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Rhonda Copelon

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WOMEN AND WAR CRIMES

RHONDA COPELON

I want to focus today on war crimes against women, and to discuss them in the larger context of violence against women. Today we are seeking to reconceptualize human rights in many ways. In particular, we are seeking to realize women's human rights that have been recognized but not enforced.¹

For example, in Haiti, there is a campaign of terror going on against the people, conducted by the opponents of Haitian President Jean-Bertrand Aristide.² Until very recently, the campaign of terror had been virtually invisible outside of Haiti.³ Part of this campaign has been the sexual assault and rape of women, a tactic which we have also seen in Bosnia.⁴

¹ See Gordon Barthos, *It's Long Past Time to Give U.N. Military Clout to Stop Such Horrors as Rwanda*, TORONTO STAR, June 18, 1994, at A2 (reporting that in fifty years of existence, United Nations rarely intervened to stop human rights violations); John Hay, *Rape and Torture by the State; Amnesty Reports Details Routine Outrages Against Women*, OTTAWA CITIZEN, Feb. 5, 1992, at A1 (reporting that even though United Nations had international covenants against rape and torture, rape was consistently tolerated in many countries and soldiers committing rape were usually not punished); Tamar Lewin, *The Balkan Rapes: A Legal Test for the Outraged*, N.Y. TIMES, Jan. 15, 1993, at B16 (noting that while rape by soldiers has long been practiced it has rarely been treated as war crime or human rights offense, and its use as form of warfare has been overlooked); Judy Mann, *Rape and War Crimes*, WASH. POST, Jan. 13, 1993, at D22 (reporting allegations that systematic use of rape in former Yugoslavia has been ignored and tolerated, and laws prohibiting such conduct have been ignored).

² *Haiti: Punishing Victims*, THE ECONOMIST, Feb. 8, 1992, at 36.

³ Compare Winston W. Wiley, *Haitians in Area Link Chaos to "Thugs,"* TELEGRAM & GAZETTE, Oct. 15, 1993, at A1 (reporting that early monitor teams saw no atrocities, though they heard stories of government-sponsored violence) with Barry Came, *Policing Haiti*, MACLEAN'S, Oct. 3, 1994, at 20, 20 (reporting that since Aristide was exiled in 1991, at least 3,000 Aristide supporters have been killed by military) and Lena H. Sun, *INS Expands Asylum Protection for Women; New Guidelines Recognize Rape, Domestic Violence May be a Form of Persecution*, WASH. POST, June 3, 1995, at A4 (noting that after Aristide was exiled, rape was systematically used by Haitian police against female Aristide supporters).

⁴ E.g., George Rodrigue, *Serbs Implementing Policy of Rape, Says U.N. Study; Muslim Women Are Main Victims*, DALLAS MORNING NEWS, Mar. 22, 1995, at A12. Serbian forces used rape as part of a developed strategy of ethnic cleansing which was planned, coordinated, and financed by top Serb leaders. *Id.* The purpose of the campaign was systematically to terrorize Muslims and Croats and drive them out of territory desired by Serbians. *Id.* As part of the plan women were gang raped—before, during, and after fighting. *Id.* Camps were even established for the sole purpose of inflicting sexual abuse on women. *Id.*

Recently, a United Nations observer in Haiti reported that there was a pattern to the use of sexual assault and rape against women. The majority of the sexual assaults were being committed against women who were aligned with the political opponents of the military authorities.⁵ This abuse had not shown up in any of the earlier U.N. or OAS reports because it happened to coincide with the ransacking of the homes of suspected Aristide supporters. Soldiers or paramilitaries would often go back to those homes and extort additional sexual favors by threatening the life or safety of the inhabitants. Such violence against women is systematic in Haiti right now.⁶

Until recently these kinds of events were virtually invisible to us. Now, stories about them are gradually beginning to creep into the media. What accounts for this invisibility? Five years ago this kind of violence was viewed as a personal problem and not as a human rights problem, similar to the way sexual harassment was viewed by society.⁷ Women were continually denied asylum because these abuses were deemed random and personal, not systemic.⁸ Political asylum in the United States is

⁵ Janet Reitman, *Political Repression by Rape Increasing in Haiti*, WASH. POST, July 22, 1994, at A10. In a span of five months, human rights monitors documented 77 cases of rape. *Id.* Fifty-five of them were against women who were activists themselves or closely related to male activists. *Id.* The Organization of American States ("OAS") reported approximately 10 to 20 cases of rape per week in other parts of Haiti. *Id.* It was estimated that five thousand women were raped by men aligned with the military. Leonard Green, *Violence to Women in Haiti Needs to be Addressed*, BOSTON HERALD, Oct. 31, 1994, at 8.

⁶ Michael Norton, *Gunmen Terrorize Supporters of Aristide in Attack at Slum*, AUSTIN AM. STATESMAN, May 24, 1994, at A4. Claudio Grossman, head of the OAS team, reported that the team received conclusive proof that women related to political opponents of the government were being raped by the Haitian police and paramilitary forces. *Id.* Women were raped not only in their homes, but also in public places, where they were told it was for the purpose of ensuring that they would never vote again. Judith Kelly, *Undoing the Wrong Against Haitian Women*, CHRISTIAN SCI. MONITOR, Dec. 2, 1994, at 20 (letter to the editor); *see also* Reitman, *supra* note 5, at A10 (detailing account of Haitian woman who was gang raped in her home by military forces because they could not find her boyfriend, who had been seen hanging picture of Aristide).

⁷ *See* Paul G. Engel, *Sexual Harassment; Victims Talk, Management Listens*, INDUS. WKLY., June 24, 1985, at 57, 57 (stating that first cases of sexual harassment were dismissed because judges saw them as personal matters). Sexual violence committed against women has long been seen as a private matter by both the courts and the immigration services, even when carried out by military forces. Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse*, N.Y. TIMES, May 27, 1995, at 1; Anne-Marie O'Connor, *U.S. Still Rarely Grants Political Asylum to Rape Victims*, ATLANTA J. & CONST., Jan. 2, 1994, at A11.

⁸ *See supra* note 7 and accompanying text; Dale Seamans, *Local Immigration Project Gets National Notice*, MASS. LAW. WKLY., June 20, 1994, at 35, 35 (noting that even politically motivated violence against women was seen as private, resulting in denial of asylum). It was not until late in 1994 that the United States, prompted in large part by the mass incidents of rape in Bosnia, reevaluated its guidelines and decided that politically motivated rape was a ground for asylum. Melita M. Garza, *Rape Becomes a Reason to Grant Asylum*, CHI. TRIB., Dec. 28, 1994,

available to those persecuted on the basis of "race, religion, nationality, membership in a particular social group, or political opinion."⁹ Women who were the victims of sexual assault did not qualify. At best, their abuse was seen as merely incidental to the political repression.

The use of rape as a method of torture was similarly viewed, despite the testimony of women that rape is one of the most effective forms of torture.¹⁰ The year 1991 marked a breakthrough with respect to attitudes on this issue. Amnesty International published a document called *Women on the Frontline*, characterizing the rape of women in custody and the rape of women by government officials as forms of torture.¹¹

While this characterization was an important breakthrough, it was only a recognition of the tip of the iceberg. Women continue to suffer from other kinds of violence, most often the privately inflicted, domestic kinds of violence which are endemic in societies throughout the world. Despite the fact that this domestic sort of violence may claim more lives than a brutal dictatorship, it is still not widely viewed as a human rights concern. Women are thus forced to fight both the brutalities inflicted on them by the dictatorships in their countries and the gender violence that confronts them in their homes and workplaces.¹²

at N1; Judith Gaines, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13.

⁹ 8 U.S.C. § 1101(42) (1988).

¹⁰ See Endya Eames, *Rape, Torture a Way of Life for Women Around the World*, U.S.A. TODAY, Apr. 15, 1991, at A13 (noting that rape victims in third world countries may also be disowned or killed by their families); Lori Heise, *When Women Are Prey; Around the World, Rape Is Commonplace—and the Victims Can't Fight Back*, WASH. POST, Dec. 8, 1991, at C1 (reporting that in addition to trauma of rape, many women are declared outcasts by their community).

¹¹ See AMNESTY INTERNATIONAL, *WOMEN IN THE FRONTLINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 18* (1991) [hereinafter AMNESTY INTERNATIONAL]. Amnesty International described how government officials torture women by raping them until they divulge information concerning political activists or other "subversive" characters. *Id.* at 18-19. Most of the rapes occur while the women are in police or government custody, but there have also been numerous reports from women who have been raped in their own homes. *Id.* at 22. Amnesty International asserted that these rapes violated a woman's right not to be tortured. *Id.* at 18.

¹² See AMNESTY INTERNATIONAL, *supra* note 11, at 19-20 (describing rapes committed by police officers with impunity); SUSAN BROWN MILLER, *AGAINST OUR WILL, WOMEN AND RAPE 270* (1975) (describing acquittal of two police officers charged with raping two women while on duty); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L. L.J. 507, 508 (1993) (describing how women fail to report domestic violence due to inadequate legal recourse); Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 7 (1994) ("Whether or not these practices are formally illegal - and it is easy to say with complacency that rape, prostitution, pornography, and sexual murder are illegal - they are widely permitted under both domestic and international law.").

It has been difficult to achieve recognition that violence against women of all types is a human rights issue. People are reluctant to equate violence against women with torture and other gross violations of human rights. After all, violence against women has traditionally been viewed as a private matter, and not as a human rights or civil rights issue.¹³ Women were thus challenged to confront this public/private dichotomy, which exists in both domestic and international law and which helps to shield those who commit violence against women.

As a result of our efforts, the historic reluctance to discuss such "private" conduct in the context of international law is beginning to give way. The Amnesty International document is evidence of this. This reluctance has given way largely because there is a powerful and global sense among women that these dichotomies are false and are a method of protecting gender violence from sanctions.

Having achieved this breakthrough, the global campaign confronting violence against women, which is a small part of a global campaign for women's human rights, converged on Vienna. The conference resulted in the recognition, for the first time in international documents, of gender violence as a human rights violation.¹⁴

Historically, the incidence of rape in war has drawn only occasional and short-lived attention. Most of the time such rapes are invisible.¹⁵ Even when the issue is addressed, it is often a part of the competing diplomacies of war. Rape is seen as an incident to conquest. Nations use rape to destroy the people against whom they are fighting.¹⁶ Thus, although rape in war has been recognized, it has rarely, if ever, been

¹³ See Culliton, *supra* note 12, at 516-21 (discussing how rape and other privately inflicted domestic violence committed by husbands and boyfriends goes unpunished in Brazil, Chile, and United States); Celina Romany, *Women as Aliens: A Feminists Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 105 (1993) (discussing family privacy and women's human rights as competing state interests).

¹⁴ The Vienna Declaration recognized that violence against women, in both public and private life, violates women's human rights and must be eliminated. See U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc. A/Conf. 157/24 (Part I) (1993), *reprinted in*, 32 I.L.M. 1661, 1678-80 (1993). The non-exclusive list of rights violations includes systematic rape, sexual slavery, and forced pregnancy. *Id.* at 1678.

¹⁵ See generally Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845 (1995) (listing numerous wartime rapes in several different countries that have not been prosecuted).

¹⁶ See BROWNMILLER, *supra* note 12, at 31-113 (describing how advancing armies used rape to terrorize conquered civilians during World War I, World War II, and Vietnam War); MacKinnon, *supra* note 12, at 8-9 (describing genocidal rape as tool for "political hegemony"); Tompkins, *supra* note 15, at 859-63 (describing how rape is used to express "total" victory, to exact vengeance upon conquered peoples and as propaganda technique).

prosecuted.¹⁷ This is true despite the fact that rape is generally recognized in local law as a crime. It was against this backdrop that we in the women's movement began to address the issue of rape as a war crime. We were confronted with several issues. The first question concerned the Geneva Conventions, which are the humanitarian laws that govern the conduct of war.¹⁸ The laws of war have traditionally prohibited rape.¹⁹ Despite this prohibition, the question remained, was rape a "grave breach?" Under the Geneva Conventions, a grave breach is a war crime of the most serious dimension.²⁰

Rape, however, was not traditionally treated as a grave breach but as a crime against dignity and honor.²¹ Yet rape is a crime of violence. What we have to overcome, and are overcoming, I think, is the perception that rape is not a crime of violence. It is very critical in that battle that we analogize rape and torture. Yet I am not satisfied merely with calling rape cruel, inhumane, and degrading treatment. Rape is all that, but it is also something more. I think it is very important to recognize that the violence done to women to be recognized as among the grossest violations of human rights and humanitarian law. Rape needs to be condemned with the same fervor as are the war crimes which happen routinely to men.

The treatment of rape as a war crime is currently at issue. There is

¹⁷ See, e.g., Tompkins, *supra* note 15, at 847-52 (detailing non-prosecution of wartime rape).

¹⁸ See LAURI HANNIKAINEN ET AL., IMPLEMENTING HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 1 (1992). Humanitarian laws of war are composed of the international norms applicable during international and non-international armed conflicts. *Id.* The scope of this law encompasses human rights law and the more traditional concept of the law of war. *Id.*; see, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; see also HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 2 (1990) ("[T]here is a seeming paradox which must be considered in there being laws, and certainly 'humanitarian' laws, of armed conflict. . .").

¹⁹ See, e.g., Fourth Geneva Convention, *supra* note 18, art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391 (1977).

²⁰ Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 249 (1994). A "grave breach" is a crime of the most serious dimension as established under the Geneva Convention. *Id.*; see Fourth Geneva Convention, *supra* note 18, art. 147 (declaring that "grave breaches" involve "wilful killing, torture or inhuman treatment . . . , wilfully causing great suffering or serious injury to body or health").

²¹ Fourth Geneva Convention, *supra* note 18, art. 27 (declaring that "[w]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault"); see also HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 240 (1986).

an International War Crimes Tribunal ("Tribunal")²² which has been established to prosecute war crimes in the former Yugoslavia. The Tribunal has not listed rape as a war crime. That issue, however, will surely be raised before that Court, given what has transpired in the Balkans.²³

Another question that arose was how to regard the prevalence of rape in Bosnia. Should the genocide there be distinguished from the gender crimes, the rapes? I began to worry that people were drawing a distinction between "genocide rape" and other types of rape.²⁴ This troubled me because the traditional definition of crimes against humanity has included only crimes motivated by political, religious, racial, and ethnic reasons.²⁵

²² See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Human Rights Law Committed in the Territory of the Former Yugoslavia Since 1991, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute], reprinted in Yugoslavia through Documents: From Its Creation to Its Dissolution, at 967-74 (Shevana Trifunovska ed., 1994) [hereinafter Yugoslavia through Documents]; see also Res. 808, U.N. SCOR. 48th Sess., 3715th mtg. (1993), reprinted in Yugoslavia through Documents, *supra*, at 842-43 (declaring "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991").

The tribunal is the first international war crimes tribunal established since the Nuremburg and Tokyo Tribunals were held after the Second World War. Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171, 172 (1994). The creation of an international tribunal is remarkable because it is the first to give special attention to gender based crimes. *Id.* at 173. The tribunal has the power to prosecute persons accused of four different classes of crime: (1) grave breaches as established by the Geneva Conventions of 1949, Tribunal Statute, *supra*, at art. 2; (2) violations of the laws or customs of war, *id.* at art. 3; (3) genocide, *id.* at art. 4; and (4) crimes against humanity, *id.* at art. 5. The only article which specifically mentions rape is the article concerning crimes against humanity. See generally Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994) (noting that of four classes of international crimes, rape is expressly named only as crime against humanity).

²³ The focus on violence against women in the Tribunal was brought about in large part because of the "persistent efforts of survivors and their advocates, as well as the growing global campaign for women's human rights, which has made violence against women a major international issue." Green, *supra* note 22, at 173.

²⁴ See, e.g., MacKinnon, *supra* note 12, at 8 (finding that genocidal rapes are "to everyday rape what the Holocaust was to everyday anti-Semitism"); Copelon, *supra* note 20, at 259 ("Genocidal rape often involves gang rapes, is outrageously brutal, and is done in public or in front of children or partners.").

²⁵ See Copelon, *supra* note 20, at 257 (finding that "crimes against humanity" were first "formally recognized in the Charter and Judgement of the Nuremburg Tribunal; they do not depend on adherence to a treaty, and they, like grave breaches, give rise to universal jurisdiction"). The London Charter, which established the Nuremburg Tribunal, defined crimes against humanity as "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 . . ." Agreement for the Prosecution and Punishment of the Major

Gender is invisible in these definitions. Why is it that crimes against humanity cannot be based upon gender?

What we sought to argue and insert into this debate is that you cannot treat genocidal rape as special. In terms of its impact on the women affected, there is no difference between genocidal rape and the most common form of rape in war, which is rape as booty, exemplified by the Japanese comfort women. These women were not kidnapped and hauled off into sexual slavery in order to diminish or destroy their ethnicity; they were hauled off to be the prostitutes for the troops.²⁶ The Japanese industrialized that practice in the Second World War, kidnapping thousands of Korean, Chinese, Philippino, and Dutch women to serve the sexual needs of their soldiers. Women were used as a way of keeping the soldiers going, as a reward to them. Why is that not a crime against humanity based upon gender?

Simply put, what is going on in the many places in the world where women are being raped, whether it be for booty, whether it be to move people off their land, whether it be for genocide, whether it be to terrorize the population, whether it be random or systematic, it is of comparable terribleness. The gender dimension of these crimes must be recognized. That is why distinctions between genocidal rape and other types of rape are wrong. By treating genocidal rape differently, one is in effect saying that all these other terrible abuses of women can go forward without comparable sanction.

The understanding that rape in war is a crime against humanity has to have an impact on the treatment of gender violence as a human rights violation and on how we see other violence against women in everyday life. It also has to have an impact on how we look at the battered woman,

War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, pt. II, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

Crimes against humanity are crimes against a civilian population carried out in connection with either violations of the laws or customs of war or the "planning, preparation, initiation or waging of a *war of aggression* or a war in violation of international treaties, agreements or assurances." HUMAN RIGHTS IN THE WORLD COMMUNITY 171 (Richard Pierre Claude & Burns H. Weston, eds. 1989); see Paust, *supra* note 22, at 518.

²⁶ See BROWNMILLER, *supra* note 12, at 59. During the International Military Tribunal for the Far East, witness after witness told stories of girls being "dragged off by gangs of four or five men in uniform; abducted women forced to wash clothes for the Army units by day and to 'service' as many as fifteen to forty men at night; women forced to perform sex shows for troops at play." *Id.* "Concentration-camp rape and institutionalized camp brothels in which women were held against their will for the pleasure of the soldiery 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." *Id.* at 63.

whether we see her as a victim of torture or as someone who has brought the violence upon herself.²⁷ When we start to understand violence against women, not as a family or social problem, but as a profound problem of human rights, we begin to change the role of gender in society.

For example, in the United States we are debating in Congress whether or not there should be a civil rights action for battered women.²⁸ The real issue in this debate is whether this abuse is a violation of women's basic human right to be free from violence. I think the right to be free from abuse ought to be viewed as a civil right regardless of who inflicts the violence, and regardless of that person's reason for doing so.

²⁷ Compare Romany, *supra* note 13, at 102 (explaining that battered women have been characterized as being responsible "for the[ir] abuse and thus exert[ing] some kind of agency over the cycle of violence") with Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994) (arguing that such violence must be understood as torture).

²⁸ See, e.g., 139 CONG. REC. H10349, at H10363 (stating that "[t]he versions of the Violence Against Women Act that are under consideration in the House . . . and the Senate . . . both contain a civil rights provision . . . [which] would declare that crimes of violence motivated by gender are discriminatory and violate the victim's civil rights under federal law") (statement of Sally Goldfarb, Senior Staff Attorney of the NOW Legal Defense and Education Fund).