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WINNER, 1994 NOTRE DAME LAW SCHOOL
FEMINIST JURISPRUDENCE ESSAY CONTEST

**Prosecuting Rape as a War Crime:
Speaking the Unspeakable**

*Tamara L. Tompkins**

Foca, Bosnia - 1992

On August 12, some foreigners came to the prison, and the Serbs were told they had to release us. On the evening between August 12 and 13, a thirty-year-old woman and I were taken away and we were raped on the benches of the sports hall. The number of men who came to rape us increased. First, there were three, then four and five. I eventually counted twenty-eight different men who raped me that night, but I lost consciousness after that. They must have thrown water on me, because I was all wet when I awoke We were taken back to [the workers' quarters at] Buk Bijeli, and there I was gang-raped again by four men dressed in camouflage. The other woman who was being raped started to cry; the soldiers started to yell at her. They started to scream, "Your guys are doing the same things we are doing."

- M., 28 year old Muslim woman with two children¹

Vietnam - 1967-68

These people are aware of what American soldiers do to them, so naturally they tried to hide the young girls. We found one hiding in a bomb shelter in sort of the basement of her house. She was taken out, raped by six or seven people in front of

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1 2 HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA (April 1993) [hereinafter HUMAN RIGHTS WATCH].

her family, in front of us, and the villagers. This wasn't just one incident; this was just the first one I can remember. I know of 10 or 15 of such incidents at least.

- Specialist/4 Joe Galbally, United States Army²

Bangladesh - 1971

Khadiga, thirteen years old, was . . . walking to school with four other girls when they were kidnapped by a gang of Pakistani soldiers. All five were put in a military brothel in Mohammedpur and held captive for six months until the end of the war. Khadiga was regularly abused by two men a day; others she said, had to service seven to ten men daily. . . . At first, Khadiga said, the soldiers tied a gag around her mouth to keep her from screaming. As the months wore on and the captives' spirit was broken, the soldiers devised a simple *quid pro quo*. They withheld the daily ration of food until the girls had submitted to the full quota.

- Khadiga, Kamala Begum: interview with Berengere d'Aragon³

Nanking, China - 1937

At the time the Japanese entered the city on December 13, 1937, I and my father and my sister had already been removed to live in a house . . . in the refugee zone. . . . I often saw the Japs come to the house asking and searching for women. . . . These women were taken away by the Japs and none of them returned with the exception of one girl who managed to get back home after having been raped by the Japs, and she told me that . . . she had seen one of the girls raped, and after being raped the Japs stuck weeds into her vagina, and the girl died from this treatment.

- Wong Pan Sze, age fifteen⁴

Somewhere during World War II

I then told him that, in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have the details as early as possible so that the offenders could properly be hanged.

- General George S. Patton, Jr.⁵

2 SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 115 (Bantam Books 1975).

3 *Id.* at 83.

4 *Id.* at 57.

5 GEORGE S. PATTON, JR., *WAR AS I KNEW IT* 23 (1947).

I. INTRODUCTION

For almost four years now, the world has read and heard about the mass rapes which have occurred, and continue to occur, in the war-torn lands of the former Yugoslavia. Statistical estimates of the number of rapes vary. In early 1992, a team of investigators from the European Community reported that in Bosnia alone over 20,000 women and girls had been raped - a body count taken a mere eight months into the war.⁶ One year later, Catherine MacKinnon, speaking in her capacity as counsel to three Croatian women's organizations, estimated that the carnage levels of Muslim, Croatian and Serbian women raped had reached 50,000. An additional 100,000 women were killed.⁷ Most recently, M. Cherif Bassiouni, head of a U.N. commission investigating war crimes, cited estimates of 13,000 to 50,000 rape victims in the Bosnian war, many of them Bosnian Muslims brutalized by Serbs.⁸

Modern communications technology is largely responsible for bringing the dimensions of this particular chapter of war atrocities against women into the living rooms of the average citizen. Wartime rape has never before been so aggressively and immediately reported.⁹ Certainly it has never been exposed in mainstream media forums in such grisly detail. Would the horrified, and seemingly paralyzed, watching world be further horrified to know that the phenomenon of wartime rape, including rape conducted on a systematic basis and massive scales, is nothing new? Would they be surprised to know that as long as there has been war, there has been rape and most of the time not a single thing was done about it, mainly because it was considered to be just another part of the "all" that was considered fair in war?

There was, for example, plenty of rape in the ancient world's wars. The Hebrews raped,¹⁰ the Greeks raped¹¹ and art lovers

6 *Rape Used As Weapon in War*, COURIER J., Oct. 20, 1993, at 12A.

7 Judy Mann, *Rape and War Crimes*, WASH. POST, Jan. 13, 1993, at D22.

8 Terry Atlas, *U.N. Will Pursue War Crimes Trials for Bosnia Rapes War Crimes*, CHI. TRIB., Jan. 30, 1994, at 1.

9 Dianna Marder, *Once Again, Rape Becomes A Weapon of War*, ATLANTA CON. J., Feb. 17, 1993, at A11.

10 As Susan Brownmiller tells it, "[t]he practical Hebrews, anxious to get a law on the book for all contingencies, made no bones about the status of women who were captured in war. Female captives were allowable as slaves and concubines, according to Deuteronomy, but Hebrew men were discouraged from marrying them." See BROWNMILLER, *supra* note 2, at 25.

11 Homer's *Iliad* for example, offers a look into the fate of a lively cast of ancient

will remember the fate of the Sabine women at the hands of the mighty Roman warriors.¹² There was also plenty of rape in the wars of the Middle Ages. Throughout their momentous march to Constantinople during the first Crusade, the knights and pilgrims took set aside time to assault women.¹³ During the Hundred Years War in the fifteenth century, French soldiers rampaged the bodies of English women.¹⁴ A century later, during the Wars of Religion, Catholic French men raped Huguenot French women.¹⁵ In 1746, King George's army celebrated the quelling of a Scottish insurrection by raping and sexually mutilating apparently any Scottish woman unfortunate enough to be home.¹⁶

The practice carried over to the early battles in the new world. George Washington's papers noted an instance of rape in the Revolutionary War.¹⁷ General Andrew Jackson is credited with coining the phrase "booty and beauty" during the War of 1812, to make quite clear just what kind of "spoils . . . to the victor go."¹⁸ It has been during the twentieth century, however, that the phenomena of wartime rape seems to have been raised to an art form by men. British historian Arnold Toynbee documented numerous rapes by the German army against Belgian and French women during the early years of World War I.¹⁹ Before the end of that war, the dissemination of inflammatory narratives of these rapes had made wartime rape useful as a propaganda tool as well as an important military tactic and pastime. In World War II, rape was used first by the Germans and Japanese as a tactic for waging war, and then by the Soviets as a weapon of retribution. In 1971, during a nine month conflict between Pakistan and what today is

Greek women who were unfortunate enough to get mixed up in war. Helen, the captured queen of the famous face, "enjoyed" the privilege of living as her captor's wife. Chryseism, a Trojan woman of lesser status, was captured by the Spartans and given to Agamemnon as his battle camp entertainment until the god Apollo came to her rescue. *Id.*

12 H.W. JANSON, HISTORY OF ART 454-55 (1977) (relating the story of the rape of the Sabine women by ancient Roman warriors in explanation of the sculpture by the 16th century Italian artist Giovanni Bologna entitled *The Rape of the Sabine Women*).

13 See BROWNMILLER, *supra* note 2, at 23.

14 *Id.* at 30.

15 *Id.* at 29.

16 *Id.* at 31-32. For example, "[w]here the River Doe meets the Moriston in a black waterfall, Isobel Macdonald was raped by five soldiers, and her husband, skulking high in the heather, watched this in agony." *Id.* (quoting JOHN PREBBLE, CULLODEN 123 (1961)).

17 See BROWNMILLER, *supra* note 2, at 23. The papers noted that Thomas Brown of the Seventh Pennsylvania Regiment was sentenced to death for rape at Paramus.

18 *Id.* at 28-29.

19 *Id.* at 34 (citing ARNOLD J. TOYNBEE, THE GERMAN TERROR IN BELGIUM (1917)).

Bangladesh, Pakistani soldiers raped more than 200,000 Bengali women.²⁰ Many of these women were impregnated. And not to be forgotten are the numerous rapes and mutilations committed by American GIs upon the bodies of Vietnamese women during the American involvement in the Vietnamese conflict.

It was left for the men engaged in the current conflict in the former Yugoslavia to elevate wartime rape to its current usefulness as a tool of genocide. As the evidence has mounted, it has become clear that the rapes in the former Yugoslavia have been perpetrated by men on all sides against, mostly, women on all sides. However, it has also become clear that neither the Croatians nor the Muslims have employed rape as the Serbians have - as an integral element of an elaborate policy of genocide. As Catherine MacKinnon notes, "the world has never seen sex used this consciously, this cynically, this elaborately, this openly, this systematically, with this degree of technology and psychological sophistication, as a means of destroying a whole people."²¹

Responding to outrage from women's advocates and pressure from frustrated international leaders, the United Nations Security Council established an international war crimes tribunal on February 22, 1993.²² When the Security Council adopted the Statute of the International Tribunal several months later, rape was included in Article 5, as one of the "crimes against humanity" which the Tribunal is empowered to prosecute.²³ On February 13, 1995, the chief Prosecutor of the Tribunal handed down the first set of indictments, charging twenty-one Serbian men with committing genocide, war crimes and crimes against humanity at the Omarska prison camp in northwest Bosnia in 1992.²⁴ Rape is listed as one of the crimes against humanity which some of these men have been indicted for committing.²⁵ The chief Prosecutor has said that he hopes the first trials will begin in March 1995.²⁶

20 *Id.* at 80-81.

21 Catherine A. MacKinnon, *Turning Rape Into Pornography: Postmodern Genocide*, MS., July-Aug. 1993, at 27.

22 Special Task Force of the A.B.A. Section of International Law and Practice, *Report on the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia*, 1993 A.B.A. SEC. INT'L. L. & PRAC. 1 [hereinafter A.B.A. Task Force Report].

23 *Id.* at 63.

24 Mike Corder, *Yugoslav War Crimes Tribunal Indicts 21 Serbs for Atrocities*, ASS'D PRESS, Feb. 13, 1995.

25 *Id.*

26 Rochus Pronk, *Prosecutor Goldstone Offers Views on War Crimes Tribunal*, HUMAN RIGHTS BRIEF, Fall 1994, at 3. Although indictments were handed down on February 13,

The inclusion of rape as one of the enumerated crimes against humanity in Article 5 of the Statute, and the February 13 indictments issued pursuant thereto, mark a watershed moment for women. After thousands of years of being raped in silence, women's voices will finally be heard denouncing this violation of their human rights. Or, will they? They may not if rape is prosecuted in this war crimes tribunal in the same manner that it was handled at the last one. Although rape was not formally prosecuted at the Nuremberg trials in 1945-46, allegations of rape were submitted in affidavits and entered into evidence. An example of one prosecutor's method of handling rape evidence illustrates the concern. When it came time for a French prosecutor to present the report of a doctor who had examined rape victims, the prosecutor said, chivalrously no doubt, "[t]he Tribunal will forgive me if I avoid citing the atrocious details A medical certificate from Doctor Nicolaides who examined the women who were raped in the region—I will pass it on."²⁷

This omission in the name of civility might not be so troubling if it were not juxtaposed with other testimony in which prosecutors had no difficulty whatsoever in reciting what Ann Goldstein has described as "sickening and detailed litan[ies] of medical experiments" performed by Nazi doctors.²⁸ Making the world aware of what really happened to the women who were raped, gang raped, forced into rape camps, and then forced to become pregnant and carry their rapists' children to term in the former Yugoslavia must be as important at the Yugoslavian war crimes trials as exposing the atrocities of the Nazis was at Nuremberg. If it is not, then although we may have helped to ensure that the rapes of Yugoslavia are remembered, we will have contributed little to educating people about why it happens and nothing to ensure that it is never repeated.

The alleged purpose of a war crimes tribunal is to hand out retribution and deter future atrocities. Rape, however, happens

1995, the Tribunal has been beset by numerous financial and logistical obstacles. For a brief analysis of these problems and the Tribunal's prospects, see Corder, *supra* note 24. For a more extensive description of the organization and functions of the Tribunal, see A.B.A. Task Force Report, *supra* note 22, at 3-4.

27 Secretariat of the International Military Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 404-07 (1946) [hereinafter Nuremberg Trials].

28 Ann Tierney Goldstein, *Recognizing Enforced Impregnation as a War Crime Under International Law* 11 (1993) (available from The Center for Reproductive Law & Policy).

during war for the same reasons it happens during peace. It is a phenomenon rooted in inequality, discrimination, male domination and aggression, misogyny and the entrenched socialization of sexual myths. A war crimes tribunal that is interested in prosecuting rape, but unwilling, or unable, to acknowledge the circumstances which give rise to it, will do little to accomplish either retribution or deterrence. Indeed, perversely, it may actually serve to legitimize the notion that rape is, as General Patton suggested, an inevitable byproduct of war.

This Essay considers the phenomenon of rape in war. Part II discusses domestic rape in an effort to understand the social and cultural forces which give rise to rape, the characteristics common to men who do rape, and the nature of the injury to women who are raped. Part III turns to the phenomenon of wartime rape. This section first examines *how* men use rape during war, then offers a theory of *why* men rape in war and finally considers the nature of the harm suffered by the women who are raped in war. The goal is to do this by telling the story of wartime rape in women's voices.

Part IV sets forth a brief overview of the history of laws against war crimes and war crimes prosecutions and the current legal status of rape as an international war crime. Part V compares the goals of war crimes tribunals and the goals of women who have been victims of rape during war. This Part then argues that those two sets of goals are mostly incompatible. This Part concludes, however, that the opportunity to present rape in an international forum with the attendant media and world scrutiny offers women an unprecedented opportunity to try to tell the story of wartime rape from women's point of view. If the story of rape in Yugoslavia can be told through the voices of the women who survived it, with a feminist perspective tying them together, then we will have moved the world a great deal further toward understanding the phenomenon of rape and one step closer to eradicating it.

I believe that few people have even the remotest understanding of what happens, physically and psychologically, to a woman who is raped. We can hardly bear to think about it and almost never talk about it. It strikes me that if we did, there might be fewer victims. I believe that even fewer people can imagine the experience of wartime rape as it actually happens. My overarching goal in this essay is to convey that experience by talking through the voices of women whose stories of wartime rape have somehow been preserved. What they have to tell us in those stories is grisly.

In a sense, I am deliberately trying to provoke, disturb, and unsettle the reader by retelling those stories. The real tragedy is, however, that the stories do that themselves. Most of what happens to women in war is unthinkable—literally and conceptually unimaginable. But only sixty years ago, so were the things that were subsequently done to some six million Jews. Rape, like genocide, will not be deterred unless and until the stories are heard. People must hear the horrifying, think the unthinkable and speak the unspeakable. This is how we have come to terms with what happened to Jews at the hands of Nazi Germans. Popular movies and museums re-enact and preserve their story in the hope that it will never be forgotten and never be repeated. We must do the same for the women of Bosnia.

II. DOMESTIC OR PEACETIME RAPE—THE CRIME AND THE INJURY

Rape in wartime, as Susan Brownmiller put it, "is more than a symptom of war or evidence of its violent excess. Rape in war is a familiar act with a familiar excuse."²⁹ War simply exaggerates the conditions which give rise to rape in "peace." To understand rape as it is inflicted in war then, it is useful to review how and why it happens domestically.

A. *The Social and Cultural Backdrop of Rape*

Although the crime of rape results from an assault committed by one man (usually) upon one woman, the phenomenon of rape is part of gender discrimination against women as a class. Rape is a gender-motivated crime; a one-way street where the risk factor is being female.³⁰ This insight has been one of the crucial contributions feminists have made to the understanding of rape. By viewing each isolated incidence of rape as part of a widespread practice of violence against women, one begins to see through the long-held myths about men's and women's sexuality and reach the core conditions of our co-existence.

Inequality: Rape is an expression of and contributor to the domination of women by men in every aspect of every society. Men and women remain distinctly unequal in the economic sense. In most developed countries, women still earn only seventy cents

²⁹ See BROWNMILLER, *supra* note 2, at 24.

³⁰ See Lori Heise, *International Dimensions of Violence Against Women*, 12 RESPONSE 2 (1989).

for every dollar that men do.³¹ In manufacturing countries such as Japan and Korea, women earn less than half of what men do.³² In many developing countries, women's productive activities are not even accounted for since customs, laws or religion dictate that husbands consider everything that women earn or produce as theirs entirely.³³ Men and women are also unequal in the political sense. In most countries, women comprise less than ten percent of the representatives at the highest councils of government, although they usually form fifty percent or more of the electorate.³⁴ Men and women are afforded significantly different educational opportunities. In 1985, there were eighty million fewer girls than boys in primary schools throughout the world and 130 million more adult women than men who were illiterate.³⁵ Furthermore, men and women are vastly unequal in the cultural sense. In most Islamic countries, a man automatically receives all children over the age of two in the event of divorce and automatically receives twice as much as a woman out of any inheritance.³⁶ In Angola, only one percent of women have access to contraceptives.³⁷ In the United States, approximately eighty-seven percent of all single-parent homes and forty-eight percent of all families living

31 SUSAN JOERES, *WOMEN IN THE WORLD ECONOMY* 16 (1987).

32 ESCHEL M. RHOODIE, *DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY OF THE ECONOMIC, EDUCATIONAL, SOCIAL AND POLITICAL STATUS OF WOMEN 15-16* (1989).

33 *Id.* at 28.

34 *Id.* at 15.

In the United States women were only 9 percent of all county governing boards in 1987 and only 4 percent were mayors or members of municipal governing boards. . . . In Africa's most prosperous, richest, and technologically most developed country, the Republic of South Africa, there were 50 cabinet and deputy cabinet members in 1987, all of them men. Not one woman was to be found among the 50-odd heads of civil service departments and agencies, either. The major exception in the world to this pattern of deliberate exclusion is the Nordic countries, where women occupy between 18 to 25 percent of the cabinet posts

ESCHEL M. RHOODIE, *DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY OF THE ECONOMIC, EDUCATIONAL, SOCIAL AND POLITICAL STATUS OF WOMEN* 17 (1989).

35 *Id.* at 15. "[Seventy-five] percent of all illiterate people in the world are women. In the so-called Third World (overwhelmingly non-white) the number of women unable to read and write actually increased by 65 million between 1960 and 1980, as compared to only a 13 million increase of illiterate men. There are member states of the United Nations where nine out of 10 women over the age of 25 have never been to school, any school." *Id.* at 30.

36 *Id.* at 15.

37 *Id.* at 16.

below the poverty line were headed by a woman in 1985.³⁸

Masculine aggressiveness. This male domination of women, which is deeply imbedded in nearly every aspect of life, gives rise to distinct conceptions of proper gender roles. From an early age, boys are taught to be aggressive, while girls are encouraged to be passive and feminine.

The gender roles emerging from the position of men and women in the home and labor market give rise to the dichotomy of nurturance/nonviolence (feminine) and aggression/violence (masculine). Those socialized into these roles, both male and female, affirm masculine power, prestige, and dominance. . . . [R]ape, then, becomes an overconforming act rather than a deviant one.³⁹

Myths of sexuality. As boys are shaped into young men by these basic psychological and behavioral differences, they begin to develop sexual identities. Boys are surrounded by media images depicting women as objects. At some point they are exposed to the notion that men's special biology gives them a unique, justifiable drive for heterosexual intercourse that women do not have. In other words, men "gotta have it" and can't control it, and women are there, accessible, to supply it. As James Messerschmidt notes, "[t]he definition of women as sexual objects, and the perception of men as having a special 'drive,' are the necessary components for turning a violent situation into a *violent sexual situation*."⁴⁰

Conditions of rape. Like the social and economic inequalities between men and women, these socialized gender and sexual roles are carried on from one generation to the next. Society continues to socialize men to dominate women; men continue to dominate women; and, the conditions that give rise to sexual violence against women are perpetuated. "The unconscious thinking seems to go as follows: being aggressive is masculine; being sexually aggressive is masculine; rape is sexually aggressive behavior; therefore, rape is masculine behavior."⁴¹ Rape happens because men exploit this climate of fear. "Women are not taught to be assertive with men and *men know this*. They know that women are not

38 *Id.* at 30.

39 JAMES W. MESSERSCHMIDT, CAPITALISM, PATRIARCHY AND CRIME: TOWARD A SOCIALIST FEMINIST CRIMINOLOGY 132 (1986).

40 *Id.* at 134.

41 Wendy Rae Willis, Note, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2208 (1992) (quoting DIANA E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE 261 (1975)).

taught how to fight. . . . Consequently it is easy for men to use violence"⁴² The fear of rape forces most women to restrict their movements and thereby constrain their lives in a way that men do not. In this way,

the ultimate effect of rape upon the woman's mental and emotional health has been accomplished *even without the act*. For to accept a special burden of self-protection is to reinforce the concept that women must live and move about in fear and can never expect to achieve the personal freedom, independence and self-assurance of men.⁴³

B. *The Causes of Rape - Profile of a Rapist*

While rape is, phenomenologically, the product of the male-female power imbalance, rapists as individuals tend to share certain characteristics. First, they tend to have conservative attitudes and opinions about women, sex, and sexual roles.⁴⁴ "The rapist acts out, in extreme form, those qualities regarded as masculine; superiority, control, and conquest. Rape becomes simply an exaggeration of those traditional gender roles that encourage violence toward women as an act of aggression, dominance, and control."⁴⁵ Second, they often harbor great hostility toward women as a class. "They tend to experience women negatively, as hostile, demanding, ungiving and unfaithful"⁴⁶ Third, the rapist frequently has feelings of inadequacy and powerlessness, which may extend to his perception of his sexual capabilities.⁴⁷

The primary goal of the typical rapist is not achieving sexual satisfaction, but rather fulfilling a need to exercise control over a woman and thereby dominate her. "[S]exual assault is primarily an aggressive, destructive act. The sexual behavior is not the expression of a sexual wish but in the service of the aggression, serving to humiliate, dirty, and defile the victim."⁴⁸

42 See MESSERSCHMIDT, *supra* note 39, at 136.

43 See BROWNMILLER, *supra* note 2, at 449.

44 LINDA B. BOURQUE, *DEFINING RAPE* 74 (1989).

45 See MESSERSCHMIDT, *supra* note 39, at 132.

46 MURRAY L. COHEN ET AL., *The Psychology of Rapists*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM AND THE OFFENDER* 299 (Duncan Chappell, et al. eds., 1977).

47 *Id.*

48 *Id.* at 298.

C. *The Injury - The Experience of the Victim*

1. The Physical Experience of Rape

Rape causes physical trauma to both genital and non-genital areas of a woman's body. Non-genital physical injuries can range from broken bones and head injuries to general soreness in areas of the body frequently bruised during rape such as the throat, neck, breasts, thighs, legs and arms.⁴⁹ Additional physical symptoms include tension headaches, fatigue, disturbed sleep patterns, gastrointestinal pain, and eating disorders.⁵⁰

We do not, it seems, talk or hear much about the physical injury caused to a woman's genitals through rape. Perhaps this is due to a hangover of Victorian propriety which suggests such things are not quite proper for public recitation. Perhaps it is due to vestiges of the notion that women always "want it," are always ready, and, unless virgins, do not experience intercourse as a painful experience. Perhaps no one ever thought to ask. As one rape victim put it, "I believe that most view [rape] as forced sex or intercourse, in the sense that this intercourse does not differ much in a psychological respect from that of consensual intercourse. . . . [However], [f]orcible rape is not in any normal sense intercourse."⁵¹

For several reasons, it seems troubling that we do not talk about the genital injuries rape causes women. First, studies have shown that one of the most effective ways to reduce the recidivism rate of convicted rapists is through an "educational" approach which, among other things, explicitly describes the experience of rape from the victim's viewpoint.⁵² This tactic has been shown to significantly decrease the myths men hold about sexual violence and begin the construction of "a more realistic understanding of the meaning and consequences of rape."⁵³ If so, then more candid discussions about all facets of the rape experience should be in order. Second, a vast number of people, presumably mostly

49 ANN W. BURGESS AND LYNDA L. HOLMSTROM, *Rape Trauma Syndrome*, in FORCIBLE RAPE, *supra* note 46, at 319 [hereinafter BURGESS & HOLMSTROM].

50 *Id.*

51 See Willis, *supra* note 41, at 2212 n.95 (quoting anonymous letter on file with *The Georgetown Law Journal*).

52 LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY* 192 (1989).

53 *Id.*

men, eagerly consume pornographic materials depicting the rape of women. It seems only right that they should also hear, in equally graphic detail, a woman's description of what she feels as a result of those acts.⁵⁴

The following is one rape survivor's description of the genital realities of forcible intercourse.

In most cases, the lubrication of the vagina required for normal completed intercourse does not exist, since petting has, more often than not, not occurred. As a result of this crucial aspect, as well as the fact that the victim is usually in a traumatized state immediately preceding the rape and, thus, the muscles at the entrance to the vagina are not relaxed, penetration cannot either easily or immediately occur. What does happen is that the rapist repeatedly batters with his penis the very delicate and sensitive features lying outside the vagina, causing the tissues to tear and to bleed. When the force of the thrusting eventually results in the penis entering the vagina, it enters usually no more than a few inches, and again the tissues (this time, the lining of the vagina) are repeatedly, with each thrust, ripped and torn.⁵⁵

Women can have long-term complications from such vaginal trauma. Even days after the rape, women experience vaginal discharge, itching, pain with urination and the institutionalization of chronic vaginal infections.⁵⁶ Women who were forced to perform oral sex may continue to have throat irritation.⁵⁷ Those subjected to anal intercourse may experience prolonged rectal bleeding and pain.⁵⁸

The medical regime for a rape victim represents yet another physical and psychological intrusion into the woman's life. She is typically given a penicillin shot to protect against the mainstream venereal diseases and prescribed at least five days worth of a medicine which prevents pregnancy at the cost of severe nausea side effects.⁵⁹

54 On a slightly more contentious note, I would suggest that members of the academy who write law review articles on various aspects of rape (proposing, for example, that we conceive of rape as, say, like theft; or, arguing that the burden of proving consent should remain on the woman) might benefit from reading or hearing women's accounts of the searing, potentially scarring pain of rape.

55 See Willis, *supra* note 41, at 2212 n.95 (quoting anonymous letter to the editor on file with *The Georgetown Law Journal*).

56 See BURGESS & HOLMSTROM, *supra* note 49, at 320.

57 *Id.* at 319.

58 *Id.* at 320.

59 *Id.* at 318. This book was written before HIV became a widespread problem in

2. The Psychological Experience of Rape

As women describe their rapes, two psychological themes are particularly noticeable. The first is an overwhelming sense of helplessness and defenselessness:

I hated myself for not being able to take a stand in the situation. He wielded his power with such confidence, and there I was feeling absolutely helpless. I shouldn't have to feel small and less muscular and all that . . . But it's like once you're there, you become paralyzed with this feeling that he's a man, he's got muscles, and he knows about things like guns.⁶⁰

Through rape, men exploit both their own physical power differential and women's socialized sense of passivity and submission.

Second, rape victims often begin to view the entire assault as something for which they were somehow responsible, which causes them to internalize a sense of guilt. They may blame themselves for what they were wearing, who they talked to, who they left with, or even for the crime of being where they were when it happened.

I keep wondering maybe if I had done something different when I first saw him that it wouldn't have happened - neither he nor I would be in trouble. Maybe it was my fault. See, that's where I get to think about it. My father always said whatever a man did to a woman, she provoked it.⁶¹

This is the darkest, most destructive aspect of rape — women internalize both the cause and the effect of rape, thereby doubling the harm. This is how the myths surrounding rape exploit women's socialized sense of gender roles and responsibilities.

Long term psychological effects of rape may include persistent nightmares, a fear of being alone, a fear of crowds, a fear of anyone walking behind them and a fear of indoor or outdoor places which are consistent with the location of the rape. Many women are unable to resume the activities of their pre-rape life until they have moved to a new house or apartment and/or obtained new, unlisted phone numbers. Women will turn to peripheral family

this country. It seems likely that some men who rape are HIV positive and that little can be done for their victims.

60 See MESSERSCHMIDT, *supra* note 39, at 136 (citing D.E.H. RUSSELL, *THE POLITICS OF RAPE* 268-69 (1975)).

61 See BURGESS & HOLMSTROM, *supra* note 49, at 320.

members, depend heavily on the support and company of close friends and make extensive use of rape and victim support groups.⁶²

3. Effect on a Woman's Sexuality

Perhaps the most tragic effect of rape is the crisis that many women experience in their sexual lives as a result of being raped. "She has difficulty dealing with men, even men whom she has known and loved, and she sometimes fears that the rape has left her less attractive. . . ."⁶³ Women who were sexually active before being raped have a great deal of difficulty when they try to resume their normal relations. As one psychologist noted,

[m]any women were unable to resume a normal sexual style during the [early recovery] phase and [the condition] persisted with difficulty. One victim reported, five months after the assault, 'There are times I get hysterical with my boyfriend. I don't want him near me; I get panicked. Sex is OK, but I still feel like screaming.'⁶⁴

III. RAPE DURING WAR

A. *How Men Use Rape in War*

Over the ages, men have found a creative number of uses for wartime rape. Soldiers use rape as a blatant tactic against the other side, as a tool of mollification and control of their own troops, and, most recently, as a weapon for the perpetration of genocide.

1. Rape as a War Tactic

Rape is used as a weapon for waging war in three primary ways. First, and probably foremost, men on the conquering side use rape as a means of expressing the totality of victory. "Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side."⁶⁵ As the conquering German army marched through Belgium in August of 1917, for example, they left a trail of women's blood behind:

62 *Id.*

63 THOMAS W. MCCAHERILL ET AL., *THE AFTERMATH OF RAPE* 73 (1979).

64 See BURGESS & HOLMSTROM, *supra* note 49, at 325.

65 See BROWNMILLER, *supra* note 2, at 31.

'A number of women' were raped at Tremeloo. At Rostselaer 'a girl who was raped by five Germans went out of her mind.' In Capelle-au-Bois a woman told how 'the German soldiers had held her down by force while other soldiers had violated her daughter successively in an adjoining room.' At Corbeek-Loo, 'a girl of sixteen was violated by six soldiers and bayoneted in five places for offering resistance.' An eyewitness who survived the siege of Louvain reported, 'The women and children were separated. . . . Some German soldiers came up to me sniggering and said that all the women were going to be raped.'⁶⁶

As the Germans advanced through Russia almost twenty-five years later during World War II, soldiers repeated the pattern of plunder and slaughter. An interim war report recorded many of these episodes and was later entered into evidence at the Nuremberg Trials. The report described the fate of thirty-two garment factory workers in Lvov, a city in the Ukraine, who "were first violated and then murdered by German storm troopers. Drunken German soldiers dragged the girls and young women of Lvov into Kesciuszko Park, where they savagely raped them."⁶⁷ In Bielorrussia, near a town called Borissov,

75 women and girls attempting to flee at the approach of the German troops fell into their hands. The Germans first raped and then savagely murdered 36 of their number. By order of a German officer named Hummer, the soldiers marched L.I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women⁶⁸

The rape mongering tactics of the Japanese as they crushed through China were, if possible, even more brutal. The judgment issued by the International Military Tribunal (the Tribunal) at the end of the Tokyo trials found that at least 20,000 cases of rape occurred in the city of Nanking during the first month of that city's occupation.⁶⁹ Diary notes contained in the affidavit of an American missionary present during the invasion and occupation

66 *Id.* at 35 (quoting ARNOLD J. TOYNBEE, *THE GERMAN TERROR IN BELGIUM* (1971)).

67 *See* Nuremberg Trials, *supra* note 27, at 456-57.

68 *Id.*

69 JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1012 (1948).

of Nanking convey the unfathomable proportions of this pillage:

December 19, 1937. It has been just over one week now since the collapse of the Chinese army in its Nanking defense It is a horrible story to try to relate; I know not where to begin nor to end. Never have I heard or read of such brutality. Rape! Rape ! Rape! We estimate at least 1000 cases a night, and many by day. In case of resistance or anything like disapproval there is a bayonet stab or a bullet.⁷⁰

Scattered throughout the transcripts from the Tokyo War Crimes Tribunal are accounts of some of these cases. The affidavit of a Chinese woman who oversaw a safety zone established in a college dormitory describes how Japanese soldiers would enter the dormitory looking for young girls. On the night of December 17, 1937, the soldiers took eleven girls. "Nine of these girls horribly raped and abused by Japanese officers later made their way back to our grounds . . . One girl was brought back to our grounds. She could not walk and was terribly bruised and swollen and stated that she had been repeatedly raped and abused by four or five soldiers."⁷¹

Although death often followed rape, resistance seemed to have guaranteed it. A report by a Nanking District Court notes, "[o]ne woman would frequently be assaulted by a number of soldiers. A woman was killed for refusing intercourse."⁷² In an affidavit, Chang Kia Sze described the slaughter of her family while en route to a refugee camp. The family encountered twelve Japanese soldiers. One of the soldiers raped and killed her sister-in-law in front of her husband and children. Subsequently, the soldier killed the husband and children as well. "The husband was killed for trying to defend his wife and the two children were killed because they wept when their mother was being raped."⁷³

70 INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO WAR CRIMES TRIALS 4467-68 (R. John Pritchard & Sonia M. Zaide eds., 1981) [hereinafter TOKYO TRIALS].

71 *Id.* at 4465.

72 *Id.* at 4544.

73 *Id.* at 4506-07.

The five-year-old girl was suffocated by having her clothing stuffed in her mouth and the boy was bayoneted. Their father and mother were both bayoneted and thereby killed. My mother was also bayoneted and died five days later. I fell to the ground and escaped later with my two children. This all happened at 10 o'clock in the morning and in broad daylight on the streets of Nanking. . . . I went to the refugee camp and on my way saw many corpses, women and civilian men. The women had their apparel pulled up and looked like they had been

Second, and not surprisingly, rape is deployed as a means of retaliation, vengeance, and reprisal. When the tables are turned and the vanquished becomes conqueror, the rape continues. "Instead of a motive of out-and-out conquest we may substitute a motivation (or excuse) of retaliation and revenge."⁷⁴ When the winds of World War II shifted and the Soviet Red Army went through Germany, there were more rapists and more victims - only the nationalities of the roles changed.⁷⁵ Historian Cornelius Ryan captured the fall of Berlin at the hands of the Russian army in 1945. As he told it, "[t]he fear of sexual attack lay over the city like a pall . . . [H]ordes of Russian troops . . . demanded the rights due the conquerors: the women of the conquered."⁷⁶ Retaliation and victory conflate here. A Russian trooper raped Ilse Antz at gunpoint, and when he finished told her, "[t]hat's what the Germans did in Russia."⁷⁷ As Margarete Promeist, a warden of an air-raid shelter described it to Ryan, "wave after wave of Russians came into my shelter plundering and raping. Women were killed if they refused. Some were shot and killed anyway. . . . I found the bodies of six or seven women, all lying in the position in which they were raped, their heads battered in."⁷⁸ The story of E.L. suggests how tragically routine rape can become. "When we were lying in bed at night we kept hearing steps coming up the stairs; these were always Russians who were sent by the Poles into the dwellings of the Germans."⁷⁹ Once again women's bodies became the battleground for paybacks.

They beat on the door with their rifle-butts until it was opened. Without any consideration for my mother and aunt, who had to get out of bed, we were raped by the Russians, who always held a machine pistol in one hand. They lay in bed with their dirty boots on, until the next lot came. . . . During the day we had to work hard, and at night the Russians left us

raped. I saw about twenty, mostly women.

Id.

⁷⁴ See BROWN MILLER, *supra* note 2, at 63.

⁷⁵ As Brownmiller noted, "[t]he testaments have a certain sameness about them, a sameness not of fabrication but of the universality of a woman's experience in war." *Id.* at 67.

⁷⁶ *Id.* at 64 (citing CORNELIUS RYAN, *THE LAST BATTLE* 26-33 (1966)).

⁷⁷ See BROWN MILLER, *supra* note 2, at 64.

⁷⁸ *Id.*

⁷⁹ *Id.*

no peace.⁸⁰

Third, rape is used as an enormously effective propaganda tool. As the battles of the twentieth century unfolded, media manipulation of rape rose to an art form. In a 1927 study entitled *Propaganda Technique in the World War*, Harold Lasswell noted that invoking atrocities is a "handy" way to "arouse hate."⁸¹ Rape stories, he said, "yield a crop of indignation against fiendish perpetrators . . . and satisfy certain powerful, hidden impulses. A young woman, ravished by the enemy, yields a secret satisfaction to a host of vicarious ravishers on the other side of the border."⁸²

To support his plea for an unconditional surrender, a Brooklyn clergyman constructed the anguish of a French soldier:

'The Germans have been in my land for a year. . . . My little house is gone, and gone my little shop! My wife is still a young woman! My little girl—she is just a little, little girl! Why, I never thought of her as a woman! And now our priest writes me that my young wife and my little girl will have babes in two months by these brutes! . . .'

Such devastations of the soul are why there must be no inconclusive peace. Unconditional surrender is the only word.⁸³

To rally the glorious Red Army in order to fend off the Germans during World War II, one Soviet war correspondent filled his reports with stories of German rapes. For example, one stated, "[t]hese filthy lechers have now come to Russia. They are polluting our houses. They are violating and infecting our women. Red Army men, in the name of our girls' honour, in the name of our women, in the name of human purity, smash these fornicating Fritzes!"⁸⁴

2. Rape as Means of Troop Mollification

Rape has always been viewed as a just reward for war weary troops. When told by a Yugoslav reporter that Soviet troops had

80 See BROWNMILLER, *supra* note 2, at 64.

81 *Id.* at 38 (citing HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* 81-82 (1927)).

82 See BROWNMILLER, *supra* note 2, at 38.

83 *Id.* at 39 (citing NEWELL D. HILLIS, *GERMAN ATROCITIES: THEIR NATURE AND PHILOSOPHY* 25-26, 54-56 (1918)).

84 See BROWNMILLER, *supra* note 2, at 63 (citing ILYA EHRENBERG, *RUSSIA AT WAR* 116-17 (1943)).

committed 121 rapes and rape-murders during their march through northwest Yugoslavia, Stalin is said to have replied, "[d]oes [one], who is himself a writer, not know what human suffering and the human heart are? 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?"⁸⁵

Military leaders have also used or at the very least tolerated rape as a means for alleviating boredom and mollifying or maintaining troop morale. This latter phenomenon most commonly manifests itself in the form of military brothels. Susan Brownmiller said of World War II that "[c]oncentration-camp rape and institutionalized camp brothels . . . were a most sinister aspect of the abuse of women in World War II, since acceptance of continuous rape without protest was held out as a possible chance for survival."⁸⁶ The wartime memoirs of a Jewish woman from Warsaw who was allowed to practice medicine at Auschwitz recount at some length her covert efforts to treat Aryan women imprisoned in an Auschwitz brothel.⁸⁷ A similar rape-camp "into which hundreds of [Russian] women and girls were driven" was established in the Soviet city of Smolensk during the German occupation.⁸⁸

Although the prohibition on sexual relations with Jews implicit in the Nazi policy against "race defilement" effectively forbade the rape or prostitution of Jewish women, it did not seem to deter such activities. A deposition entered into evidence at Nuremberg described how the head of a concentration camp at Tulchin, Romania "asked each night for two Jewish virgins."⁸⁹ Upon liberation of Vught, a Nazi concentration camp in Holland, the *New York Times* reported that the "[v]iolation of young Jewish women by prison wardens was a common occurrence."⁹⁰

The Japanese organized and established battlefield sex camps, mainly with the bodies of Korean women on a scale that is staggering. Outrage over Japanese sexual enslavement of Korean "comfort women" during the War has recently led to both a true accounting of the extent of the practice and demands for compensation.⁹¹ Experts estimate that Japanese military leaders may have

85 See BROWNMILLER, *supra* note 2, at 70.

86 *Id.* at 61.

87 *Id.* (citing R.J. MINNEY, *I SHALL FEAR NO EVIL; THE STORY OF DR. ALINA BREWDA* 141 (1966)).

88 See BROWNMILLER, *supra* note 2, at 62.

89 *Id.*

90 *Id.* (citing Vught, *N.Y. TIMES*, Nov. 13, 1944, at 1).

91 See *e.g.*, Shim Jae Hoon, *Haunted by the Past*, *FAR E. ECON. REV.*, Feb. 6, 1992, at

taken between 60,000 and 200,000 Korean women to war zones in China, Southeast Asia and the islands of the South Pacific.⁹² Unearthed military reports suggest that in China alone, about 1000 women were assigned to every 50,000 Japanese soldiers.⁹³ Some eighty percent of these women were "recruited" from Korea.⁹⁴ As one survivor described it, "[m]y life in the ensuing 15 months until the end of the war was a living hell."⁹⁵ During the day the women worked hard, usually washing clothes. By night they were forced to provide sex; each woman forced to deal with as many as twenty men a night.⁹⁶

The American experience with prostitution in Vietnam, while less brutal than the Japanese and German sexual-slavery camps during World War II, stands out as one the most appalling aspects of our involvement in that country. The American government not only consciously tolerated prostitution in Vietnam, but in most cases division commanders controlled and regulated it. The Associated Press's correspondent Peter Arnett remembers the growth of regulated prostitution as a natural byproduct of "the McNamara theory."⁹⁷ Arnett described the McNamara theory by saying,

"There was a lot of discontent and boredom [among the rear-area troops]. The men were aware that they were soldiers who weren't fighting, who weren't getting any medals. They might drive into town to the illegal brothels, but for reasons of VD and security the brothels were off limits."⁹⁸

McNamara stated, "[i]n 1965 the main idea was to keep troops contented and satisfied. Ice cream, movies, swimming pools, pizza, hot dogs, laundry service and [women]."⁹⁹ It is comforting to know that access to women's bodies ranked up there with hot dogs and movies. Taking this sentiment to heart, by 1966, at least

20.

92 *Id.*

93 *Id.*

94 The recruitment process worked as follows. The women would sign for what were advertised as factory jobs. When they arrived for work, military police would herd them into sealed trains which took them to their assigned rape camps, usually in China. *Id.*

95 Shim Jae Hoon, *Haunted by the Past*, FAR E. ECON. REV., Feb. 6, 1992, at 20.

96 *Id.*

97 See BROWNMILLER, *supra* note 2, at 96 (citing Interview with Associated Press' Peter Arnett, Special Correspondent, in New York, N.Y. (Dec. 11, 19, 1972 & Jan. 22, 1973)). Brownmiller conducted extensive interviews with Arnett about his observations and memories of the Vietnam War.

98 See BROWNMILLER, *supra* note 2, at 96-7.

99 *Id.*

three army divisions had established official military brothels next to the hot dog stands in the recreational areas inside the base camps.¹⁰⁰ At the brothel set up within the base camp of the 1st Infantry Division at Lai Khe, approximately 120 women "serviced" a 4000 man brigade.¹⁰¹ The price? About US \$2 each, out of which seventy-five cents went to the woman.¹⁰²

3. Rape as Genocide

The ongoing war in the former Yugoslavia has elevated the tactical deployment of sexual assault to an entirely new level. As portrayed above, the use of rape as a war tactic to *subjugate* people is not new. What distinguishes Serbian aggression against Muslim (mostly) women¹⁰³ is the way in which rape, enforced prostitution, and enforced pregnancy have been utilized as a systematic means of *destroying* an entire population. By using sexual atrocities against Muslim women in this manner, the Serbs have consciously exploited a central tenet of Muslim life - the separation of gender roles and the sanctity of women's sexuality.

In many ways, the rape stories Bosnian Muslim women have survived to tell do not vary much from the wartime rape stories told by women for centuries. They are verbally insulted and sexually abused, sometimes in front of their families but more often in rape camps, usually by gangs of men, and frequently accompanied by brutal beatings. In three respects, however, the rape experiences of the Bosnian Muslim women are unique. First, the women are often raped by men with whom they are acquainted, a phenomenon which aggravates the psychological harm of rape.¹⁰⁴ An eighteen year old girl who was interned, although not herself raped, at Trnopolje in northwest Bosnia for fourteen months described this almost surreal situation:

Every night, Serbian soldiers would come to the large room where we were confined. They would take out girls and rape them—at least one girl was taken out every night . . . One [of

100 *Id.* at 97.

101 *Id.* at 95.

102 *Id.*

103 For the most part, unless otherwise indicated, I will focus on the Serbian aggressions against Bosnian Muslims.

104 *See e.g.,* MCCAILL, *supra* note 63, at 67 ("A rape victim who is previously acquainted with her attacker, even if he is no more than a relative stranger to her, is significantly more likely to experience increased negative feelings toward known men than is a victim who is raped by a total stranger.").

the soldiers] was my physics teacher, Ljubomir Zjelar. He had been my teacher for almost four years and had always seemed to like me. In the camp he pretended not to recognize me or the other girls who had been his students. The other was Miso Radulovic . . . he had been my crafts teacher.¹⁰⁵

B., a forty year old Muslim woman interned at Obudovac, a camp in northeast Bosnia, told the following story:

Some of the local Serbs wore black stockings on their heads to disguise their faces because they didn't want to be recognized. [Nevertheless], I recognized many of them. [They were] colleagues—doctors with whom I worked. The first [man] who raped me was a Serbian doctor named Jodic . . . I had known Jodic for ten years. We worked in the same hospital. I would see him everyday in the employees' cafeteria . . . Another doctor whom I had previously known also raped me; . . . I wasn't allowed to say anything. Before he raped me he said, Now you will know who we are. You will remember forever."¹⁰⁶

The husband of a young women who was raped in front of him in Carakovo said of the rapist: "I know the man who rapes my wife. He is from my wife's village . . . He raped her, then he burned our house. I worked with him at the rail company in Prijedor."¹⁰⁷

Second, the men make it clear these are acts of xenophobic racism. Selima, a forty year old Muslim woman who was arrested and interned at a camp in northwest Bosnia, was gang-raped on an office table. When the first man ordered her to take her clothes off, she began to cry and told him that she was menstruating. As she tells it, "[h]e said he didn't mind and that he would show me how a Serb does it. . . . While one of them was raping me, the other two were laughing, insulting me and cheering him on."¹⁰⁸

A twenty-eight year old Croatian-Muslim survivor of a Bosnian war camp describes what was said to her by Serbian soldiers as they raped her:

[They] were telling me, 'Croatia needs to be crushed again. *Balijas*¹⁰⁹ need to be crushed completely. You are half this

105 See HUMAN RIGHTS WATCH, *supra* note 1, at 182.

106 *Id.* at 218.

107 *Id.* at 169.

108 *Id.* at 166-67.

109 *Balijas* is a derogatory term for Muslims.

and half that. You need to be crushed to the end. Because you're Croatian, you need should be raped by five different men - and because you're a *Bula*,¹¹⁰ you should be raped by five more.¹¹¹

Catherine MacKinnon recounted the gang rape of a Muslim woman, as witnessed by a spying Muslim soldier, that merges sado-masochism, misogyny and xenophobia in a way that is difficult for the mind to comprehend:

The woman was tied to four stakes in the ground, "in a lying position but suspended." While they were raping her, the soldiers said "that Yugoslavia is theirs . . . that they fought for it in World War II, partisans for Yugoslavia. That they gave everything for Yugoslavia" [T]he men laugh and chide each other for "not satisfying her," for not being able to "force a smile out of her, because she is not showing signs of love." . . . The superior who is ordering them says, "She has to know that we are *chetniks*. She has to know this is our land. She has to know that we're commanding, that this is our Greater Serbia, that it'll be like this for everyone who doesn't listen."¹¹²

Third, pursuant to the Serbian policy of genocide, many of the rapes are committed with the goal of impregnating the woman. As Professor Francis Boyle described to the International Court of Justice, the soldiers rape "for the express purpose of making sure they produce chetnik babies . . . for the express purpose of preventing the birth of children who would be either Bosnian, or Muslim, or both."¹¹³

M., a twenty-five year old Croatian woman was imprisoned and regularly gang raped for more than two months by men she believes to have been Montenegrin Serbs. She was held captive until she had missed two menstrual periods. As she said, "[i]t was their aim to make a baby. They wanted to humiliate us. They would say directly looking into your eyes, that they wanted to make a baby. They seemed to be men without souls and hearts. They are without mercy."¹¹⁴

110 *Bula* is another derogatory term for Muslims.

111 See MacKinnon, *supra* note 21, at 27.

112 *Id.* at 29.

113 See Goldstein, *supra* note 28, at 23.

114 See HUMAN RIGHTS WATCH, *supra* note 1, at 215.

B. *Why Men Rape in War*

1. War legitimates violence.

Just as rape is the exaggeration of traditional gender roles that encourage violence toward women as acts of machismo and control, war is an exaggeration of the conditions which hold out violence as the central mechanism for human interaction. Aggression, violence, a tolerance for pain and discomfort, and the ability to self-defend are generally rewarded in war. Weakness, passiveness, emotionalism, and the inability to defend oneself are not. In this way, war legitimates violence and aggression as the means for getting what is desired. Victory is usually the desired goal. Rape is an extremely effective way to subjugate and terrorize a population. As Susan Brownmiller put it:

[R]ape by a conqueror is compelling evidence of the conquered's status of masculine impotence. Defense of women has long been a hallmark of masculine pride, as possession of women has been a hallmark of masculine success. Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side.¹¹⁵

In other words, if victory is the desired end, and rape is seen as an effective mechanism for achieving it, then by all means, rape will be employed. As a Bengali politician put it when a reporter asked him to explain why so many Bengali women had been raped by Pakistani soldiers in 1971, "[w]hat do soldiers talk about in barracks? Women and sex Put a gun in their hands and tell them to go out and frighten the wits out of a population and what will be the first thing that leaps to their minds?"¹¹⁶

This mindset helps explain the extensive use of rape in particularly humiliating ways during war. Sexual assaults are often carried out, for example, in very public forums. As one veteran of the Vietnam conflict later recounted:

One thing that was more or less like a joke . . . and it would get a laugh every time from somebody, was if we were moving through a village and there was a woman present. Her clothes, at least the top half of her clothes, were just ripped. I've seen

115 See BROWNMILLER, *supra* note 2, at 31.

116 *Id.* at 86.

that happen, and done it several times, probably thirty, forty times I've seen civilians with their clothes just—just because they were female and they were old enough for somebody to get a laugh at . . . ¹¹⁷

In her memoirs, a Polish-Jewish woman described similar scenes of public sexual humiliation perpetrated by the Nazis during World War II. During daylight hours, the Germans would amuse themselves by publicly disrobing men, women, and children. "They forced us to undress and lie on the ground as they walked by, laughing and making lewd comments. Then we were beaten with whips on our bare backs and chased through the ghetto. Their actions shamed me."¹¹⁸

This motive of total humiliation also might explain another aspect of wartime rape. Occasionally survivors tell that the raping soldiers attempted to force members of their families to join in the assault. A report made by a District Court in Nanking, China and entered into evidence at the Tokyo trials notes that, "[f]or amusement, a father was forced to assault his daughter. In another case, a boy was forced to assault his sister. An old man was forced to assault his son's wife."¹¹⁹ Describing what went on in her rape camp at Diboj in northeast Bosnia, a forty year old Muslim woman said, "[t]hey liked to punish us. They would ask women if they had male relatives in the city; I saw them ask this of one woman and they brought her fourteen-year-old son and forced him to rape her."¹²⁰

This may also explain what drives murderer/rapists to defile their victims' bodies in sexually humiliating ways and/or leave the bodies in public places. Inserting objects into women's vaginas and leaving bodies in a spread eagle position seems to be popular. An American missionary in Nanking, China made a diary entry noting that British embassy officials were out touring British property, possibly a golf course, when they stumbled across "the body of a woman who had had a golf club forced up internally; a part of it was protruding."¹²¹ Twenty years later, an American G.I. who was flying over a rice paddy near the village of My Lai in Vietnam told a similar story. Flying a few days after an American army unit had

117 *Id.* at 112.

118 *Id.* at 46 (citing SALA PAWLOWICZ with KEVIN KLOSE, *I Will Survive* 41, 54 (1962)).

119 See TOKYO TRIALS, *supra* note 70, at 4544.

120 See HUMAN RIGHTS WATCH, *supra* note 1, at 217.

121 See TOKYO TRIALS, *supra* note 70, 4479.

massacred nearly the entire population of My Lai, he sighted a woman's body. As he emotionally described it later, "[s]he was spread-eagled, as if on display. She had an 11th Brigade patch between her legs — as if it were some type of display, some badge of honor."¹²² Another Vietnam vet, on trial for his role in the My Lai massacre, told the following wrenching story:

I saw one case where a woman was shot by a sniper, one of our snipers. When we got up to her she was asking for water. And the lieutenant said to kill her. So he ripped off her clothes, they stabbed her in both breasts, they spread her eagle and shoved an E tool up her vagina, an entrenching tool, and she was still asking for water. And then they took that out and they used a tree limb and then she was shot.¹²³

2. War Exaggerates Myths of Gender and Sexuality

The conditions of war magnify all the myths that traditionally define men, women, and sex. One of these is the age-old belief that men have an uncontrollable sex drive. It is undoubtedly a short step from the idea that men have a unique nature that enables them to "do war," to the conclusion that they have a similarly unique biology which makes it necessary for them to "do women." And what makes women unique in this line of reasoning is their availability to "be done."

From these fundamental assumptions grows the "keep-the-boys happy" mentality that explains at least some of what happens to women in war. These assumptions are what really underlie the "just reward" theory that Stalin was propounding when he berated the Yugoslav reporter for not understanding why exhausted soldiers needed to "take some trifle."¹²⁴ These assumptions also explain the toleration, indeed condonation, of prostitution during war. A more perverse version of this thinking is what led the Japanese to kidnap and make battlefield sex slaves out of tens of thousands of Korean women during World War II.

An extreme version of this exaggerated machismo might also explain the extremely high incidence of gang rape during war. One Vietnam veteran suggests that this may be the *primary* motivation behind wartime rape. "They only do it when there are a lot

122 See BROWNMILLER, *supra* note 2, at 109.

123 *Id.* at 113.

124 See *supra* text accompanying note 85.

of guys around You know, it makes them feel good. They show each other what they can do - 'I can do it,' you know. They won't do it by themselves."¹²⁵ Susan Brownmiller's account of a gang rape of a Vietnamese woman named Mao is more illuminating:

Of the five men in the patrol only one, Private First Class Sven Eriksson, did not participate in Mao's rape and murder. As [one soldier] described the ordeal, individual acts of superfluous cruelty practiced on Mao appeared to be a competition for a masculinity pecking order. Eriksson, for refusing to take his turn in Mao's gang rape, was derided by the patrol leader . . . as a queer and a chicken. One of the followers . . . later haltingly told the military prosecutor that fear of ridicule had made him decide to go along with the rest: "Okay, let's say you are on a patrol. These guys right here are going to start laughing you out. Pretty soon you're going to be an outcast from the platoon."¹²⁶

Another Vietnam vet, who did a great deal of raping, put it more bluntly, "[i]t wasn't like [the Vietnamese] were humans. . . . They were a gook or a Commie and it was okay."¹²⁷

As an interesting aside, the juxtaposition of certain races of physically larger men with a different race of particular diminutive women has been cited as another source of exaggerated gender perceptions in war. Correspondent Peter Arnett, for example, told Susan Brownmiller that he believed "the juxtaposition of fragile, small-boned Vietnamese women against tall, strong American men created an exaggerated masculine-feminine dynamic that lent itself readily to rape."¹²⁸ Some sense of this perception is conveyed by the descriptions American G.I.s gave of Vietnamese women. As he described a gang rape, one soldier said, "[h]e punched this chick on the side of the head. The girl was, you know, Vietnamese people are a lot smaller than American people. It doesn't take that much to hurt one of them, you know?"¹²⁹ Said another when he described the efforts of a mother to protect her daughter from

125 See Brownmiller, *supra* note 2, at 111. It is difficult to comprehend what mechanism triggers the violent mob mentality behind gang rape. As one veteran who served in Vietnam without raping women said, "I know the guys, and I know basically they're not really bad people, you know? I just couldn't figure out what was going on to make the people like this do it. It was part of the everyday routine, you know." *Id.* at 116.

126 See BROWNMILLER, *supra* note 2, at 104.

127 *Id.* at 113.

128 *Id.* at 100.

129 See BROWNMILLER, *supra* note 2, at 116.

rape, “[s]he was fighting off two or three guys at once. She was fantastic. Usually they’re pretty passive. . . .”¹³⁰

In stories of wartime rape, like many of domestic rape, one also senses that men do not distinguish between sex and rape. For example, men describe rape encounters as “making love.” This was reflected in the following gang rape story told by an American soldier who was not a participant. The soldier related that one of the rapists later told him that “it was the first time he had ever made love to a woman with his boots on.”¹³¹ The non-participating soldier went on in his own words to explain that “the last man to make love to her shot her in the head.”¹³² Note that both the rapist participant and the soldier interpreting and relating the story describe what happened as “mak[ing] love.”¹³³ Possibly this is just semantics; the verbal result of limited vocabularies. More likely, though, it reflects their total indifference and incomprehension of the true nature of this sexual encounter. Either way, it is pathetic.

A further example of this phenomenon comes from a Serbian woman whom Croatian soldiers imprisoned and gang raped every night for approximately one month. As she described it, “[t]hey acted as if they were making love to their own girlfriends, but if you tried to resist, they would hit you.”¹³⁴

3. Rape is an Expression of Misogyny

Unlike most other forms of wartime atrocities, rape is a gender-specific act. As such, it is an outlet for, and expression of, hatred of women as a class. Sometimes, the nature of the specific acts inflicted on women when they are raped are cruel in such a biologically-specific way that one literally feels the loathing of women. The propensity men seem to have for inserting objects into women’s vaginas comes to mind here. As one Croatian woman told of her twenty-eight days in a Serbian rape camp in northeast Bosnia, “[i]f a man couldn’t rape me [i.e. he was physically unable] he would use a bottle or a gun or he would urinate on me.”¹³⁵

130 *Id.* at 107.

131 *Id.* at 114.

132 See BROWNMILLER, *supra* note 2, at 114.

133 *Id.*

134 See HUMAN RIGHTS WATCH, *supra* note 1, at 234.

135 *Id.* at 217.

In Bosnia, still another motivating factor has been added to the mix - xenophobia. As Catherine MacKinnon puts it, "[x]enophobia and misogyny merge here; ethnic hatred is sexualized; bigotry becomes orgasm."¹³⁶ The following story about K.S., a fifty-five year old housewife from a village in northeast Bosnia, stands out as a pinnacle of barbarity.¹³⁷ One evening, Serbian soldiers broke into the home of K.S. and her husband. K.S. was dragged outside and gang raped by three men in her front yard. Next, she was dragged to the side of her house and raped again, on concrete pavement, until she passed out. When she regained consciousness, she crawled into her house. Then, as she told it:

[I] went upstairs, found the room, and lay down on the bed and slipped a blanket over my head. Then, one of them came in. I only heard him at first. Then he pulled off the blanket, lit my face with a flashlight and roared . . . he then spread my legs and raped me. He was very strong—you cannot defend yourself.

When he was done, he inserted his hand inside of me and began pinching me with his fingers, as if he wanted to pull everything out. I screamed, and he grabbed my right breast and twisted it so hard that I screamed again; long afterwards my entire breast was blackened. He thrust the knife to my throat and said if I screamed one more time, he would slaughter me. He inserted his fingers inside me again—it hurt tremendously—and then he thrust his hand in my face and I had to lick his fingers clean, one by one. He repeated the same thing once more. . . . I was covered with blood all over. Once they left, I vomited. I felt very ill.¹³⁸

C. *The Injury of Wartime Rape*

1. The physical injury

The level of non-genital injuries women sustain from wartime rape varies, obviously, with the level of accompanying violence. For example, the Japanese had a propensity for inflicting bayonet wounds, particularly on the breasts of the women they raped.¹³⁹ Other men are satisfied with brutal beatings. Others may inflict only the pain necessary for compliance. Perversely, when women

136 See MacKinnon, *supra* note 21, at 27.

137 See HUMAN RIGHTS WATCH, *supra* note 1, at 172-78.

138 *Id.* at 174-75.

139 See *supra* text accompanying note 70.

are not battered, it may only be because they were frightened into passivity and did not resist.

Few of the women's accounts of their wartime rapes specifically discuss the injury sustained to their genital organs. Given that the pain and trauma to a woman's genitals can be severe from a single isolated episode of rape,¹⁴⁰ it seems logical to conclude that the injuries sustained in wartime rape may only be more extreme. Even a "single episode" of rape in war is often carried out as a gang rape with anywhere from two to twenty-eight men taking part. How does one even begin to comprehend the magnitude of pain and injury that would result from this anatomical abuse? K.S., the Bosnian house-wife who somehow survived the vicious gang rape, reported to Human Rights Watch that she continued to suffer "medical complications" as a result of her ordeal.¹⁴¹ Harder still to imagine is the bodily abuse that women, who were subjected to multiple rapes on a daily basis in military rape camps, suffered during their enslavement. After interviewing a Korean woman who survived fifteen months of life as a Japanese "comfort woman," a journalist described the woman as having a permanently "shattered body."¹⁴² "[S]he walks with the aid of a cane that barely supports her hunched frame."¹⁴³ It is also difficult to think of the infection and internal injury that must be caused by the many objects men insert in into women's vaginas. Can a uterus withstand golf clubs and E-tools? What do weeds and grease-guns do to the vaginal cavity? And what of multiple incidents of anal sodomy?

2. The psychological injury

(a) *Loss of Bodily Autonomy*.—As with domestic rape, part of the psychological injury of wartime rape comes from destroying a woman's sense of control over her body and life. Rape during war tells a woman that enemy men, rather than she, will decide how, when, and with whom she has sex. It tells her that when her country loses political autonomy, she loses sexual autonomy. It suggests that as long as her country is occupied by foreign troops, her body will be occupied by their penises. It says to women, in other words, that they are sitting ducks. The stories that emerge

140 See *supra* text accompanying notes 55-58.

141 *Id.* at 177.

142 See Hoon, *supra* note 91.

143 *Id.*

from war are replete with accounts of women who understand this message clearly and who try to protect themselves and each other. In her autobiography, a German woman describes the fall of Berlin at the hands of the Russians. She stood in her doorway watching as truckloads of refugees fled past the women shouting, "[c]lear out, the Russians'll rape you."¹⁴⁴ As a fifteen year old Chinese girl said of the occupation of Nanking in World War II, "I hid every time a Jap came to the house and that is why the Japs never caught me."¹⁴⁵ M., the twenty-five year old Croatian woman held for two months in 1992 by Montenegrin Serbs remembers: "I saw what was happening to other women, and I was afraid. I tried to be as invisible as possible."¹⁴⁶ Said Z.M., a twenty-five year old Muslim woman, "[i]n the Trnopolje camp we were most afraid of rape because drunk soldiers would come and take women out. We had an agreement that girls and unmarried women would stay in the attic. We were hiding our girls."¹⁴⁷ Aida, an eighteen year old girl who spent fourteen days in the same camp said that when the Serbs would come at night into the room where the women were confined, "[m]others would hide their daughters under blankets. The soldiers would pull aside the blankets and look at the girls with flashlights."¹⁴⁸

War severely heightens the sense of defenselessness and helplessness that accompanies domestic rape. A young German woman who endured nightly rapes by Russian soldiers during the occupation of Berlin said, "[o]ne could hardly any longer call it raping, for the women were passive instruments, for one could not protect one's self or refuse, and one therefore suffered it."¹⁴⁹ A forty year old Muslim woman who was interned and gang raped almost nightly for one month at a rape camp in northeast Bosnia described her feelings: "I wanted nothing, not bread, not water, just to be alone."¹⁵⁰

(b) *Confirming the Peripheralism of Women.*—A deeper and more destructive message sent to women through wartime rape tells

144 See BROWNMILLER, *supra* note 2, at 64 (citing HILDEGARD KNEF, *THE GIFT HOUSE* 77 (1972)).

145 See BROWNMILLER, *supra* note 2, at 57.

146 See HUMAN RIGHTS WATCH, *supra* note 1, at 215.

147 *Id.* at 183.

148 *Id.* at 182.

149 See BROWNMILLER, *supra* note 2, at 67-68.

150 See HUMAN RIGHTS WATCH, *supra* note 1, at 218.

them that they are little more than message bearers. Wartime rape says to a woman, “[y]ou are a marginal, expendable, peripheral, essentially useless, sub-human, being. You are here for me to humiliate in order that *your* men understand just who is winning this war.” If war is a game for and between men, then women’s bodies are their scorecards. The acts of rape, sexual mutilation, sexual-slavery, enforced pregnancy, and murder, in turn, make up the tally. “There has not been a war where women have not been used as the envelope to carry the message from the conquering group of men to the conquered that ‘you are so totally defeated this is what we are doing with your women.’”¹⁵¹ This notion of women as “envelopes” may explain why so many women are raped during wartime in front of their husbands and families (father and sons) and/or in such publicly symbolic places as their doorsteps or yards. Wartime accounts are replete with stories of rapes in which the rapists force husbands and families to watch. A young Bosnian Muslim woman told how a Serbian soldier broke into her home and raped her in front of her family:

[m]y husband had to watch while I was raped. I have a four-year-old daughter; she saw the rape too. There was no way I could avoid it; he would have killed both of us. He just said, ‘Your husband has to watch.’ He was in the house all day and raped me once for three or four hours.¹⁵²

Another such incident, which illustrates the truly brutal effect of such tactics, occurred in Bangladesh around 1971. As recounted by the victim’s father, a truckload of Pakistani soldiers came to his home during the day on the pretense of searching “for pamphlets.” While there, the soldiers observed the man’s allegedly beautiful, and newlywed, daughter. Later that night, six of the soldiers returned and kicked in the door to the house.¹⁵³

Two [soldiers] went into the room that had been built for the bridal couple. The others stayed behind with the family, one of them covering them with his gun. They heard a barked order, and the bridegroom’s voice protesting. Then there was silence until the bride screamed. Then there was silence again, except for some muffled cries that soon subsided.

In a few minutes one of the soldiers came out, his uniform in disarray. He grinned to his companions. Another sol-

151 See Mann, *supra* note 7 (quoting Robin Morgan, Editor-in-Chief of MS. magazine).

152 See HUMAN RIGHTS WATCH, *supra* note 1, at 169.

153 See BROWNMILLER, *supra* note 2, at 82.

dier took his place in the extra room. And so on, until all six had raped [her]. Then all six left, hurriedly. The father found his daughter lying on a string cot unconscious and bleeding. Her husband was crouched on the floor, kneeling over his vomit.¹⁵⁴

For whom were these acts of brutality intended? Certainly not only, if at all, for the women. If the women were the targets, then why not simply have taken them away? These acts of rape were communications from "conquerors" to the vanquished. They were intended directly for the husbands and fathers, and indirectly, through their sense of humiliation, for the entire male community of their respective countries.

c. Treble Harm.—The key to understanding the injury of wartime rape, however, is in recognizing that while the insult may have been intended *for men through women*, it is internalized *by women*. This response triples the injurious effect on women of wartime rape. First, women bear the physical injury. Second, they blame themselves for being raped and feel ashamed. Although the sixty-six year old Korean "comfort woman" eventually returned to Seoul, she certainly never returned to life. "Out of shame, she avoids meeting people, refusing to look up friends or family. She has said she can never set foot in her hometown again lest people recognize her."¹⁵⁵

Third, in cultures where the men actually do view rape as a stain on a woman's honor and, by extension, on the honor of her father or husband, women also internalize all of this guilt. This reaction plays an important role in the phenomena of rape in Muslim cultures. Husbands and communities actually reject Muslim women who are raped. The women, consequently, conclude that their lives are effectively over. The fate of the young Bengali woman who was gang raped in her bedroom in front of her husband during the Pakistani-Bengali war of 1971 is illustrative. When a journalist tracked her down, she was living in a shelter for rape victims. She said she doubted that she would ever return to her village. Her husband refused to see her, her father was "ashamed," and the villagers "did not want me."¹⁵⁶ A Muslim social worker described this notion as it operates in modern day

154 *Id.*

155 See Hoon, *supra* note 91.

156 See BROWNMILLER, *supra* note 2, at 82.

Bosnia:

For Muslim women, virginity is incredibly divine, incredibly precious Once it is lost, an unmarried woman will not be accepted. A married woman who is raped may not be accepted by her husband. . . . It depends on the person Some men become angry and want revenge (against the rapist). Other men accuse the women.¹⁵⁷

The conscious exploitation of this triple reaction to wartime rape is the heart of the Serbian rape campaign against Muslim women in Bosnia. A Muslim woman from northwest Bosnia described the rape of her twenty year old neighbor: “[S]he was raped by fifteen men. We had to carry her from the village. She didn’t know where she was, didn’t even know her own name I could hear her screaming and crying and begging: ‘I’m a virgin.’ ‘Well, that is why we chose you,’ they said.”¹⁵⁸

The psychological and emotional damage inflicted on a woman by this is enormous. The same Muslim woman described her own later experience in a rape camp: “There are women in the camp who were raped, but they are not talking about it. . . . They want to forget this and lead a normal life. They think they are inferior. Virginity is very important to us Muslims.”¹⁵⁹ Unfortunately, the harm, while different, is just as great for married women. As K.S., the fifty-five year old housewife, described it:

When I arrived here [at the refugee camp], I did not come out of my room for a month. I was ashamed. Whenever somebody looked at me, I thought he or she knew everything about what I had been forced to do. Sometimes, I wonder would it be best for me to throw myself under a bus . . . [a]nd yet I would have the strength to return home someday . . . !? God grant that all of this settles down, but . . . [e]ven this frightens me—this statement I am giving you. There are Serbs everywhere.¹⁶⁰

Socialized in a culture which adheres strongly to the notion of tarnished honor, Muslim women internalize every fragment of guilt and shame. Tragically, their silence protects everyone but themselves. The rapists go unnamed; the husbands and fathers

157 Leslie Sowers, *Angered Into Action*, HOUST. CHRON., June 8, 1993, at A1 (quoting Dr. Selima Ahmed).

158 See HUMAN RIGHTS WATCH, *supra* note 1, at 171.

159 *Id.* at 72.

160 *Id.* at 178.

neither cope directly with the rape nor contemplate their own complicity in it. Their silence also allows the cycle to continue. As K.S. said:

What happened to me, happened to many, but the women keep it secret. It is shameful. Thus, the mother conceals it if it happened to her daughter so she can marry and if it happened to an older women, she wants to protect her marriage. It is a huge embarrassment, you know.¹⁶¹

IV. WAR CRIMES

A. *Evolution of the Laws of War*

The laws of war have been developing for thousands of years. Ancient cultures promulgated codes of conduct for warfare¹⁶² while the "just war theory" governed wars during the Middle Ages.¹⁶³ In the sixteenth and seventeenth centuries, individual European nations began a trend toward codifying a body of laws governing war.¹⁶⁴ The bulk of these laws, however, were concerned with the conduct of combatants against one another. Not until the nineteenth century did the notion of outlawing harm to civilians gain credence.¹⁶⁵ As acceptance of this notion of humanitarian law grew, the European powers began to formalize comprehensive treaties and laws governing the conduct of war. Among these treaties were: the Declaration of Paris of 1856, the Geneva (Red Cross) Convention of 1864, the St. Petersburg Declaration of 1868, the Declaration of Brussels of 1874, and the Hague Conventions of 1899 and 1907. The Hague Convention of 1907 (Fourth Hague Convention) addressed the laws and customs of warfare conducted on land and contained a provision protecting civilians.

At the Paris Peace Conference, held at the conclusion of World War I, the Allies established a Commission to investigate reports of atrocities committed "in violation of the laws and cus-

161 *Id.*

162 In the fourth century B.C., in *The Art of War* for example, Sun Tzu directed up soldiers to "treat captives well and care for them," quoted in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 154 (1992) [hereinafter BASSIOUNI, HUMANITY]. In the same time period, the Hindus followed a body of rules governing warfare on land in the *Book of Manu*, cited in M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 201 (1986) [hereinafter BASSIOUNI, CRIMINAL LAW].

163 HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 10 (1992).

164 *Id.*

165 *Id.* at 15.

toms of war" by Germany and its allies.¹⁶⁶ The Commission concluded that gross violations of the rights of both combatants and civilians had occurred. It recommended that an international court be set up to prosecute "all authorities . . . who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting to an end or repressing, violations of the laws or customs of war."¹⁶⁷ Although the Allies formally demanded the extradition of 896 Germans accused of violating the laws of war, a compromise struck during the signing of the Versailles Treaty led them to drop the effort.¹⁶⁸

Throughout World War II, the Allies repeatedly warned leaders of the Axis powers against the commission of barbaric acts and expressed their resolve to prosecute and punish responsible individuals.¹⁶⁹ At Yalta, the Allies agreed that an international tribunal should be established to "bring all war criminals to just and swift punishment."¹⁷⁰ The Charter of the International Military Tribunal for the Far East established both the Nuremberg and Tokyo trials.¹⁷¹ The Tribunals were to deal only with major war criminals; trials of so-called "lesser" criminals were left to the courts of the various occupying powers.¹⁷²

The Charter declared three categories of crimes within the Tribunal's jurisdiction: crimes against peace, war crimes, and crimes against humanity. The Tokyo trials simply contained war crimes. These categories were defined, in relevant part, in the Charter as follows:

(a) *Crimes Against Peace*. Namely, the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international . . . treaties . . .

(b) *Conventional War Crimes*. Namely, violations of the laws of customs of war. Such violations shall include, but not be

166 SIR THOMAS HETHERINGTON & WILLIAM CHALMERS, *WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY* 46 (1989).

167 *Id.*

168 *Id.*

169 Whitney R. Harris, *A Call for An International War Crimes Court: Learning From Nuremberg*, 23 U. TOL. L. REV. 229, 237 (1992).

170 *Id.* at 239 (citing UNITED STATES DEPARTMENT OF STATE, *THE AXIS IN DEFEAT* 7 (United States Department of State Pub. No. 2423, 1945)).

171 International Military Tribunal for the Far East, proclaimed at Tokyo, Jan. 19, 1946 and amended Apr. 26, 1946 T.I.A.S. No. 1589 [hereinafter Nuremberg Charter].

172 WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 5 (Norman E. Tutorow ed., 1986).

limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory . . . killing of hostages

(c) *Crimes Against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population¹⁷³

Convictions were secured for nineteen of the twenty-two defendants at the Nuremberg trials and twenty-five of the twenty-eight defendants at the Tokyo trials.¹⁷⁴

The experience of World War II as well as the introduction of the notion of crimes against humanity at Nuremberg led the International Red Cross in 1949 to promulgate the four Geneva Conventions. These conventions with their two Additional Protocols represent the most comprehensive codification of the rules and regulations of warfare to date. The Fourth Geneva Convention deals with the protection of civilians.

B. *The War Crime of Rape*

For centuries, laws on the books have prohibited soldiers from raping during war. Under national military codes of the Middle Ages as well as the 1863 Lieber Code promulgated by the United States, violators of this prohibition were subject to capital punishment.¹⁷⁵ While there were cases in which soldiers were prosecuted in their national courts for committing rape, for the most part "rape has been given license, either as encouragement for soldiers or as an instrument of policy."¹⁷⁶

Under current international law, Article 27 of the Fourth Geneva Convention explicitly outlaws wartime sexual atrocities. It provides that "[w]omen shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault."¹⁷⁷ A number of other

173 See Nuremberg Charter, *supra* note 171, at art. 5(a)-(c).

174 See *supra* note 172, at 11, 16.

175 Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

176 *Id.*

177 The 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

Furthermore, Article 27 provides that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and

sources implicitly outlaw sexual atrocities: (i) they are crimes against "family honour and rights" in violation of Article 46 of the 1907 Hague Convention;¹⁷⁸ (ii) they constitute "ill treatment" of civilians in contravention of Principle IV(b) of the Nuremberg Charter;¹⁷⁹ (iii) they are "inhumane acts" that violate Principle IV(c) of the Nuremberg Charter;¹⁸⁰ and, (iv) they constitute "torture," "inhuman treatment," and "wilfully causing great suffering," all of which are defined as "grave breaches" of the Article 147 of the Fourth Geneva Convention.¹⁸¹

Although rape was not specifically enumerated or prosecuted as a crime against humanity at the Nuremberg trials, stories and affidavits of rape were introduced into evidence. Furthermore, at the Tokyo trials rape was prosecuted as a war crime.

V. PROSECUTING RAPE AS A WAR CRIME

A. *The Goals of War Crimes Tribunals*

The proposition that the victors of World War II would try the defeated for "crimes against humanity" engendered controversy. While precedent existed in the form of the international treaties for the categories of war crimes and crimes against the peace, "crimes against humanity" had never before been codified as such. As one observer put it, "[t]he circularity of having victors create a charter that gave them jurisdiction over areas of law contained in that selfsame charter was not lost on critics of war crimes tribunals."¹⁸² The Allies justified the prosecutions for crimes against humanity on essentially two grounds. First, by the nature of their crimes, the defendants had "offended against society itself, and society, as represented by international law, has summoned them for explanation."¹⁸³ Second, it was said that crimes against hu-

shall be protected especially against all acts of violence or threats thereof . . .

Id. The Geneva Conventions additionally obligate contracting parties to search for and prosecute any person alleged to have committed grave breaches of the Conventions, regardless of the accused's nationality or the site of the breach.

178 Hague Convention Regulations Respecting the Law and Customs of War on Land, October 8, 1907, art. 46, 36 Stat. 2277, 2306-07.

179 See Nuremberg Charter, *supra* note 171.

180 See Nuremberg Charter, *supra* note 171.

181 The 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

182 See *supra* note 172, at 9.

183 Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2556 n.75 (1991) (quoting *Opening Statement of Prose-*

manity present a threat to world peace. This was essentially a bootstrapping argument that predicated jurisdiction over crimes against humanity on the basis that the crimes were executed in the course of committing crimes against the peace. In this way, the claim to international jurisdiction over crimes against humanity was narrowly limited to the context of war.¹⁸⁴

A parsing of the rhetoric surrounding the establishment of the International Military Tribunal suggests that the real animating theories were threefold: a desire for retribution, the hope of sending a message of deterrence, and the need to make a statement of moral and political outrage over the atrocities that had been committed.

The theme of retribution, sometimes worded as the need for punishment, frequently appeared in statements issued by various governmental representatives. In 1942, the United States Representative to the International Conference on Military Trials reported that Allies had reaffirmed "their solemn resolution to insure that those responsible for these crimes shall not escape retribution. . . ."¹⁸⁵ Stalin announced in 1943 that "[f]acist criminals . . . must be dealt stern punishment . . ."¹⁸⁶ Also, in 1943, President Roosevelt declared it "fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished."¹⁸⁷ The conclusion of the Moscow Declaration, which President Roosevelt, Prime Minister Churchill, and Premier Stalin jointly issued in 1943, warned perpetrators of war crimes that, "[m]ost assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."¹⁸⁸

The motive of deterrence arose from the view which was commonly held in 1945 that World War II might have been prevented if the initiators of World War I been justly punished. "These crimes [against humanity] had been tolerated through lack of prosecution throughout history. The lesson learned is that unless

cution, United States v. Ohlendorf (Case No. 9), TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462 (1950)).

184 *Id.* at 2558.

185 See Harris, *supra* note 169, at 237.

186 *Id.* at 238 (quoting 10 VITAL SPEECHES OF THE DAY 108 (1943)).

187 See Harris, *supra* note 169, at 238 (quoting R. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 10 (United States Dep't of State Pub. No. 3080 1949)).

188 See Harris, *supra* note 169, at 237-38.

crimes against humanity are vigorously prosecuted they are destined to be repeated."¹⁸⁹

The last underpinning for the Nuremberg and Tokyo trials seems to have been an almost panicky need to reassure the war weary world that justice and morality were still alive. As Professor Roling, one of the judges at the Tokyo trials put it,

the purpose was not to punish all cases of criminal guilt, but to give expression to the abhorrence of what had happened. The exemplary punishments serve the purpose of restoring the international legal order, that is of reassuring the whole community that what they had witnessed for so many years was criminal behavior.¹⁹⁰

B. *The Goals of Women*

In a sense, as with domestic rape, two groups of victims emerge from wartime rape. One group is comprised of women as a class, since the cumulative effect of the widespread practice of rape in warfare is the targeting of women as a population for the infliction of biology-specific violence. For women as a class, one overriding goal exists - to end the cycle of violence against women and eradicate rape completely. The second, more obvious group of victims, includes all the individual women who were actually assaulted. For these women, the goal is more immediate - to find an environment in which they can heal their bodies, repair their minds, and get on with their lives. Recovering from rape is difficult even under the best of circumstances. Women who are raped in non-warfare settings and who have an extensive support network which provides counseling, medical attention, and emotional sustenance must surpass enormous emotional and psychological obstacles to heal and regain equilibrium.

For women who are abused in the surreal context of war, which inflicts the accompanying elements of exaggeration and savagery, the prospect of reestablishing a normal life must appear impossible. As one survivor of a Bosnian rape camp said to a human rights representative, "I have no use for telling you the rest. I have no security. I have nothing."¹⁹¹ K.S., the fifty-five year old

189 David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 *FORDHAM INT'L L.J.* 86 (1989-90).

190 See BASSIOUNI, *CRIMINAL LAW*, *supra* note 162, at 203 n.48.

191 See MacKinnon, *supra* note 21, at 30.

Bosnian housewife, described how deeply her life was shattered:

My heart keeps pounding, I often cannot sleep. I fear my own shadow. I keep dreaming about handguns; that they are killing me. I keep awaking with a jerk. That fear cannot be described. I wish they had just gunned me down instead of what they did to me. They denigrated me, which will be bear hard on my body and soul as long as I live.¹⁹²

The women who are left in this kind of psychological void require an enormous amount of aid and support - shelter, medical attention, extensive counseling, and, in some instances, new homes.

When the rape victim comes from a culture which adheres strictly to a gender code, as do Muslims, addressing the women alone will many times not be enough. Efforts must also be made to target and educate husbands and fathers who callously reject these women as stained goods. This is the cultural sentiment that triples the harm to a raped woman and effectively destroys her last vestige of human integrity. The myth that only sexually pure or chaste women are acceptable as wives is the root of the gender stereotyping that leads men to rape women to begin with. This is the heart of the problem which must be confronted in order to construct a solution.

As an example of an admirable attempt to address such cultural baggage head-on, consider the following story told by a German rabbi after World War II.

Immediately after we were liberated from the ghetto . . . [a] young woman of a good family came to me crying that she was one of our poor sisters who had been humiliated by the Germans. Besides abusing her body, the Germans had tattooed on her arm the legend, "Whore for Hitler's Troops." After liberation she had succeeded in finding her husband, and they hoped to resume their marriage But, seeing the fearful tattoo on her arm, the husband was taken aback Before living together as man and wife they had first to clarify whether she was permitted to him.

[The rabbi responded,] Far be it from any man to cast aspersions on pious Jewish women in such a plight as this. Rather, it is our duty to proclaim the reward they will receive for their suffering. We must avoid causing them any unnecessary anguish. Certainly husbands who have divorced their wives under similar circumstances have acted reprehensively.¹⁹³

192 See HUMAN RIGHTS WATCH, *supra* note 1.

193 See BROWNMILLER, *supra* note 2, at 50. The rabbi finished by noting:

The fate of tens of thousands of Bengali women whom Pakistani soldiers raped in 1971 stands in stark contrast. The majority of husbands initially rejected their wives who had been raped on the basis of a rigid tradition that dictated that a man could not take back a wife who was touched by another man, even if she was taken by force.¹⁹⁴ As the dimensions of both the rape campaign and the subsequent pattern of victim-rejection surfaced in the international press, women's and human rights advocates issued swift and vocal statements of outrage. In response to this pressure, the Bengali government initiated a campaign to reintegrate the victimized women back into society. Prime Minister Mujibur Rahman declared that the victims of rape were national heroines. He urged men to allow their wives to come home and implemented a program to find husbands for the young, unmarried victims.¹⁹⁵ The results of these efforts, however, were dismal. Very few men agreed to continue their marriages and even fewer stepped forward to initiate new ones. Those few men who offered to marry a rape victim, moreover, demanded outrageous material items from the government in lieu of dowry. One suspects the gallant bridegrooms viewed it to be more like hardship salary than dowry.¹⁹⁶

C. Reconciling the Goals of Women and War Crimes Tribunals

1. Retribution

I have argued that the injury to a woman of wartime rape is threefold: first, the physical injuries inflicted by the rape; second, the self-blame for being raped; and third, the internalization of the concept of stained honor. I have further argued that the immediate interest of an individual rape victim is to repair and resume her life, and that the interest of women as a class is in the eradication of rape. The search for retribution does not seem to protect any of these interests.

Retribution has been defined and distinguished from simple

Nor, in my opinion, need the husband and wife in this case make any effort to remove the cursed legend on the wife's arm. Rather, let it be preserved and exhibited - not as a sign of disgrace and humiliation, but as the symbol of honor and courage, in behalf of those who were slaughtered.

Id.

194 *Id.* at 80.

195 *Id.*

196 *Id.*

revenge as follows:

The demand for punishment as retribution . . . grows out of a respect for the law (not simply oneself), the demand that attacks against the law (not simply against oneself) be taken seriously, and the belief that the only morally acceptable way to deal with such attacks is in terms of a theory based on *justice* or respect for *rights* (and not utility) as a primary value.¹⁹⁷

In this way, the retributivist is after a punishment which is "just" vis-a-vis his crime, rather than a punishment which reflects social utility or an individual desire for revenge. Defined as such, retribution would seem to be something which is administered *by* and *for* the state. The primary purpose seems to be the protection of the state's interest in having its laws obeyed and vindication of any violations thereof.

Translated to the context of an international tribunal then, the prosecution and punishment of war criminals by the international community (as proxy for the state) is seemingly concerned with the protection of the international community's interest in having states comply with international law. So who comprises the international community? Of course, in the largest sense, the people of every state do. As a practical political matter however, governments espouse our interests in international forums through government representatives, most of whom are men.

So now we have the specter of men, speaking to each other in an international tribunal about the wrong inflicted on the international community through the rape, mass rape, and the gang rape of women. The injury to the woman has been transmogrified from one against her bodily integrity to one against the state. This looks uncomfortably like an international tribunal of men co-opting harm done to women for their own political and moral uses. The very real physical and psychological injuries women suffer are rearticulated into the abstract notion of a crime against humanity. Against *humanity*? This is precisely the problem come full circle - rape is not a crime against *humanity*, it is a crime against a woman, and by extension, against all women.

If this is all we have to give to the women who were so vilely abused, then in a perverse way, we have confirmed the fact that rape in war is an injury between men. Men rape in war first to defeat and humiliate other men and then to be judged and pun-

197 JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 120-21 (1990).

ished by still other men. This, unaccompanied by more, is punishing the crime on the perpetrators' terms.

2. Deterrence

I have argued that rape happens in war for three main reasons: first, because of the legitimating effect war has on men's propensity toward violence and aggression; second, because the conditions of war magnify the myths which surround sexuality during peacetime; and third, because war liberates men predisposed to misogyny. If I am right that these are the reasons rape happens in war, then prosecuting rape as a war crime will not, alone, deter the phenomenon of wartime rape.

Rape happens during wars for the same reasons it happens during peace - only more so. It happens because of the structurally unequal positions men and women hold in every society in this world. It happens because men are socialized to view women as objects and property. It happens because men are taught that in the Hobbesian jungle, they can dominate and control women. It seems unlikely that the international tribunal will have much time to address these issues. Indeed, at the last war crimes tribunal, the prosecutors had trouble even talking about the most basic facts of the crimes that happened.

One glimpses in the anecdote of the French prosecutor at Nuremberg who so chivalrously demurred from "citing the atrocious details"¹⁹⁸ of rape, a danger which lurks for the Bosnian war crimes tribunal. The danger is that rape will be handled in precisely this same censored and detached way. The story will be told quantitatively rather than qualitatively, numbers without contextualization or analysis. Who will explain that rape happens because of the structural inequalities of the genders, because we are socialized into twisted conceptions of sexuality, because we live in a world that teaches men that aggression against women is an acceptable mating ritual? The danger suggested by the story of the French prosecutor is that the raping of Bosnian women will be presented as little more than a massive exaggeration of a phenomenon that is, nonetheless, inevitable in war. The ghost of General Patton hovers nearby . . . "in spite of my most diligent efforts, there would unquestionably be some raping."¹⁹⁹ If rape is pre-

198 See *supra* text accompanying note 27.

199 See *supra* text accompanying note 5.

sented at the Yugoslavian trials as it was at Nuremberg and Tokyo, there is a risk of legitimating the notion of its inevitability in war.

3. Statements of Outrage

It has recently been said of the Nuremberg war crimes tribunal that its ultimate justification was that "[i]t established the record of Nazi crimes for all of posterity . . . the whole world now knows why they were there."²⁰⁰ As a forum for telling stories in the women's voices, expressing outrage on women's terms, and recording the horrors for the next posterity, the Yugoslavian war crimes tribunal holds out enormous possibilities. Women's advocates must, therefore, ensure that the stories get told inside the Tribunal and ensure that the unthinkable and unspeakable are thought and spoken about. They must then use the power of the media to tell the watching world what is being told to the Tribunal. This is where the goals of the Tribunal and goals of women merge.

VI. CONCLUSION

In his opening statement at the Nazi doctors' trial at Nuremberg, Telford Taylor gave a lengthy and gruesomely explicit account of the kinds of medical experiments that had been performed by the defendants. In explaining why it was necessary to introduce and describe each nauseating detail, Mr. Taylor noted:

The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellow men as less than beasts.²⁰¹

We owe it to the women of the former Yugoslavia, as well as all the women who have ever been raped in war, to do no less.

200 Michael Howard, *When War Became a Crime*, WASH. POST BOOK WORLD, May 22, 1994, at 12.

201 THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 68 (George J. Annas & Michael Grodin eds., 1992).