrages reportedly committed in the former Yugoslavia, produced substantial agreement that rape constitutes a grave breach of international law and is, at the least, "inhumane treatment." Thus, the International Committee of the Red Cross declared in 1992 that the grave breaches resulting in "willfully causing great suffering or serious injury to body or health" encompasses rape. Both governments and commentators have agreed. A disturbing tendency persists, however, to demand something "extra" before rape is accepted as torture — rape coupled with violent injury, for example. This view reflects the failure to understand the violent nature of rape, and the physical and mental injury it inflicts.

61. See discussion, supra notes 57-59.
62. Fourth Geneva Convention, supra note 43, art. 147. The grave breach provisions of the Conventions apply only to States that have ratified the Conventions, and only to international conflicts. Id. at art. 2 (“[T]he present Convention shall apply to all cases of... armed conflict which may arise between two or more of the High Contracting Parties...”). Similar prohibitions apply to other armed conflicts, although not defined as grave breaches. Common article 3, for example, which is repeated in each of the four Conventions, bars “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” Id. at art. 3. Protocol II to the Geneva Conventions, which applies to some internal conflicts, forbids “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Conflicts (Protocol II), June 8, 1977, art. 4(2)(e), 1977 U.N. Jurid. Y.B., 135 reprinted in 16 I.L.M. 1442 (1977).
64. Meron, supra note 48, at 426-28 (citing position of U.S., French and other governments). There is also general agreement that rape falls within the prohibitions of Common article 3 and Protocol II. Id.
65. Professor Meron, for example, states that rape “in certain circumstances” can rise to the level of torture or inhumane treatment. Meron, supra note 48, at 426.
66. Torture requires the intentional infliction of severe pain or suffering. Torture Convention, supra note 34, art. 1. This intent follows from the fact that rape necessarily inflicts severe pain and suffering; a person who intentionally commits a rape is presumed by the law to intend the foreseeable consequences of that act, i.e., the severe pain and suffering
IV. APPLICATION OF THE INTERNATIONAL NORMS IN THE FORMER YUGOSLAVIA AND RWANDA

Widespread reports of violence committed against women in the former Yugoslavia played a key role in the United Nations' decision to establish an ad hoc international tribunal to prosecute those responsible for war crimes committed during the conflict. As early as 1993, the Security Council expressed its concern about “massive, organized and systematic detention and rape of women...” The U.N. Commission of Experts investigating human rights violations in the conflict concluded that widespread abuses had been committed, including rape. The Secretary General's report to the Security Council on the establishment of a tribunal, called for special attention to the needs of victims of rape and other sexual assault. Thus, the Yugoslavia Tribunal began its work with a clear mandate to investigate and prosecute gender violence what has been called “a specific intent to recognize and redress sexual assaults...”


67. See Sellers and Okuizumi, supra note 66, at 48-50.


69. See Secretary-General's Report, supra note 57, ¶ 9.

70. The Secretary General proposed that “qualified women” be appointed to the Office of the Prosecutor in order to respond to “the sensitivities of victims of rape and sexual assault.” Id., ¶ 88. The report also called for “protection measures” for victims and witnesses, “especially in the cases of rape and sexual assault,” to include in camera proceedings and protection of the victim’s identity. Id., ¶ 108.

See also, 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: Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), reprinted in 33 I.L.M. 484 (1994) (hereinafter “Rules of Procedure and Evidence”). The Rules of Procedure and Evidence adopted by the Tribunal reiterate the goal of appointing women to the staff. Id. at Rule 34 (B). It also provides for “counseling and support” for victims and witnesses, particularly in cases of “rape and sexual assault.” Id. at Rule 34(A)(ii). Rule 96 also specifies certain rules of evidence applicable to charges of sexual assault prosecutions: corroboration of the victim's testimony is not necessary, rule 96(i), evidence of the victim's prior sexual conduct is inadmissible, rule 96(iv), and consent is not a defense if the victim “has been subjected to or threatened with or has reason to fear violence, duress, detention, or psychological oppression, or if the witness reasonably believes that if they did not submit, another might be so subjected, threatened or put in fear.” Id. at Rule 96.

The Yugoslavia Tribunal’s effort simultaneously demonstrates progress and obstacles in two key areas: interpretation of the governing legal norms, and attention to the needs of victims and survivors of sexual assault.

A. Applying the Legal Norms

The statute governing the ICTFY defines four categories of violations triggering its jurisdiction: grave breaches of the laws of war; violations of the laws or customs of war; genocide; and crimes against humanity.\(^7\) The first three, in keeping with the traditional notions of international law, omit any reference to rape or gender violence. Specifically, there is no mention of sexual assault as a grave breach of the laws of war,\(^3\) as a violation of the laws or customs of war,\(^7\) or as a means of genocide.\(^7\) In a major redefinition of international crimes, however, rape is listed as one of the “inhumane acts” sufficient to constitute crimes against humanity.\(^7\)

Despite the lack of specificity, rape may be charged as any one of these violations if the prosecutor and the justices fully understand gender violence and the harm it inflicts on the victim. The Yugoslavia Tribunal’s response on these issues to date has been mixed, less assertive and innovative than many had hoped but, nonetheless, an improvement over past interpretations and practice.

The Yugoslavia Tribunal has pending before it several indictments which include allegations of gender violence.\(^7\) The Foca Indictment includes charges based both on command responsibility and direct responsibility for enslavement, rape and other torture of women in the Foca detention center in 1992 and 1993. The gender


\[^{72}\] See ICTR supra note 71, at art. 2.

\[^{73}\] Id. at art. 3.

\[^{74}\] Id. at art. 4.

\[^{75}\] Id. at art. 5.

\[^{76}\] For a comprehensive review of the indictments through June 1996, see Sellers and Okuzumi, supra note 66, at 54-56. The following discussion is correct as of the time this article was drafted: September, 1997.
violence is charged as a form of torture, and therefore a "grave breach" under the Tribunal's statute, as well as inhumane treatment, a violation of the laws and customs of war, and a crime against humanity. None of the remaining indictments, however, charge rape or other sexual assaults as torture, although it is treated as a grave breach in several indictments through a charge of inhumane treatment.\footnote{78}

As of May of 1997, the Rwanda Tribunal\footnote{79} had not issued any indictments for gender violence. However, one of the defendants, Jean-Paul Akayesu, has been linked to charges of repeated rapes and other gender violence in an area of Rwanda under his direct control. The failure to charge Akayesu with responsibility for gender violence prompted criticism, including an amicus brief filed by several women's human rights organizations.\footnote{80} In June 1997, however, the prosecutor announced that she had amended the Akayesu indictment to include charges of sexual assault. But the amended indictment charges the brutal rapes as crimes against humanity, with the triggering acts listed as rape and "other inhumane acts," not as torture, mutilation, or acts of genocide.\footnote{81}

\footnote{78. Id.}

\footnote{79. Given that the Rwanda violence has been characterized as a non-international conflict, Rwanda Tribunal's jurisdiction differs from that of the Tribunal for the former Yugoslavia, in that it does not encompass grave breaches and other provisions limited under the Geneva Conventions to international conflicts. \textit{See ICTR Statute, supra note 71}, at art. 4. Instead, the Rwanda Tribunal has jurisdiction over violations of Common article 3 of the Geneva Conventions and Protocol II, both applicable to internal conflicts. \textit{See Fourth Geneva Convention, supra note 43}.}

\footnote{80. Amicus Brief Respecting Amendment of the Indictment of Jean-Paul Akayesu, to Ensure Prosecution of Rape and other Sexual Violence (May 27, 1997). The brief was authored by attorneys from the Working Group on Engendering the Rwanda Tribunal, the International Women's Rights Law Clinic at CUNY Law School, and the Center for Constitutional Rights.}

\footnote{81. The indictment charges that the acts of sexual violence violated two provisions of the Rwanda Statute, \textit{See ICTR, supra note 71}, at arts. 3, 4: the prohibition of crimes against humanity, with the triggering acts constituting rape and "other inhumane acts"; and the prohibition of violations of Common article 3 and Protocol II, consisting of "outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault." \textit{International Criminal Tribunal for Rwanda, Prosecutor Against Jean-Paul Akayesu, Amended Indictment, ICTR-96-4-I} (June 17, 1997). The Amicus Brief had urged that the rapes and other sexual violence be charged as crimes against humanity with the triggering acts including torture, as well as rape, art. 3(f); that the violations of Common article 3 and Protocol II include torture and mutilation, art. 4(a); and that the rapes be considered acts of genocide, art. 2(2). Amicus Brief, \textit{supra note 80}, at 18-19.}
The prosecutor, of course, cannot publicly explain her indictment decisions. Facts not apparent on the public record may explain the decisions to limit the indictment in this way. The pattern of these indictments, however, points to the possibility that the Tribunal has fallen into the error of insisting on a finding of rape-plus-something-else before a rape constitutes torture, thereby denying the violent harm inflicted by rape whether or not it is accompanied by other bodily harm.

The indictments issued by these two Tribunals indicate that existing humanitarian law norms are adequate to encompass gender violence. If properly understood, such norms support prosecutions for the gravest violations. However, the apparent hesitancy to charge the maximum crimes indicates the dangers of applying norms written without thought to gender violence and to such crimes. Without specific reference to sexual assaults, prosecutors and judges may apply unnecessary and unrealistic requirements before applying the norms. Moreover, prosecutions will depend upon the sensitivity and understanding of the Tribunal staff, characteristics that may be in short supply. This pattern points to the importance of revising international law norms to specifically incorporate rape and other gender violence into the norms that define human rights violations both during times of peace and war.

B. Responding to the Needs of Survivors and Witnesses

In principle, the Tribunals have, from their very inception, recognized the importance of responding to the needs of survivors of rape and other sexual assault. The Secretary General’s report calling for the establishment of a tribunal urged attention to "the sensitivities of victims of rape and sexual assault" and special protections, including in camera proceedings and anonymity. Women’s human rights groups almost immediately sought to urge the Tribunals to consider the physical and emotional needs of the survivors, as well as procedural rules that reflected current understandings of rape as a violent crime.

82. See Secretary General’s Report, supra note 57, ¶ 88.
83. Id., ¶ 108.
84. See Jennifer Green, et al., 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 L.J. 171, 205-06 (1994) (suggesting rules of evidence and mechanisms for protection of witnesses); International Women’s Human
In practice, however, the Tribunal’s record has been spotty at best. Financial limitations have made it impossible to offer the support services and protection required by witnesses. Moreover, the sensitivity reflected in the Tribunal’s original mandate has not always been reflected in its practice. Human Rights Watch issued a scathing denunciation of the Rwanda Tribunal’s investigation of sexual violence stating:

[S]ome involved in prosecuting the genocide, both at the national and international level, have suggested that it is nearly impossible to investigate rape because Rwandan women will not talk about their ordeals. This is patently false. Rwandan women will talk, but only under certain conditions. Among other things, investigation of rape...is best carried out by female investigators using female interpreters...Investigators taking testimonies must also be sensitive to the trauma of rape victims...If women agree to testify, mechanisms to protect rape victims must also be guaranteed...Without taking steps to insure that Rwandan women can safely give their testimonies, it is unlikely that the genocide perpetrators of rape will be held accountable.

The Tribunal has attempted to respond to such criticisms. However, even with the best of intentions, successful investigation and prosecution of sexual violence requires an expensive commitment to staff hiring and training and both support services and protection for survivors. To date, the world community has not indicated a willingness to make this commitment.

V. THE PROPOSED INTERNATIONAL CRIMINAL COURT

Current legal norms, properly applied to sexual assault as a violent crime, permit prosecution of such violence as war crimes. The lack of more specific reference to rape and other gender violence in the legal norms creates the danger that cramped interpreta-

Rights Clinic of CUNY Law School, Gender Justice and the Constitution of the War Crimes Tribunal, reprinted as Appendix B to Green, supra, 235, 238-40 (undated) (recommending protection and support for survivors of sexual assault).

85. Minna Schrag, The Yugoslav War Crimes Tribunal: An Interim Assessment, 7 TRANSNAT’L L. & CONTEMP. PROBS. 15, 21 (1997) (former Tribunal prosecutor notes that “[t]he Tribunal has no way to protect witnesses, or their families...”); James C. McKinley, Jr., On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace, N.Y. TIMES, Nov. 26, 1997, at A1, A8 (reporting that two witnesses who testified before the Tribunal were killed upon their return to Rwanda).

tions of those standards may lead to the unnecessarily narrow application of the international prohibitions. Survivors of sexual violence should not have to maintain constant vigilance, and a constant battle to ensure adequate response to the abuses they have suffered.

The effort to specifically codify the prohibition of gender violence in international norms is currently the subject of negotiations over the statute for a proposed International Criminal Court. An international coalition of women's human rights groups has called for incorporation of rape and other sexual assaults into the definitions of war crimes. The fate of such proposals is still unclear.

CONCLUSION

When rape and other sexual assaults are properly understood as acts of violence, such violence triggers the harshest prohibitions of international humanitarian law. Disagreements about how exactly to classify gender violence coupled with the danger that gender-insensitivity will lead to more restrictive interpretations of existing norms, demonstrate the importance of including specific references to gender violence in future formulations of the international rules governing armed conflict.

The discussion and debate about these issues has contributed to a marked increase of international awareness of gender violence as a tactic of war, as well as important advances in the international legal community's response to such abuses. The pending indict-


88. The Women's Caucus for Gender Justice in the ICC has called for a two-track approach: specific mention of sexual violence, along with recognition that such violence triggers the prohibitions currently in place. The Women's Caucus proposal suggests:

That crimes of sexual and gender violence be incorporated as war crimes in a manner which reflects the principle against discrimination and the progressive developments in customary international law, specifically, that rape and other forms of sexual and gender violence must be recognized (i) as crimes in themselves; and (ii) as constituting one or more of the enumerated crimes against the person, including the most severe crimes of violence, and not simply humiliating and degrading treatment...

WAR CRIMES DRAFT TEXT, supra note 3.
ments and prosecutions for the crimes of gender violence represent landmark victories for those struggling for international recognition of violence against women as an egregious violation of international human rights.

Will this process actually hold accountable those responsible for gross human rights violations? Will it serve as a deterrent to future abuses? Will survivors feel any sense of justice as a result? At this point, unfortunately, the legacy of the Tribunals prosecuting humanitarian law violations in the former Yugoslavia and Rwanda is yet unclear. That legacy will depend on their success in detaining defendants and bringing them to trial, the success of the resulting prosecutions — and on the Tribunals' records in respecting and protecting survivors and witnesses.