Forgotten Victims: Responsibility Under Law for Systematic Sexual Violence Toward Women During Warfare

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By Professor Linda A. Malone

THE 50TH ANNIVERSARY of the Japanese surrender in World War II focused intense debate on the moral implications of using nuclear weapons. Yet the West paid limited attention to another moral and political issue that arose from the commemoration of the war’s end: sexual violence toward women during war.

Earlier this year Japan’s Prime Minister announced that he would send official letters expressing “humble apologies” to the surviving “comfort women” in Asian countries. These women were among hundreds of thousands forced to serve as sex slaves for Japanese soldiers during World War II.

The announcement was a striking reminder that sexual violence toward women has long been used as a weapon of warfare—and that the international community has been slow to react against it.

Recent events in Bosnia, however, have brought to the forefront the deficiencies of international law in addressing responsibility for systematic sexual violence toward women during warfare.

THE INTERNATIONAL COMMUNITY RESPONDS

After hostilities broke out in the former Yugoslavia four years ago, reports of human rights violations—including atrocities toward women—began to reach the West from victims, witnesses, human rights organizations, journalists and official United Nations observers.

On May 3, 1993, U.N. Secretary General Boutrous Boutros Ghali issued a report proposing the establishment of an international tribunal to prosecute persons responsible for war crimes in the former Yugoslavia. The Security Council approved the Secretary General’s report on May 25, 1993, and adopted the statute annexed to that report.

With the establishment of the Tribunal, the Security Council had become, for the first time, a force in mandating compliance with international humanitarian law. The Security Council established the Tribunal under its authority, spelled out in Chapter 7 of the United Nations Charter, to impose sanctions on states when there is a threat to peace or breach of peace or an act of aggression.

The Security Council also established a Commission of Experts to provide the Secretary General with its conclusions on evidence of war crimes and other violations of international humanitarian law in the territory of the former Yugoslavia.
This Commission investigated numerous reports of widespread and systematic rape and other forms of sexual assault. The Commission in particular sought to examine the relationship between “ethnic cleansing,” and rape and other forms of sexual assault.

**INVESTIGATING THE UNTHINKABLE**

In its final report, issued in May 1994, the Commission of Experts noted that—owing to the social stigma attached to rape even in times of peace—rape is among the least reported crimes. For this reason, it was very difficult for the Commission to make any general assessment of the actual number of rape victims in the former Yugoslavia. (The most recently available reports estimate that there have been 20,000 rape victims in Bosnia alone.) Nonetheless, the Commission’s evidence of sexual assaults was explicit and horrifying. Five patterns of rape emerged from its findings, with victims ranging in age from 5 to 81 years of age.

The first pattern of rape involved individuals or small groups committing sexual assaults, together with looting and intimidation of a target ethnic group, before any widespread or generalized fighting broke out in a region. The second involved individuals or small groups committing sexual assaults when there was fighting in an area, often including the rape of women in public.

The third pattern of rape involved individuals or groups sexually assaulting people in detention, after the population of a town or village had been rounded up. Soldiers, camp guards, paramilitaries, and even civilians would be allowed to enter the camp, pick out women, take them away, rape them, and then either kill them or return them to the site. The reports frequently referred to gang rape.

The fourth pattern of rape involved individuals or groups committing sexual assaults against women for the purpose of terrorizing and humiliating them in pursuit of “ethnic cleansing.” Women would be raped by their captors until they became pregnant and then detained until it was too late for them to obtain an abortion.

Finally, the fifth pattern involved detention of women in hotels or similar facilities for the sole purpose of sexually entertaining soldiers. Unlike the women in the other camps, these women reportedly were more often killed.

From reports of these atrocities, the Commission of Experts concluded that rapes seemed to occur in conjunction with efforts to displace a targeted ethnic group from the region. Although there were reports of rape by all sides, the largest number of reported victims were clearly Bosnian Muslims and the largest number of alleged perpetrators were Bosnian Serbs.

**THE COMMISSION’S CONCLUSIONS**

In Bosnia, some of the rape and sexual assault cases committed by the Serbs against Muslims were clearly the result of individual or small group conduct without evidence of command direction or an overall policy. However, the Commission of Experts concluded that many more seemed to be part of an “overall pattern whose characteristics include: similarity among practices and non-contiguous geographic areas; simultaneous commission of other international humanitarian violations; simultaneous military activities; simultaneous activity to displace civilian populations; common elements in the commission of rape, maximizing shame and humiliation to not only the victim, but also the victim’s community; and the timing of rapes.”

The Commission of Experts concluded that on the basis of information gathered, examined and analyzed, grave breaches of the Geneva Convention and other violations of international humanitarian law had been committed in the former Yugoslavia on a large scale and were particularly “brutal and ferocious in their execution.” The incidences of “ethnic cleansing,” and rape and sexual assault in particular, had been carried out "so systematically that they strongly appeared to be the product of a policy, which may also be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators.”

**GAPS IN THE LAW**

It is a tragedy that so many women have suffered so much in order to shock the public and international lawyers into examining this neglected area of law. Although rape by individual soldiers has been prohibited by military codes for hundreds of years, in many cases rape has been given license, either as encouragement for soldiers or as an instrument of policy. The Japanese practice of forced prostitution by the comfort women is only one example of such policies.

These practices may have, at the very least, been facilitated by the gaps in the law of war and the humanitarian rules of warfare con-
cerning rape. For example, Article 46 of the Hague regulations can be read to include rape if broadly construed, but in practice it has seldom been so interpreted. (Article 46 provides that "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.") Rape was never mentioned in the Nuremberg Charter, nor prosecuted in Nuremberg as a war crime under customary international law.

And although both the Fourth Geneva Convention for the Protection of Civilians and the additional protocols to that Convention explicitly and categorically prohibit rape, these documents do not list rape among the grave breaches of the Convention which are subject to universal jurisdiction and thus can be prosecuted and enforced by any state in the global community.

The hesitancy to recognize rape as a grave breach began to erode in response to the public outrage over the reports of atrocities occurring in the former Yugoslavia.

As early as 1992, the International Committee of the Red Cross had declared that the grave breach of "willfully causing great suffering or serious injury to body or health" under Article 147 of the Fourth Geneva Convention covered rape. Soon after, the Red Cross declared that rape was a grave breach of the Geneva Conventions. The U.S. Department of State also stated that rape was a war crime and a grave breach under customary international law and the Geneva Conventions and could be prosecuted in that manner.

It was also unclear whether massive and systematic practice of rape and its use as a national instrument of "ethnic cleansing" qualified it to be defined and prosecuted as a crime against humanity. A crime against humanity, as defined in the Nuremberg Charter, includes "... murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population, before or during the war; or persecutions on political, or racial or religious grounds." Proof of systematic governmental planning is considered a necessary element of crimes against humanity, in contrast to war crimes, with all the difficulties of proof that element entails when rape is used as a weapon of war by a warring party.

Whatever may come of the U.N. International Tribunal of the former Yugoslavia, its mere establishment has provided one major development in this area: the statute of the Tribunal lists rape among the crimes against humanity.

Yet even in this statute, rape is not explicitly mentioned in Article 2 concerning what constitutes grave breaches, or in Article 3 concerning violations generally of the laws and customs of war, or in Article 4, dealing with genocide. Prosecution for genocide is dependent upon inclusion of rape as "causing serious or bodily harm to members of [a] group" with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

Although each of these articles in the Tribunal's statute can be read to authorize implicitly prosecution for rape and other gender-specific violations, limiting express inclusion of rape to crimes against humanity necessarily makes prosecution in other contexts more difficult and minimizes the atrocity of rape on an individual basis.

**THE NEED FOR CHANGE**

The above examples are only a few of the legal problems in securing justice for victims of systematic rape in war. Given the long history of rape as a weapon in warfare, it may seem surprising that the relevant international documents have not more explicitly addressed rape within their terms. This omission is much less surprising, however, when one considers the virtual exclusion of women from international lawmaking bodies.

For example, until the appointment of Rosalyn Higgins last July, there has never been a woman judge on the International Court of Justice. And no woman has ever sat on the International Law Commission, the principal U.N. body charged with development and codification of international law.

In a recent interview, U.S. Ambassador to the United Nations Madeleine K. Albright (one of just seven women among the U.N.'s permanent representatives and the only woman on the Security Council), was asked if rape would have been labeled a war crime earlier if there had been more women in foreign policy. She responded: "Absolutely. No question. Male diplomats have a hard time with this issue. At the U.N., when I would bring up the evidence about rape as a war policy in Bosnia, they just didn't want to talk about it.

"They are even uncomfortable with rape as a metaphor," Ambassador Albright continues. "I'll tell you how I get people's attention in the Security Council. Some people are critical of the Bosnians for fighting back against the Serbs. And I say, 'You are getting mad at the rape victim for defending herself.' They get very embarrassed."