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Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda

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I. INTRODUCTION

Although rape has been categorized as a crime against humanity in past international declarations and has been prohibited in military codes as far back as 1385, it has only recently begun to gain more widespread recognition as a crime against humanity, a war crime, or a form of genocide.

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1. Military codes of Richard II (1385) called for capital punishment of anyone convicted of rape, and rape was prohibited by the military code of Henry V in 1419. See Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int'l L. 424, 425 (1993). Rape was also prohibited by the Lieber Code, which was published during the American Civil War to regulate armed conflict. See Richard Shelly Hartigan, Lieber's Code and the Law of War 54 (1983).

2. There has never been an international convention on crimes against humanity, but various international agreements have defined the term. For example, according to the Charter of the International Military Tribunal for the Trial of the Major War Criminals of the European Axis, crimes against humanity were “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 278, 288 [hereinafter Agreement for Prosecution and Punishment]. See also Charter of the International Military Tribunal for the Far East, Jan 19, 1946, amended Apr. 26, 1946, art. 5(c), T.I.A.S. No. 1589.

3. “War crimes are crimes against the conventional or customary law of war that are committed by persons ‘belonging’ to one party to the conflict against persons or property of the other side.” Meron, supra note 1, at 426 n.19. War crimes, defined as violations of the laws or customs of war, include but are not limited to: “murder, ill-treatment or deportation to slave labour or for any other purpose of civilian populations of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.” Agreement for Prosecution and Punishment, supra note 2, art. 6(b). War crimes were later codified in the 1949 Geneva Conventions which govern the treatment of wounded and sick military personnel, prisoners of war, and civilians. Violations of the Geneva Convention include, but are not limited to: “willful killing; torture or inhumane treatment, ... and willfully causing great suffering or serious injury to body or health. ...” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, art. 50, 75 U.N.T.S. 31; 62. See also Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130,
For example, the world passively watched as over 200,000 Bengali women were raped by Pakistani soldiers in Bangladesh's war for independence in 1971. Between 1932 and the end of World War II, the Japanese Imperial Army raped and enslaved over 200,000 Korean, Filipino, and other Asian women, in addition to systematically raping Chinese women in Nanking. However, rape was not a focus of the International Military Tribunal for the Far East and only a few men were prosecuted for rape as a war crime. Similarly, the International Military Tribunal at Nuremberg did not prosecute nor charge anyone for rape as a war crime.

However, with the establishment of the International Tribunal for the former Yugoslavia (ICTY) in 1993, rape began to gain stature as a violation of international law. The statute governing this tribunal explicitly enumerated rape as a crime against humanity. In addition, the International Criminal Tribunal for Rwanda (ICTR), which was established by a United Nations resolution in 1994, includes rape as a crime against humanity, and enumerates rape and enforced prostitution as grave breaches of the Geneva Conventions.

The rapes of over 200,000 women in Asia went virtually unpunished after World War II. Today, men have been prosecuted by the ICTY for the rape of a single woman. In addition, the ICTR recently convicted a former mayor for his incitement of sexual violence against Tutsi women.

4. "[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1945, art. II, 78 U.N.T.S. 278, 280.
5. The object of the rapes was to "produce a large number of children with non-Bengali fathers to dilute the prevailing Bengali nationalism." Robert Trumbull, Dacca Raising the Status of Women While Aiding Rape Victims, N.Y. TIMES, May 12, 1972, at 2.
8. See Meron, supra note 1, at 425.
9. See Brownmiller, supra note 7, at 48-56.
12. See id. arts. 3(g), 4(e) at 116.
14. See discussion infra Part II.B.
What has precipitated the international community to respond to such atrocities previously given only cursory consideration in the international military tribunals after World War II, but which have been the mainstay of almost every war since? This article examines the recent actions of the ICTY and ICTR to prosecute rape as a crime against humanity, a war crime and an act of genocide. It also discusses the varying success of these tribunals and possible explanations for the differing treatment of rape by the ICTY and the ICTR as compared to other recent conflicts.

II. RAPE AS A HUMAN RIGHTS VIOLATION

Prior to Yugoslavia and Rwanda, the world community saw rape as a tolerable and inevitable consequence of war. However, the rapes in the former Yugoslavia and Rwanda were viewed not as attacks against women, but campaigns to annihilate an ethnic group. For example, in the former Yugoslavia, Serbs raped not only as a form of terror, but also to actually impregnate Bosnian Muslim women with "Serb" children. Women were raped and detained until it was no longer legally possible to get an abortion. After being raped, women were told "You will now bear a Serb baby." In Rwanda, "(t)he rape of Tutsi women was systematic and was..." There have also been important advances made in the proposed International Criminal Court (ICC). In July 1998, 120 nations approved a draft treaty to establish a permanent ICC which would hear cases similar to those being adjudicated in the ad hoc tribunals set up in the former Yugoslavia and Rwanda. Only seven nations opposed the draft treaty. These nations were: United States, Libya, Iraq, China, Israel, Yemen and Qatar. See Anthony Lewis, A Turn in the Road, N.Y. TIMES, July 20, 1998, at A15. After some controversy, advocates were finally successful in classifying rape as both a war crime and a crime against humanity within the docket of the proposed International Criminal Court. See Elizabeth Neuffer, War Crimes Tribunal Adopted as US Votes 'No', BOSTON GLOBE, July 18, 1998, at A1.

17. See generally BROWNMILLER, supra note 7, at 98 (reporting that American soldiers raped Vietnamese women during the Vietnam War); Janet Reitman, Political Repression by Rape Increasing in Haiti, WASH. POST, July 22, 1994, at A10 (reporting that rape was a prevalent form of torture against supporters of Jean-Bertrand Aristide during military rule in Haiti); Kathy Evans, Kuwaiti's Rape Children Offer Bitter Reminder, GUARDIAN (London), July 29, 1993, at 24 (stating that up to 1,000 Kuwaiti women were raped during the Iraqi invasion).
18. See supra Part I and note 17 and accompanying text.
20. See id.
21. Id. See also UNITED NATIONS, COMMISSION ON HUMAN RIGHTS: REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE TERRITORY OF THE FORMER YUGOSLAVIA SUBMITTED BY MR. TADEUSZ MAZOWIECKI, SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS, PURSUANT TO COMMISSION RESOLUTION 1992/S-11 OF 14 AUGUST 1992, para. 48(a), U.N. Doc. E/CN.4/1993/50 (1993) (describing how Serbs would use rape as tool for ethnic cleansing: "Serb paramilitary units would enter a village. Several women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. Several days later, Yugoslav Popular Army (JNA) officers would arrive at the village offering permission to the non-Serb population to leave. ... [M]ale villagers who had wanted to stay then decided to leave with their women and children in order to protect them from being raped ... ."); HUMAN RIGHTS WATCH, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 14 (1995) (reporting that one woman who
perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown.\(^{22}\)

The genocidal elements of these crimes commanded attention from the United Nations and other human rights organizations.\(^{23}\) As a result, rape and sexual violence were no longer seen through a gender prism as exclusively crimes against women.\(^{24}\) Instead, the violations were perceived as human rights violations, rather than as sexual assaults against individual women.\(^{25}\)

III. YUGOSLAVIA

A. Genocidal Rape in the Former Yugoslavia

According to the Special Rapporteur on Human Rights, as many as 20,000 women were raped in the former Yugoslavia from 1992 to 1994.\(^{26}\) This systematic rape of European women next door to Western European nations demanded that action be taken.\(^{27}\)

In addition to the sheer number of rapes and the close proximity to Europe, the rapes were particularly brazen. For example, women were enslaved in hotel rooms, houses, or apartments where soldiers would rape and torture them repeatedly for months. In one case, a fifteen year old girl was allegedly raped, tortured, and enslaved for eight months. During this time, she was continually gang-raped by countless men who later sold

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22. Akayesu Judgment, supra note 15, at ¶ 52. See also AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE 411-412 (1994) ("Systematic rape was one of the instruments of genocide used to devastating effect by the extremists. Unlike in the case of killings, there is no evidence that the architects of the genocide had prepared lists of women they wanted to see raped, nor indeed that specific instructions went out to the interahamwe that they should rape women. But the exhortation to kill, destroy and humiliate Tutsi, seize their property, slaughter and eat their cows, and defile the churches where they sought refuge had a clear implication: rape the women. So, as they carried out their genocidal attacks and hunted the Tutsi throughout the country, the killers also raped the women. They were the booty, the rewards of the genocide").

23. See supra notes 21-22 and accompanying text.


25. See id.

26. See CHAVEZ REPORT, supra note 6, para. 9.

27. See Kathleen Pratt & Laurel E. Fletcher, Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, 9 BERKELEY WOMEN'S L.J. 77, 81 n.22 (1994) (stating that the rape of women in a "Westernized" country that was familiar to European and American leaders sensitized them and their citizens to the problem).
To allow such egregious and systematic violations of international law to go unpunished in Europe's backyard would have constituted a complete failure of international human rights law.

B. International Criminal Tribunal for the Former Yugoslavia

In 1993, the United Nations' Security Council adopted the statute of the ICTY giving the Tribunal jurisdiction to "prosecute[e] persons responsible for serious violations of international humanitarian law" committed in the former Yugoslavia.\(^2^9\) Article 5(g) of the ICTY statute explicitly enumerates rape as a crime against humanity.\(^3^0\) Rape is not listed as a war crime or form of genocide, but it is implicitly prohibited under these provisions.\(^3^1\)

To date, the Tribunal has indicted and convicted several people on charges of rape as a war crime. The so-called Foca indictment, which has received much publicity, was the first ICTY indictment to deal specifically with rape and sexual assault.\(^3^2\) Submitted in June 1996, it charged eight Bosnian Serb police and military officers with the rape and sexual assault of at least fourteen Bosnian Muslim women in the town of Foca, in Southeastern Bosnia. The men were charged with detaining and enslaving women, some as young as twelve, in houses and apartments that were run as brothels by paramilitary troops. These women—and girls—were subjected to almost constant rape, sexual assault, and torture.\(^3^3\) These crimes had a devastating impact on their lives.

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30. See Statute of the International Tribunal, supra note 10, art. 5(g), at 135.
31. See Nicole Eva Erb, Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court, 29 COLUM. HUM. RTS. L. REV. 401, 422-23 (Spring 1998) (explaining that, in order to prosecute rape under the categories in which it is not explicitly enumerated, both the elements of rape and the elements of the specific category must be satisfied. For instance, if one wanted to prosecute rape as a war crime in the ICTY, one would have to prove the elements of rape, in addition to the elements of torture which is explicitly recognized as a war crime).
32. See ICTY Indictment, supra note 26 (discussing the Foca Indictment).
The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion, vaginal discharges, bladder problems and irregular menstrual bleedings. The detainees lived in constant fear. Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression. Many women suffered permanent gynaecological harm due to the sexual assaults. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatised.

Before the surrender of Dragoljub Kunarac on March 10, 1998, not one of the Foca eight was in the Tribunal’s custody and some actually remained employed as policemen. Kunarac initially pleaded guilty to the offense of rape but the court later learned that he did not intend to plead guilty to crimes against humanity because he did not believe that the rapes were part of a systematic attack aimed at the Muslim population of Foca. As a result, the court entered a new plea of “not guilty” on his behalf.

In November 1998, the Tribunal convicted Hazim Delic, a Bosnian Muslim deputy commandant assigned to the Celebici prison camp, of two rapes and two murders and sentenced him to twenty years in prison. The court found Delic guilty of rape as torture and therefore guilty of a war crime in grave breach of the Geneva Conventions. Significantly, the trial chamber emphasized that “there can be no question that acts of rape may constitute torture under customary law.”

One month later, on December 10, 1998, the Tribunal convicted a Bosnian Croat paramilitary chief, Anto Furundzija, of rape as a war crime for his involvement in the rape of a Bosnian Muslim woman. Furundzija...
ija's conviction, carrying a prison sentence of ten years, was the first war crime conviction based exclusively on rape. This case is also extraordinary because Furundzija was found guilty not because he committed the rape himself, but because he allowed it to occur under his command. The judge wrote, "In such situations the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering." The judgment relied exclusively on the testimony of the woman notwithstanding the defendant's claim that she suffered from post-traumatic stress disorder and therefore could not accurately remember the events.

Despite these few high profile convictions and indictments, the Tribunal, as a whole, has room for much improvement. Alarmingly, over 20,000 women were the victims of rape, but, as of January 12, 1999, only seventeen accused perpetrators were awaiting either arrest or the completion of their proceedings.

IV. RWANDA

A. Systematic Rape on a Massive Scale

In contrast to its swift reaction to widespread rapes of Bosnian women in the former Yugoslavia, the international community was slow to respond to the systematic rape of women in Rwanda. Genocide and rape in Rwanda were reported a full year before the large-scale massacres of April 1994, yet no international action was taken. In March 1993, one human rights observer reported that, "[w]omen have been raped on a phenomenal scale by soldiers." Yet it took the death of at least 500,000 Rwandans and the rape of hundreds of thousands of women before Rwanda was afforded a tribunal of its own.

43. See id. § E (discussing the validity of the witness's testimony).
44. See CHAVEZ REPORT, supra note 6, para. 9.
45. This data is based on the author's original research into the current state of the prosecution of rape as a war crime in the ICTY. The author compiled these statistics solely from information on the United Nations ICTY website, <http://www.un.org/icty> (case analysis on file with author).
46. See, e.g., The Government and Armed Forces Responsible for the Reign of Terror in Rwanda, CANADA NEWSWIRE, March 8, 1993 (acknowledging genocide, rape, and war crimes throughout Rwanda and calls for the international community to help establish peace); Human Rights Team Says It Found Atrocities in Rwanda, THE REUTERS LIBRARY REPORT, Jan. 22, 1993 (discussing genocide in Rwanda).
47. The Government and Armed Forces Responsible for the Reign of Terror in Rwanda, supra note 46. See also Human Rights Team Says It Found Atrocities in Rwanda, supra note 44.
RECENT DEVELOPMENTS

Even then, the ICTR took until August 1997, three years after its establishment, to issue its first indictment concerning sexual violence against women.\(^{49}\) The delayed response, prompted "only after heavy international pressure from women's groups,"\(^{50}\) was surprising considering the widespread evidence of systematic rape\(^{51}\) and sexual abuse\(^{52}\) against women in Rwanda.

B. International Criminal Tribunal of Rwanda

The ICTR was established by the United Nations Security Council on November 8, 1994.\(^{53}\) It built upon the advances of the ICTY, permitting grave breaches of the Geneva Conventions to be prosecuted during internal conflicts. In addition, Article 4(e) of the statute explicitly enumerates rape and enforced prostitution as a grave breach of the Geneva Conventions,\(^{54}\) and Article 3(g) specifically lists rape as a crime against humanity.\(^{55}\)

Despite strengthened mechanisms to prosecute rape and evidence of widespread rape during the genocide, the Tribunal waited almost three years before it indicted anyone for a sexual violence crime.\(^{56}\) Within a year of the first indictment, however, the Tribunal handed down its historic decision against Jean Paul Akayesu, a former mayor, who was alleged to have rallied his troops with the cry, "don't ever ask again what a Tutsi woman tastes like."\(^{57}\) Akayesu was convicted of genocide for inciting rapes and sexual violence against women.\(^{58}\) The Tribunal also convicted him of crimes against humanity for these acts.\(^{59}\) The judgment explained that rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such . . . . These


\(^{50}\) Id.

\(^{51}\) See African Rights, Rwanda: Death, Despair, and Defiance, supra note 22 and accompanying text; The Government and Armed Forces Responsible for the Reign of Terror in Rwanda, supra note 46.

\(^{52}\) See Coomaraswamy Report, supra note 49, para. 38 (citing an example of a woman who was attacked in her home by a group of men who used a pair of rusty scissors to cut and mutilate her genitalia which they subsequently displayed in public).


\(^{54}\) See Statute of the International Tribunal for Rwanda, supra note 11, at 16.

\(^{55}\) See id.

\(^{56}\) See Coomaraswamy Report, supra note 49, para. 38 (stating that the first indictment for a crime of sexual violence was issued in August 1997).

\(^{57}\) See Akayesu Judgement, supra note 15, ¶ 52.

\(^{58}\) See id. Count 1.

\(^{59}\) See id. Count 13.
rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.\textsuperscript{60}

\section*{V. Outlook for the Future}

While the ICTY and the ICTR represent progress in the efforts to prosecute rape as a war crime, to date, prosecution under the current system of international law has been highly dependent on the whims of the political leaders of the most powerful nations including the United States and the nations of Western Europe. The ICTY and ICTR examples suggest that these leaders will not be galvanized to criminally prosecute the rape of women unless either the women are from a European country, or the situation is as extreme as it was in Rwanda.

The international community’s inaction in the past may serve as an illustration of what is likely to happen in the future. For instance, Human Rights Watch reported that in 1993 many women from the Muslim minority of Rohingya in Burma were raped “after their husbands or fathers had been taken for forced labor . . . . Sometimes the rapes occurred in the homes[;] . . . . other times the women were taken to a nearby military camp where they were sorted out by beauty. In some cases, the women were killed . . . .”\textsuperscript{61} The report also noted another neglected conflict in Somalia where:

[a] staggering number of rapes, as well as abductions of women and forced marriages, have occurred during the civil war, particularly during the fighting of 1991-1992 but by no means confined to those years . . . . Women who lack the protection of powerful clan structures or who belong to particularly vulnerable groups, such as ethnic minorities, are particularly at risk.\textsuperscript{62}

Like the women who lack a powerful “clan structure” in Somalia, minority women lack a state actor who is willing to pressure the international community to take action.\textsuperscript{63} The state actor who could speak for them is often the actual abuser. Therefore, women from disempowered minority groups, who are most often the victims of rape, are least capable of pressing their concerns. Bosnian Muslim women, formerly a minority within the country of Yugoslavia, were partly granted a voice when the newly formed state of Bosnia pressured the international community to hear their cases.\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{60} Id. ¶ 51.
  \item \textsuperscript{61} Human Rights Watch, supra note 21, at 111.
  \item \textsuperscript{62} Id. at 26.
  \item \textsuperscript{63} See generally MacKinnon, supra note 24, at 14.
  \item \textsuperscript{64} See id. at 16.
\end{itemize}
VI. CONCLUSION

The recent rulings and convictions for rape as a form of genocide and as a war crime in both the ICTY and ICTR are reason to celebrate, but, as the system stands, the determination of who will receive this justice is a highly political matter. As Regan Ralph, Executive Director of the Human Rights Watch Women’s Rights Project, explained, “Rape is a serious war crime like any other. That’s always been true on paper, but now international courts are finally acting on it.”65 There is still a danger, however, that what once was only a paper right will evolve into a privilege exercised only for a certain minority of women whom the world leaders deem worthy of receiving retribution. As a result, advocates for women must continue to press the international community to enforce international law and prosecute the rape of all women as a crime against humanity, a war crime, or a form of genocide.