Crimes Against the Humanity of Women:

Rape and Sexual Violence in War

By Annemarie Micklo

Yugoslavia had been the poster country of Eastern Europe—a country that had hosted the Olympics in 1984. Recent events there illustrate how thin is the veneer of civilization, how precious are the elements that keep a country civilized. And how quickly they can go.

—Judge Patricia Wald, ICTY

In the 1990s, reports of mass rape in the former Yugoslavia galvanized the attentions of women human rights activists—and, finally, of the Security Council of the United Nations—and the reality of rape as a separate, prosecutable war crime began to invade and reconfigure international law.

Nevertheless, the myth persists that wartime rape is simply an autonomous aberration made by individual rogue troops in the heat of battle—simply something young soldiers need after a hard day of war.

This mis-definition permits politicians and the military—precisely those with the power to stop it—to continue to deny that rape and sexual violence against women are, as Human Rights Watch (HRW) has stated, "integral parts of conflicts, whether international or internal in scope." Or, as Sally Apple, an activist studying systematic use of sexual violence in the Burmese military, put it:

judges' photo courtesy of ICTY-Photo
illustration: Jill Tedhams

"Rape of women in war is as much as part of war as the killing of soldiers."

Experts in legal and humanitarian fields now accept that wartime sexual crimes against women serve many specific functions. Like other human rights abuses, sexual violence serves to terrorize civilian communities and to enforce hostile occupations. It can be a means of revenge against the enemy and a mechanism of ethnic cleansing. Rape can serve as political repression by targeting women activists or the families of opposition forces, and can force cooperation or betrayal simply by its threat. It can be a vehicle for minority extermination and humiliation by compelling pregnancies and often leads to long-term enslavement and prostitution.

Defining the crime

The "crime" of "rape" has long existed under customary international law. The Lieber Code, promulgated by President Lincoln in 1863, listed it as a specific, capital offense; and The Hague Conventions, World War II prosecutions, and the Geneva Conventions reinforced prohibitions against rape and other sexual violence. Nevertheless, international military tribunals—most notably the Tokyo Tribunals and the Nuremberg Trials after World War II—largely overlooked acts of sexual violence in the judgments and placed them under the more euphemistic umbrella of "Crimes against Humanity—Inhumane Treatment." Even the most famous prosecution of the Vietnam War, the My Lai Trial, ignored rape although its incidence was documented. The result, according to former U.S. Ambassador-at-Large for War Crimes David J. Sheffer, was that "rape was lost in the mass of overall crimes. It became a passing reference in a tale of horror."

When the UN Security Council chartered establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1992, there was concern about how and even whether to prosecute rape because it was unclear whether it *was* a war crime. As established, the Statute of the Tribunal listed rape only under Article 5 of the statute for

What Women Lawyers Can Do

It is virtually certain that the global gains of the women's movement—especially in the latter third of the twentieth century—made possible the changes to war crimes law discussed in this article. Here are suggestions for those inspired to contribute to further progress:

Get involved in organizations that address these issues. Kelly Askin, who has worked in an advisory capacity at International Criminal Tribunal for the Former Yugoslavia (ICTY) and currently is compiling a report on the extent of sexual violence in Indonesia, cites organizations such as the Women's Caucus for Gender Justice and Human Rights Watch (see websites listed below) as having been "crucial in pressuring prosecutors to investigate and indict gender-related crimes."

For those interested in humanitarian law as a broader issue, look into working with nongovernmental organizations (NGOs), the United Nations, or the State Department.

Lobby for change. Judge Pat Wald, whose term at ICTY expired this fall, states that "women's groups have to be more active in lobbying their countries to nominate women [for judgeships at the Tribunals]. There won't be another election for four years . . . but it can be organized at that level."

Women lawyers, particularly those already working in international law, can be valuable in lobbying to effect continuing reform and in introducing new legislation that applies international human rights standards. Public awareness and policy regarding rape as a crime of war can be influenced, and women can help ensure the media also apply stringent reporting standards. For help in getting started, the Caucus for Gender Justice website is an excellent resource: www.iccwomen.org. A Web resource on war crimes, with links to almost 50 sites, is maintained by the University of Minnesota at www1.umn.edu/humanrts/links/intrib.html. For regular updates on human rights conditions around the world, see the Human Rights Watch website: www.hrw.org

Make your voice heard. Elizabeth Odio Benito, previously a justice on the ICTY and currently second vice president of the Republic of Costa Rica, cautioned in a 1999 interview with Sara Sharratt in *Women and Therapy* that women have not kept as close a watch on the work of the tribunals as they should. She advocates that when something important happens, women should "make it known worldwide. There must be an echo of women's voices so that each time these voices get louder and more difficult to ignore."

— A.M.

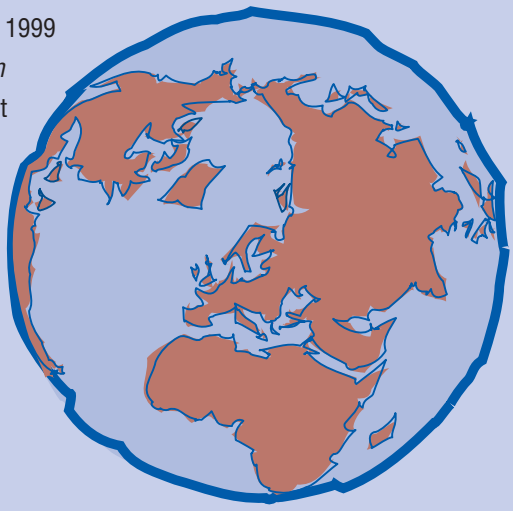

photo: AP Worldwide/Peter Dejong

Judge Patricia Wald

crimes against humanity, which meant the standard of proof would be met only in cases where rape was committed as part of a widespread or systematic attack against the civilian population. Countless other incidences of opportunistic rape would be excluded. In addition, because only rape was listed specifically, other forms of sexual violence commonly committed during armed conflict—such as sexual slavery, forced abortion, forced pregnancy, forced sterilization, and sexual mutilation—also were excluded.

In 1994 the Security Council enlarged its mandate and created the International Criminal Tribunal for Rwanda to address that country's horrific genocide and related crimes. Staff at both tribunals then immersed themselves in the serious work of determining how various forms of sexual violence could be prosecuted as "grave breaches" of the Geneva Conventions, the Customs and Laws of War, crimes against humanity, and/or genocide or incitement to genocide.

One of the major achievements of the tribunals' process, according to Judge Patricia Wald, the sitting U.S. judge at ICTY for the past two and a half years, is that the tribunals have been very liberal in construing what constitutes a sexual crime. "It goes beyond the laying on of hands," she explains. "In one case, Serbians made women disrobe and dance for them but did not actually touch them. We were able to interpret this as a crime against their integrity, their dignity.

"In some ways," she continues, "these rules are more liberal than their counterparts in U.S. trials. Our Ground Rule 96, for example, states evidence of previous sexual activity on the part of the victim is not admissible—it *cannot* be used against the victim. The issue of consent cannot minimize the charge—'consent' cannot be used against her." There is no question, Wald believes, that "in terms of international humanitarian

Comfort Women: No Satisfaction

As part of Japan's activity during World War II, the Japanese Imperial Army forced more than 200,000 Asian girls and young women into sexual slavery in rape centers throughout Asia—commonly referred to as "comfort stations," staffed by "comfort women." The majority of "comfort women" were between 11 and 20 years of age and were primarily of Korean ancestry, although many were also taken from China, Indonesia, and the Philippines. They were kidnapped; stripped of their names, heritage, language, and clothing; and "forcibly raped multiple times on a daily basis, subjected to severe physical abuse and to sexually transmitted diseases," according to a report issued by the Special Rapporteur of the UN Commission on Human Rights in 1998.

After denying for years the extent to which the Japanese military was directly involved in establishing and supervising the rape centers during the Second World War, the government finally recognized the extent of its complicity in 1993. In July 1995—the 50th anniversary of the end of the war—the Japanese government issued a public apology, in ambiguous language that referred to "the problem of the so-called 'wartime comfort women.'" The government acknowledged that this "problem" had left a scar "and seriously strained the honour and dignity of many women."

Nevertheless, the Japanese government has continued to deny legal liability for the atrocities, on grounds including that the "crime of slavery" does not accurately describe the situation of the "comfort stations." The Japanese also argue that acts of rape in armed conflict are not prohibited by the Hague Convention or by "customary norms of international law" in force at the time. In the past decade, Japanese courts have consistently denied claims made by former "comfort women," at both the trial and appellate levels.

In response to the silence into which the women's voices have fallen—and as violence continues against women in "military actions" in Cambodia, Guatemala, Haiti, Sierra Leone, East Timor, Algeria, and elsewhere—the Women's International War Crimes Tribunal was convened in December 2000, because legal redress has failed. The tribunal brought the trial to Japan's doorstep, hearing testimony from 75 survivors—now in or approaching their 70s—at a site separated from the Imperial Palace only by a moat. Outside the courtroom, government supporters mocked the women, carrying signs asserting that the women were voluntary prostitutes and jeering as they passed.

Presiding Judge Gabrielle Kirk McDonald, former president

law, the two tribunals (1) brought women's issues front and center, and (2) have tried to ensure that sexual crimes are perceived in and of themselves as war crimes, not as peripherals."

Yet, even in such a rarefied climate of judicial purpose, many of the early indictments themselves almost missed crimes of sexual violence in the counts charged. "The sole female judge at the Rwanda Tribunal was a member of the Trial Chamber rendering the judgment," explains Kelly Askin, fellow, Carr Center for Human Rights Policy, Harvard University, and legal consultant on international crimes. "The evidence was there, but because men and women have different experiences, what might be obvious to a female judge might not be so clear to a male." Then-Presiding Judge Gabrielle Kirk McDonald (recently honored with the ABA Commission on Women's 2001 Margaret Brent Award) saw incidents of similar cultural blindness while confirming indictments at ICTY: "Rape had not been charged. As soon as I looked at it, I called the prosecutor and asked him about it. He said, 'There is no support for it.'" McDonald went through the evidence and found "numerous statements referring to rape."

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In a 1999 interview, shortly after she left the Tribunal and returned to the United States, McDonald stated: "There is danger in running away from the issue . . . It can be very difficult [for men] to identify with women's issues because of their position of power . . . [and for women] because they want to pretend they are equal and they made it on their own. When we talk about sex crimes, sex and gender are important."

Judicial Hurdles

In its first year of operation, the ICTY had a total budget of just $276,000. Brenda Hollis, a former

of the International Criminal Tribunal for the former Yugoslavia, and a panel of international judges received evidence over a three-day period regarding responsibility by the state of Japan and nine high-level officials for establishing and maintaining the "comfort stations." Many of the women spoke aloud for the first time about repeated rapes, beatings, psychological torture, and forced abortions. The tribunal also heard evidence from historians and from former soldiers in the Imperial Army who admitted participating in the mass rapes.

The trial judgment, not legally binding but validating for the survivors and indicative of the new global climate concerning sex crimes throughout the world, found Emperor Hirohito responsible for the forced recruitment of the women.

Other efforts to address the crimes committed against "comfort women" have not yet resulted in tangible compensation for the victims. A class action suit, *Hwang Geum Joo v. Japan,* was filed in the U.S. District Court for the District of Columbia in September 2000 under the Alien Tort Claims Act on behalf of former "comfort women" from Taiwan, South Korea, and the Philippines. Consistent with its response to other suits, the Japanese government filed motions to dismiss, claiming the statute of limitations has expired and that Japan is protected by sovereign immunity.

In April 2001 the U.S. Justice Department filed a brief expressing the government's opinion that "the court does not have jurisdiction and may not hear the case." On October 4, 2001, District Court Judge Kennedy granted the motion to dismiss. Agnieszka Fryszman, a plaintiff's lawyer with the Washington, D.C., office of Cohen, Milstein, Hausfeld & Toll, says a notice of appeal has been filed.

On July 25, 2001, a resolution was introduced in Congress asking Japan to formally issue an "unambiguous apology" and pay reparations to the women. It further urged Japan to provide education for future generations on the issue of sexual slavery and to "publicly refute claims that the subjugation and enslavement of 'comfort women' never occurred." A congressional resolution is nonbinding and must be passed by a majority vote by both houses.

Michael Hausfeld, another plaintiff's attorney, says: "People tend to overlook the significance of this claim. What Japan did was traffic in human lives for purposes of making them slaves and subject to rape. Trafficking in women and children is one of the greatest current global offenses. There is a very contemporary relevance for this issue in our time."

— A.M.

military investigator and one of about 20 lawyers "loaned" to the Office of the Prosecutor in 1993 by the U.S. government, recalls that the big issue then was who got access to "the one computer, and who got the desk."

One of the biggest tasks Hollis and other judicial and prosecutorial representatives wrestled with—and which remains one of the highest hurdles to the tribunals' work—was establishing jurisdiction. In Rwanda, most of the victims and witnesses had come back to the scene of the devastation, which produced problems related to overwhelmed systems. In the territories of the former Yugoslavia, however, victims and witnesses—more than a million—had been forced out and sent to countries all over the world, and many accused had fled or shortly would flee to escape prosecution. This created problems with physically locating people and finding a budget to travel and interview them or return them to The Hague to testify or stand trial. It also strained relations among nations, which often balked at giving up the accused.

Both the Rwanda and Yugoslavia tribunals have received criticisms—how few trials have been completed, how long accused are detained before trial, how long the trials take. On the issue of jurisdiction, however, Hollis directs the criticism squarely back to the nations from which the criticism comes. "When the international community talks about the failures of the tribunals," she says, "they talk about their own failure." A lot of Western states—traditionally viewed as mainstays of UN operations—have not supported turning over the accused, Hollis notes. She cites in particular one instance involving the United States, which "took two or three years" to hand over an accused indicted by the ICTR.

If there is an indefensible weakness to the overall structure of the tribunals, it relates to this inability to enforce the terms to which countries that are parties to the UN have ostensibly agreed. As Hollis points out, the Charter allows for the tribunals to report noncooperation by member nations to the Security Council, but "if the noncooperation is by France or the U.S. or Great Britain, well . . . getting the Security Council to respond is hard even with a small state's violation. The real key to our success is our ability to get the international community actually to enforce the powers the statute gave us—this reflects the political will of the countries of the world."

The tribunals' budget has increased dramatically in the past eight years, with $96.5 million budgeted for 2001 for the ICTY alone. In fact, operating the two tribunals now takes up a full 10 percent of the

Table of Cases: 1997–Present

The work of the Tribunals has so far produced a number of landmark verdicts regarding prosecutions for rape—in the broad interpretations detailed elsewhere on this page—as a specific offense against humanity. Briefly summarized, each of the trials and its significance follows.

• ***Tadic.*** The first case tried at ICTY was against Dusan Tadic, a Serb with free and repeated access to major prison camps where he allegedly engaged in every crime against humanity except genocide. The case decided major jurisdictional issues for subsequent trials at ICTY and delineated the scope of most crimes within the tribunal's jurisdiction. (Judgment: May 7, 1997)

• ***Akayesu.*** This case represents the first time rape and acts of sexual violence were prosecuted equally with all other offenses. Jean-Paul Akayesu was mayor of Taba in central Rwanda during the 1994 genocide and was convicted of genocide, direct and public indictment to genocide, and crimes against humanity, including rape. The ICTR's decision held that, like torture, rape is used for intimidation, degradation, humiliation, discrimination, punishment, control, or destruction of the person. The decision also held that rape or sexual violence can be prosecuted as genocide if evidence shows it is accomplished with the intent to physically and/or psychologically destroy a group. (Sept. 2, 1998)

• ***Kambanda.*** Jean Kambanda was the prime minister of Rwanda during the genocide. This case marks the first time that a former head of government was convicted of genocide or crimes against humanity and confirmed that heads of states do not have immunity from criminal responsibility for certain international crimes. (Sept. 4, 1998)

• ***Celebici.*** This trial of four guards who held various positions of authority in Celebici prison camp was the first to accuse a defendant of breach of command responsibility. Zejnil Delalic, Hazim Delic, Esad Landzo, and Zdravko Mucic were convicted by judges in the ICTY under judgments that recognized rape as a violation of the Laws and Customs of War and as a basis of torture under the Geneva Conventions. The ICTY court held that it "considers the rape of any person to be a despicable act which strikes at the core of human dignity and physical integrity." (Nov. 16, 1998)

• ***Furundzija.*** The ICTY case against Anto Furundzija, a local commander of a special unit of the Bosnian Croat military police, is significant because it was the first to consist exclusively of rape charges and determined the elements of rape under international law. The Trial Chamber judgment determined these elements to be (1) sexual penetration, how-

UN budget. The increase in funding ensures that the tribunals' work continues, but cases still proceed at a glacial pace. The requirement for three judges to sit on each case in order to ensure impartiality requires a lot of time. Compounding this is the fact that each tribunal headquarters (the ICTY resides in The Hague, and the ICTR in Arunda, Tanzania) contains only three chambers, and they share an appeals chamber.

Despite the tribunals' increased resources, their results to date (especially the ICTR's) still fall short. During the Rwandan genocide more than 800,000 people were killed in a matter of two months (an article in the June 14, 2001, issue of *The Economist* calls it possibly the fastest-ever slaughter of such scale). Yet, only 63 people have been charged, and only 45 of these are in custody. Nine are on trial and 27 await trial. Only eight have been convicted. At one point more than 120,000 Rwandans were being held in detention camps with better living conditions than many survivors of the genocide. Many have been held so long without trial that they now must be released.

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Swift justice seems oxymoronic where trials must rely so intensively on the testimony of living witnesses, not on records that may speak for the dead. "In Nuremberg," Wald notes, "there was a clear paper trail of crimes—the Germans kept meticulous records of everything, even to their detriment. This is not so in Serbia and Bosnia. We have to count on witness testimony, and the average trial hears 100 witnesses."

The issue of the judges' limited ability to hear cases will be eased starting in fall 2001 when a complement of newly approved judges *ad litem* will join the judicial offices to assist the ICTY with its workload.

Women on the Bench

The new *ad litem* judges, a majority of whom are women, will serve to alleviate the gender imbalances found

ever slight, (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (2) by coercion or force or threat of force against the victim or a third person. It is particularly significant because Furundzija had not physically raped the woman himself but because he was a co-perpetuator of torture and an aider and abettor of rape because his presence, words, and omissions facilitated the sexual violence. (Dec. 10, 1998)

• ***Foca.*** Foca, a small Bosnian town southeast of Sarajevo, was overrun by Serbian forces in 1992. Three former Bosnian Serb soldiers (Dragoljub Kunarac, Radomir Kovac, and Zoran Vokovic) were found guilty of raping and torturing Muslim women and girls. Kunarac and Kovac also were found guilty of enslaving their captives, some as young as 12, abusing them sexually, forcing them into day labor, and renting and selling them to other soldiers. Although the men were not high-level commanders, the court stated that "lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be." (Feb. 22, 2001)

• ***Sister Maria Kisito & Sister Gertrude, Vincent Ntezimana, Alphonse Higaniro.*** In 1993 a Belgian law was passed giving the country's courts "universal jurisdiction" for crimes against humanity, no matter where they occurred. Four Rwandans who had fled the country to escape prosecution—two Catholic nuns, a university professor, and a businessman—were convicted of murder and involvement in the Rwandan genocide. They were sentenced to prison terms ranging from 12 to 20 years. (June 8, 2001)

• ***Hwang Jen Joo v. Japan.*** This class action suit against the government of Japan was filed in the Federal District Court for the District of Columbia on behalf of former World War II "comfort women" from Taiwan, Korea, China, and the Philippines. It is the first case in which women enslaved for sexual purposes have filed in the United States under the Alien Tort Claims Act. (Motion to dismiss granted Oct. 4, 2001; on appeal)

• ***Nyiramashuko.*** The indictment of Pauline Nyiramashuko by the ICTR marks the first prosecution of a woman for genocide. (Trial date has not been set.)

As of June 2001, a total of 20 accused have been publicly indicted by the ICTY for sexual offenses (indictments unrelated to violations of the laws or customs of war, genocide, and/or crimes against humanity).

—A.M.

among tribunal personnel. Because both the ICTY and ICTR are UN projects, it is easy to assume they reflect gender and global diversity—a delusion to which Wald gives short shrift: "That is *absolutely* not true! When I leave, there will be *one* woman [among 16 ICTY judges]. ICTR has had only one woman ever."

Wald, appointed to serve out the term of Presiding Judge Gabrielle Kirk McDonald (who left ICTY in 1999), served in the ICTY two years before withdrawing her name from reelection consideration last March. Individual countries propose nominees for tribunal judgeships every four years; the last elections were held in March 2001 and not one country nominated a woman. "Florence Mumba [of Zambia, the Rwanda tribunal vice president] ran for reelection and only narrowly made it," Wald reports.

When asked to explain such a dramatic lapse—in political correctness if nothing else—Wald says, "Nobody did their homework." Among others, she cites women's groups for not taking seriously enough their responsibilities to lobby countries. "The Old Boys still run the thing—even though the Chief Prosecutor [Carla Del Ponte] is a woman, it doesn't filter down to the lower echelons."

Clearly, the work of the tribunals, ad hoc tribunals in specific countries, Truth Commissions, and the like leaves much to be done. Patricia Viseur-Sellars, legal officer on gender issues at ICTY, chillingly sums up the emotional and psychological toll of those exposed only secondhand to the extent of military violence against civilian women: "When I started doing this work, I didn't go back to my gynecologist for two years."

Kelly Askin says it is always important for her to maintain focus on "the extraordinary progress achieved in the past few years. When I began this journey in 1993, there was debate as to whether rape was even a war crime." She continues, citing a litany of major trial accomplishments to date (see Table of Cases sidebar for details of each case.):

> Today it is firmly established that rape is not only a war crime in both international and noninternational armed conflicts but also sexual violence is an instrument of genocide (Akayesu), a crime against humanity (Akayesu, Celebici), and a means of torture (Furundzija, Celebici, Kunarac). Enslavement of women who are repeatedly raped constitutes sexual slavery (Kunarac). Forced nudity constitutes sexual violence (Akayesu, Kunarac). Forced oral and anal sex may constitute rape, and rape can be committed with a foreign object (Furundizja, Akayesu, Celebici). Men can be raped (Celebici). Being forced to watch someone raped may constitute torture (Celebici). Not only the physical perpetrator but others who aid, abet, or otherwise facilitate a rape by their presence, acts, or omissions may be convicted of rape (Furundzija, Akayesu, Celebici, Kunarac, Kayishema, Musema). The ICC Statute recognizes rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as justiciable before the court.

Askin:

"Today it is firmly established that rape is a war crime and sexual violence an instrument of genocide."

By no means are gender-related crimes being prosecuted adequately or in proportion to the crimes actually committed—and without constant pressure and lobbying by women's groups, the gender crime would again be ignored or marginalized. Nonetheless, it must be recognized that in no other time in recorded history has the progress been so vast, rapid, and dramatic.

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