Impunity or immunity: wartime male rape and sexual torture as a crime against humanity¹

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Abstract
This paper seeks to analyze the phenomenon of wartime rape and sexual torture of Croatian and Iraqi men and to explore the avenues for its prosecution under international humanitarian and human rights law.

Male rape, in time of war, is predominantly an assertion of power and aggression rather than an attempt on the part of the perpetrator to satisfy sexual desire. The effect of such a horrible attack is to damage the victim's psyche, rob him of his pride, and intimidate him. In Bosnia-Herzegovina, Croatia, and Iraq, therefore, male rape and sexual torture has been used as a weapon of war with dire consequences for the victim's mental, physical, and sexual health. Testimonies collected at the Medical Centre for Human Rights in Zagreb and reports received from Iraq make it clear that prisoners in these conflicts have been exposed to sexual humiliation, as well as to systematic and systemic sexual torture.

This paper calls upon the international community to combat the culture of impunity in both dictator-ruled and democratic countries by bringing the crime of wartime rape into the international arena, and by removing all barriers to justice facing the victims. Moreover, it emphasizes the fact that wartime rape is the ultimate humiliation that can be inflicted on a human being, and it must be regarded as one of the most grievous crimes against humanity. The international community has to consider wartime rape a crime of war and a threat to peace and security. It is in this respect that civilian community associations can fulfil their duties by encouraging victims of male rape to break their silence and address their socio-medical needs, including reparations and rehabilitation.

Key words: sexual torture, male rape, wartime rape, gender crimes, Croatia, Iraq

Introduction
Wartime rape of both men and women had never been judged as a crime against humanity before the codification of the charters of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

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The case law of both these tribunals has made a great contribution to the development of international humanitarian and human rights law, particularly on gender crimes and sexual assault. This development is clearly reflected in the Rome Statute of the International Criminal Court promulgated in 1998.

This paper tries to address three principle issues relating to the above topic: wartime male rape as a crime of war and a threat to peace and security under international humanitarian and human rights law; the use of wartime male rape and sexual torture as a strategic weapon of war during the Yugoslav crisis and the US-led invasion of Iraq; and, finally, potential socio-legal remedies for meeting the needs of male rape victims under national, regional, and international law, as well as civilian and psycho-social remedies within civil community associations.

Rape as a crime against humanity
In past years, male rape in particular, and rape in general, during armed conflict have been overshadowed by other war crimes. Legally speaking, rape was never considered or prosecuted as a crime against humanity under international humanitarian law before the establishment of the ICTY and the ICTR in 1993 and 1994 respectively. The Charter of the International Military Tribunal (IMT) of 1945, and the Charter of the International Military Tribunal of the Far East (IMTFE) of 1946, had excluded rape from crimes against humanity, although the Control Council Law No. 10 (CCL10) did add it to its list of these crimes; nevertheless no prosecution of rape has taken place under this law. In the last few decades, however, rape as a crime of war has been implicitly mentioned in a number of international humanitarian law conventions. Re-
cently, the systematic mass rape of Bosnian and Rwandan women between 1991 and 1995 challenged and developed the case law of the ICTY and the ICTR, allowing these bodies to make a great contribution to the development of international humanitarian and human rights law, particularly on gender crimes and sexual assaults. This development has been reflected clearly in the Rome Statute of the International Criminal Court, of 1998, and the Statute of the Special Court for Sierra Leone.

Despite the conventions' and statutes' fine-sounding norms, however, none of them has provided an explicit definition of rape as genocide, as a war crime, or as a crime against humanity in the true sense of the term. Consequently, the case law of the ICTY and ICTR has developed different definitions through the trials and judgments of a number of suspects charged with, or convicted for, wartime rape as a crime against humanity.

As a matter of fact, the ICTY and the ICTR were the first ever tribunals in the history of the international judicial system to prosecute and convict wartime rape as a crime against humanity. Before developing their own definitions of rape, both tribunals turned to classical definitions in national laws, which were inadequate to prosecute this grievous crime and, consequently, inappropriate to address the needs of the victims. This was due to the lack of a comprehensive technical definition, the responsibility for which must be shared by feminist legal


7) The ICC Statute broadened the concept of rape to cover other sexual assaults as crimes against humanity and war crimes. Article 7 (1/g) states that “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,” are crimes against humanity. Moreover Article 8 (2/b/xxi) considered “committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva conventions,” to be war crimes. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002) (hereinafter the Rome Statute).

8) Similarly, Article 2 (g) of the Statute of the Special Court for Sierra Leone provides that “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence,” as crimes against humanity. See Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002) (hereinafter The Sierra Leone Statute).
writers and national and international legislators.10

The ICTY and the ICTR case law presented a number of rape cases, three of which alone permitted three distinct definitions of rape based on the elements of the crime.11 Drawing heavily on national laws, since no comprehensive definition of rape existed in international law,12 the Trial Chamber I of the ICTR defined rape in the Akayesu Judgement of 2 September 1998,13 as: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” At the same time, the Tribunal defined sexual violence, including rape, as “any act of [a] sexual nature which is committed on a person under circumstances which are coercive.”14

While this landmark definition of rape has restricted the elements of the crime to


12) Akayesu Judgement, supra note 9, at paragraph 886.
(a) a physical invasion (penetration) of sexual nature, (b) committed on a person (male or female), (c) under circumstances which are coercive (against the victim’s will or without her or his consent), the Tribunal conceded that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” Simultaneously, the Tribunal noted that “rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.” For example, the Tribunal considered “the interahamwe thrusting a piece of wood into the sexual organs of a woman as she lay dying,” an act of rape. This instrumental rape, like other forms of sexual violence, constitutes a method of torture and sexual mutilation.

However, this broad definition of rape, as established in the Akayesu Judgement, was the first conceptual definition that refrained from specifying sexual organs, and that did not require penetration or the lack of consent as essential elements of the crime of rape set forth in classical definitions. In contrast to the prosecution’s and the defence’s attempts to elicit an explicit description of rape in physical terms, the Tribunal ruled that “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts,” thereby establishing a more acceptable definition.
that would protect the victims, particularly in cases of mass violence, and recognize cultural diversity on the concept of rape as a violation of the victim’s personal dignity. Later on, the same Trial Chamber took the same decision in the Musema Judgement when it asserted that “the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.”

It must be emphasized that the above definition has been reflected in a number of ICTR and ICTY judgments of war crime suspects charged with rape as a crime against humanity between 1998 and 2005. The Trial Chambers at both Tribunals had no difficulty adopting and endorsing the definition of rape and sexual violence articulated in the Akayesu Judgement, or agreeing with its conclusion.

The Tribunals’ case law led to a new definition of rape enacted in the Furundžija Judgement by the Trial Chamber II of the ICTY. Noting that no definition of rape existed in the international law, and relying on Article 5 of the ICTY Statute, Article 27 of the Geneva Convention IV, Article 76 (paragraph 1) of the Additional Protocol I, and Article 4 (paragraph 2/e) of the Additional Protocol II, the Chamber concluded that rape “is a forcible act of the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object.”

From what has been said, it becomes clear that the ICTY Trial Chamber definition of rape in the Furundžija Judgement distinguished between the actual rape resulting in the sexual penetration of the vagina or anus of the victim by the penis of the perpetrator, on the one hand, and other sexual assaults falling short of actual penetration, on the other. This was in spite of the fact that the latter constitutes a serious abuse of a sexual nature upon the physical and moral integrity of the victim by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity. Furthermore, the Furundžija definition was in sharp contrast to the Akayesu definition of rape. While the Trial Chamber I of the ICTR explicitly rejected a mechanical definition of rape as proposed by the prosecution and found in many national laws, the Furundžija’s conceptual definition stated the body parts in minute detail. Based on the above discussion, one might conclude that the Furundžija definition is more accurate and the Akayesu broader; in any event, this has qualified the first as the most acceptable definition of the crime of rape in interna-

19) Akayesu Judgement, supra note 9, at paragraph 687; de Brouwer, supra note 11, at 107 & 109; Musema Judgement, supra note 9, at paragraph 226; Quénivet, supra note 10, at 8.

20) Namely, Čelebiči Judgement, supra note 9, at paragraphs 478-479; Musema Judgement and Sentence, supra note 9, at paragraphs 220 & 226; Niyitegeka Judgement and Sentence, supra note 9, at paragraph 456; Muhimana Judgement and Sentence, supra note 9, at paragraphs 535-551.

21) Čelebiči Judgement, supra note 9, at paragraphs 478-479; Musema Judgement, supra note 9, at paragraphs 20-27; Muhimana Judgement, supra note 9, at paragraph 535.

22) Furundžija Judgement, supra note 9, at paragraph 175; Geneva IV, supra note 6, at Article 27; Additional Protocol I, supra note 6, at Article 76 (paragraph 1); Additional Protocol II, supra note 6, at Article 4 (paragraph 2/e).

23) Furundžija Judgement, supra note 9, at paragraph 174.

24) Ibid., at paragraph 186.
There is no doubt that the Preparatory Commission for the International Criminal Court (PrepCom) was influenced by ICTY and ICTR case law. This was reflected in the elements of crimes (EoC) prepared to help the court in its interpretation and application of Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) as stated in article 9 of the ICC statute, and in consistency with the PrepCom mandate. As wartime rape in the former Yugoslavia and Rwanda fits the crime of genocide as well as crimes against humanity and war crimes under the ICC statute, the PrepCom provided three sets of EoC on the definition of rape: one according to Article 7 (paragraph 1/g), crimes against humanity; another according to Article 8 (paragraph 2/b/xxii), war crimes associated with an international armed conflict; and a third according to Article 8 (paragraph 2/e/vi), war crimes associated with an armed conflict of an international character.

**Rape as a strategic weapon of war**

Male rape in times of war is predominantly an assertion of power and aggression rather than an expression of satisfying the perpetrator’s sexual desire. The impact of such a horrible attack can damage the victim’s psyche and cause him to lose his pride, break him down, and perhaps even extend this feeling to his entire family and society. In ancient wars and societies, male rape in times of war was considered as an absolute right of the victorious soldiers to declare the totality of the enemy’s defeat and to express their own power and control. It has been used as a weapon of war and a means of punishment in many cultures. In the military context, there was a widespread belief that when a victorious soldier emasculated a vanquished enemy and sexually penetrated him, the victim would lose his...
manhood, and could not be a warrior or a ruler anymore.  

For the first time in the history of international legal discourse, rape was defined in gender-neutral terms in the Tribunals’ case law and in the ICC Elements of Crimes, as both men and women could be victims of rape. Although the Office of the Prosecutor has never charged any of the war crimes suspects with rape for sexual assaults on men, the Trial Chamber I of the ICTR recognized in the Akayesu case that “rape and sexual violence constitute one of the worst ways of harming the victim as he or she suffers both bodily and mental harm.”

When war finally came to an end in the former Yugoslavia, the medical records of health care centres provided evidence of male rape and sexual torture of Croatian and Bosnian Muslim men including castration, genital beatings, and electroshock. Testimonies collected at the Medical Center for Human Rights in Zagreb from fifty-five men who were captured by Serb militants, emphasized that they had been exposed to five categories of systematic and organized sexual torture, with the aim of expressing aggression, psychologically damaging the victims, and destroying their identity, rather than satisfying the perpetrators’ lustful desires. These assaults included rape, deviant sexual acts, total and partial castrations, injuries to the testes with blunt objects, and a combination of other injuries. In this sense, male rape was used as a weapon of war to inflict serious mental, physical, and

29) In spite of the lack of evidence on male rape incidents during war, recent studies have confirmed that men were also raped but to a much lesser extent. Some writers have controversially alluded to one of the most famous male rape cases during WWI, when the Ottoman Turks captured and sexually assaulted Thomas Edward Lawrence, known as Lawrence of Arabia, on 2 November 1917 in Deraa, Syria. He was subjected to humiliating treatment including beatings and sexual assault at the instigation of the governor. See J. Godl, Feature Articles: The Disputed Sexuality of T. E. Lawrence, Online: First World War www.firstworldwar.com/ features/telawrence.htm (Accessed on: 21 June 2006); J. Wilson, Lawrence of Arabia: The Authorized Biography of T. E. Lawrence (New York, N.Y.: Atheneum, 1990) 5 (hereinafter Wilson); L. Stermac, et al., “Sexual Assault of Adult Males,” (1996) 11:1 Journal of Interpersonal Violence 52 (hereinafter Stermac); Quénivet, supra note 10, at 17.

30) Akayesu Judgement, supra note 9, at paragraph 731.


sexual health consequences leading to the destruction of the victim, and to be evidence of the perpetrators’ complete victory.33

In occupied Iraq, the Abu Ghraib Scandal of April 2004 revealed that rape and sexual torture of both Iraqi women and men were conducted in a systematic way to crush the spirit of the political detainees who opposed and resisted the invasion.34

Although President Bush has described the abuses at Abu Ghraib as “exceptional isolated cases” and “a disgraceful conduct by a few American troops,” his administration continued the policy of deliberate coercive interrogation inside Iraq, in Afghanistan and in CIA secret prisons in other parts of the world.35 Worse than this is the administration’s attempt to develop outrageous legal theories to justify torture and finally legalize it. Recently, the American president signed the Military Commissions Act of 2006 (MCA) after it had been passed by the Congress. This bill has rendered the Geneva Conventions unenforceable in court and has immunized CIA personnel from prosecution for their abuses. Section 5 of the bill provides that the Geneva Conventions and related treaties are unenforceable in court in civil cases involving the US government or its agents. Moreover, this law bars aliens held as “unlawful enemy combatants” from filing cases to challenge the legality of their detention or raise claims of torture or other abuses.36

The worst of the above is the promotion of the culture of impunity by an interna-


tional organization. In this respect, the UN Security Council Resolution 1487 (2003) adopted on 12 June 2003 has exempted the American troops and personnel serving in any UN force in Iraq from prosecution for international war crimes under the Rome Statute of the ICC.37

However, investigations of convicted American troops involved in the disgraceful Abu Ghraib scandal revealed that the abuses of Iraqi detainees did not erupt spontaneously at the lowest levels of the military chain of command; rather it was the product of a deliberate policy drawn up at the highest levels immediately after the decision by Secretary of Defence Donald Rumsfeld to step up the hunt for “actionable intelligence” among Iraqi prisoners.38

Mechanisms of justice and socio-legal remedies for wartime male rape victims

This paper provides three kinds of potential remedies available for addressing the needs of Croatian and Iraqi wartime male rape victims: legal remedies, remedies within the United Nations system, and psycho-social remedies within civil community associations.

Under the heading of legal remedies, there are four different fora that have jurisdiction over perpetrators: national courts in Iraq, Croatia, Serbia, and the United States; national courts experiencing universal jurisdiction; regional courts; and international ad hoc and permanent courts. Although the American-led occupation laws did not give any mandate to the Iraqi national courts over the American coalition troops and personnel, these courts, according to the principles of international law, still have jurisdiction to define and punish wartime male rape crimes committed within Iraqi territory. Article 146 of the fourth Geneva Convention requires each High Contracting Party to prosecute any offence that qualifies as a grave breach of the convention. Similarly, Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as Article 5 (par.1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, obligates the Iraqi, Croatian, Yugoslav, and American governments, as


state parties, to take the necessary measures to establish jurisdiction over wartime male rape crimes.\textsuperscript{39}

Croatian and Iraqi victims can also institute civil lawsuits against rapists in the courts of the United States under two pieces of legislation: the Alien Tort Claims Act, passed in 1980, and the Torture Victim Protection Act, signed in March 1992.\textsuperscript{40}

In this respect, the Supreme Court of Canada, in the case of R. v. Finta, states that: “The principle [of Universality] permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place”. Additionally, subsection 7 (para. 3.71) of the Canadian Criminal Code provides that “every person who commits a war crime or a crime against humanity that would constitute on offence against Canadian laws in force at that time shall be deemed prosecutable as if he or she had committed a crime in Canada at that time.” Accordingly, under this provision and pursuant to both the Torture Convention 269.1 of the Canadian Criminal Code, Canadian authorities may prosecute wartime rape perpetrators found within Canadian territory.\textsuperscript{41}

Before the political abuse of the Belgian universal jurisdiction in April 2003, war crime victims were able to file lawsuits against their perpetrators. Unfortunately, after a number of high-profile lawsuits were filed against the American president and his secretary of defence for alleged crimes committed during the Gulf War of 1999\textsuperscript{1}, the Belgian government passed an amendment in April 2003 changing the law. The new amendment provides that the victim or the defendant must be Belgian.\textsuperscript{42}

On the regional level, Iraqi victims of wartime rape may file petitions with the Inter-American Court of Human Rights, which prosecutes violations of the rights to


life and personal integrity as a remedy under Articles 1 (para.1), 8, and 25 of the American Convention on Human Rights. Under these articles, state parties are obligated to provide a fair hearing before a competent and independent court, and to make effective internal remedies to the victims.43

Croatian victims of wartime rape can file cases with the International Criminal Tribunal for the Former Yugoslavia according to Article 5 of the statute of the tribunal, which has the mandate to prosecute and indict war crime suspects for crimes against humanity, including rape and sexual torture. Moreover, rule 106 of the tribunal’s Rules of Procedure and Evidence provides that the Registrar shall transmit to the competent authorities of the state concerned the judgement finding the accused guilty of a crime. After this, the victim may file a lawsuit with a national court or another competent body to obtain compensation.44

By the same token, Croatian and Iraqi victims of sexual torture have the right to receive reparations under Articles 75 and 79 of the Rome Statute of the International Criminal Court and rules 94-99 of the ICC Rules of Procedure and Evidence. Pursuant to Article 79 (para.1), the Trust Fund for victims and their families was established on 9 September 2002 under the Assembly of State Parties’ Resolution 6, of 9 September 2002.45

Remedies for wartime rape victims could also be obtained within the United Nations system under both the treaty-based procedure, including the Human Rights Committee and the Commission against Torture, and the non-treaty procedure, involving the UN Commission on Human Rights and its Sub-Commission, which provides that “all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation, and the means of rehabilitation.” The Human Rights Committee, which was established under the International Covenant on Civil and Political Rights, has an individual complaint procedure. Individuals of more than eighty countries that ratified the Optional


**Conclusion: What have we learned? What must we do to help these victims?**

At the fifty-eighth anniversary of the Universal Declaration of Human Rights, let us recall General Dallaire’s critical question as stated in his book “Shake Hands with the Devil”: “Are we all human, or are some more human than others?” General Dallaire asked this question after he was informed by an American officer that the lives of the 800,000 Rwandans slaughtered in the genocide were only worth risking the lives of ten American troops, in a reference to the ten Belgian blue helmets who were massacred by Hutu militias at the beginning of the Rwandan Genocide.\footnote{H. Zawati, Gendered Violence in Ethno-National Conflicts: Systematic Wartime Rape as a Crime against Humanity (Lewiston, N.Y.: Edwin Mellen Press, forthcoming 2007) 179; R. Dallaire & B. Beardsley, Shake Hands with the Devil: The Failure of Humanity in Rwanda (Toronto, Ont.: Random House Canada, 2003) 522.} To reinforce the norms of the Universal Declaration of Human Rights, stressing that all humans are equal and no one is more human than another, we should combat the culture of impunity in both dictator-ruled and democratic countries by bringing the crime of wartime rape into the international arena, and by removing all barriers to justice facing the victims. Moreover, we should emphasize the fact that wartime rape is the ultimate humiliation that can be inflicted on a human being, and it must be regarded as one of the most grievous crimes against humanity. The international community has to consider wartime rape a crime of war and a threat to peace and security. It is in this respect that civilian community associations can fulfil their duties by encouraging victims of male rape to break their silence and address their socio-medical needs, including reparations and rehabilitation.
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