

Just War Theory, Crimes of War, and War Rape

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ABSTRACT: Recent decades have witnessed rape and sexual violence used on such a massive scale and often in a widespread and systematic program that the international community has had to recognize that rape and sexual violence are not just war crimes but might be crimes against humanity or even genocide. I suggest that just war theory, while limited in its applicability to mass rape, might nevertheless offer some framework for making the determination of when sexual violence and rape constitute war crimes, crimes against humanity, or genocide. In addition, just war theory can provide the normative justification individual soldiers need to resist orders and actions that demonstrate egregious moral breakdown as found in instances of mass rape and systematic use of sexual violence, and just war criteria demonstrate that the use of rape and sexual violence in war time can never be legitimated, especially in the case of prisoner interrogation.

Rape during war has traditionally been classified as a war crime. In recent years, however, the international community has seen not only rape on a mass scale used as a strategy and objective of war efforts, but also sexual violence employed on an almost daily basis in detention facilities and prisoner of war holding sites. Some steps have been taken to confront the massive scale that rape sometimes takes during conflict situations. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were the first to add rape to the list of “crimes against humanity.” The Rwanda tribunal also added “forced pregnancy.” Rape on a mass scale has become recognized as a gross violation of human rights but other forms of widespread and systematic violence and individual rapes have not received the same attention within the human rights framework. Scholars have also suggested that mass rape is not just a means to genocide but a form of genocide itself.¹ The crisis in the Darfur Region of Sudan was called “genocide” by the U.S. Congress but the United Nations opted against labeling it genocide.² While some of the reasons for not calling a mass rape campaign “genocide” or for resisting the charge that

sexual violence is “widespread and systematic” include the requisite political and humanitarian response that would be mandated by applying these labels, there is also quite a lot of controversy over the normative determination of “crimes against humanity” and “genocide.” While genocide is a crime against humanity, not all crimes against humanity rise to the level of genocide. This article suggests that just war theory, while limited in its applicability to situations of mass rape, might nevertheless offer some framework for making the determination of war crime, crime against humanity, or genocide at least for moral theorists. Just war theory is useful to an analysis of sexual violence and rape in war in three important ways: (1) just war theory provides the normative justification individual soldiers need to resist orders and actions that demonstrate egregious moral breakdown as found in instances of mass rape and systematic sexual violence; (2) just war theory aids in the classification of rape and sexual violence during war as war crime, crime against humanity, and form of genocide; and (3) just war criteria demonstrate that the use of rape and sexual violence can never be legitimated.³

When sexual violence or rape occurs during war it takes on a political meaning that is absent from peacetime rapes.⁴ The political meaning can vary but because rape in war is perpetrated by a member of the military—a representative of the state—it is thus perceived as or actually is an act of the state. This is true regardless of whether the rape or sexual violence is an individual offence or a mass rape campaign.

For the purposes of this article, I confine the discussion to rape and sexual violence of enemy civilians, combatants, and prisoners of war. Rape of fellow combatants and civilians by military personnel during combat falls outside of the category of war rape because such rapes have a different political meaning given the absence of explicit enmity.⁵ Whereas rape might be broadly defined as forced, nonconsensual sex, sexual violence covers a range of violations that destroy in whole or in part the bodily integrity of the victim.⁶ Individual rape, rape of a single person, might be rape by one soldier or rape by multiple soldiers (i.e., gang rape). Mass rape or mass rape campaigns are often part of a larger war effort or an escalation of violence within a war, but at times appear as the very purpose of the war itself. Often mass rape is sanctioned by the state, ruling party, dominant ethnic group, or commanding military officer but this should not be used as a necessary condition to the category of mass rape. Of course, it is important to remember that mass rape campaigns are constituted by individual rapes. This fact becomes particularly important in the allocation of blame for war crimes and crimes against humanity.

War is the temporary forfeiture of certain rights and the violation of others, ostensibly in order to bring about some other end or goal. Individual combatants suspend their right to life and liberty during war but civilians of warring states or ethnic groups never give up these rights. Rape and sexual violence, however, violate a right to bodily integrity and a right not to be tortured that is never suspended during wartime. In spite of this, however, during the mass rape campaigns of recent history, states, ruling parties, or commanding officers have given orders to rape or failed to do anything to stop the mass rapes occurring under their watch. Moreover, mounting evidence from U.S. detention facilities

in Iraq, Afghanistan, and Guantánamo Bay points to not only a failure to act on the part of high ranking officers, but a long-standing program of sexual violence used in interrogation of prisoners and detainees.⁷ Clearly those in command are culpable for the atrocities perpetrated under their rule but individuals are also morally required to evaluate commands and may be obligated to disobey an order if that order is contrary to justice. “The task,” according to Robin May Schott, “is to understand the breakdown of *practical* morality, how people commit acts that are contrary to what they themselves initially believe is right.”⁸ Of course, a normative theory is necessary to determine whether any particular order or action is contrary to justice and to provide the normative justification for individual resistance to atrocity.

Just war theory, which already enjoys a wide international acceptance (albeit not a universal approval or even a uniform interpretation), can serve as an instrument, in addition to human rights law, to convince individual combatants not to rape. Individuals who appeal to just war theory find therein the tools necessary to appeal to conscience and take a stance against unjust orders and actions thereby enabling them some means to resist the moral breakdown evident among their peers in a mass rape campaign and in other uses of widespread and systematic sexual violence. Schott identifies this need saying, “It may be that procedures of normative justification can provide individuals with moral and psychological supports in the face of social breakdown. In this case, however, the value of justification is not in the theorizing alone but in the role of theory in strengthening an individual’s resistance to moral dissolution—that is, in its practical benefits.”⁹

The application of just war principles to the specific case of war rape further aids in the classification of various forms of sexual violence during war as either war crimes, crimes against humanity, or genocide. Individual rapes and isolated instances of sexual violence are generally understood as uncontroversially war crimes. The first person to be prosecuted for rape by an international military tribunal was Sir Peter von Hagenbach in 1474.¹⁰ His real crime, however, was not allowing his men to rape but rather failing to tell the city in which the rapes occurred that it was occupied. Occupation and rape went hand in hand. The father of international law, Hugo Grotius, includes a prohibition (or at least a caution) against rape in his analysis of the conduct of war in 1625.¹¹

More recently, the Fourth Geneva Convention of 1949, article 27, states that “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Article 47 calls these violations “war crimes.”¹² The Geneva Convention also specifies clear sanctions that protect victims in both internal (Protocol II) and international armed conflicts (Protocol I). Prisoners of war are protected against “physical mutilation” and “acts of violence or intimidation and against insults and public curiosity” under Article 13 of the Geneva Convention relative to the Treatment of Prisoners of War and Article 14 protects the person and honor of prisoners of war.¹³ While not explicit, these articles would certainly protect prisoners against sexual violence as well as photos of that violence aimed at humiliating or otherwise degrading the detainees and prisoners.

The U.S. Uniform Code of Military Justice explicitly names rape as a criminal act under Section 920, Article 120 "Rape and Carnal Knowledge." Accordingly, "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."¹⁴ Furthermore, the code cites "Penetration, however slight, [as] sufficient to complete" the offense of rape.¹⁵

Classification of mass rape campaigns is more complex. Mass rape campaigns are comprised of individual rapes but the campaign itself constitutes a human rights violation on a massive scale and thus may constitute either a crime against humanity or genocide. International law appeals to the definitions of "war crimes" and "crimes against humanity" (as well as "crimes against the peace") found in Principle VI of the Principles of the Nuremberg Tribunal (1950). Principle VI, however, also does not explicitly name rape:

War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.¹⁶

"Genocide," from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, is understood as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.¹⁷

Crimes against humanity can occur during war time or peacetime and must be "widespread and systematic" according to the multiple international documents that have defined the term since Nuremberg. Moreover, as is evident from the definitions above, when war crimes themselves become widespread and systematic then they likely become crimes against humanity.

Just war principles, which scrutinize the intent, means, and ends of war, can facilitate greater understanding of the distinctions between human rights violations and war crimes during war. It is, however, important to note that genocide as a human rights violation need not occur during war though often that is the case. Further, many contemporary examples of mass rape were within states rather than between states. The tools of human rights and just war theory are both designed for conflict between states and their limitations for intrastate conflicts are

readily apparent.¹⁸ That being said, however, just war theory can still function as a moral tool in practical situations within states and for soldiers confronted with an order or situation that would violate human conscience.

JUS IN BELLO PRINCIPLES APPLIED TO WAR RAPE AND SEXUAL VIOLENCE

One of the tasks of the individual combatant is to make a clear distinction between enemy combatants and civilians from the opposing side. Modern warfare complicates this as the line between combatant and noncombatant has blurred considerably.

When combatants rape or otherwise sexually harm civilians, they violate the just war criterion of discrimination. Discrimination here means that noncombatants are not to be involved in the war or subject to its attacks. War is between states, not individuals. This being the case, only justly appointed representatives of the state ought to be considered combatants. Rape targets noncombatants regardless of whether it is used as a means of warfare or as an outlet of tension and it does so solely on the basis of their gender and reproductive ability.¹⁹ This is a direct violation of the *jus in bello* principle of discrimination. In both the case of mass rape and the case of individual rapes, rape may be seen as the paradigm example of misplaced violence insofar as it usually targets noncombatants (women and children), demoralizes families and communities, and is often accompanied by military denial of its significance in the overall war effort.

Similarly, prisoners of war are protected by the *jus in bello* principle of discrimination. The Third Geneva Convention specifies that although prisoners of war are enemy combatants they are to be treated humanely. The International Committee of the Red Cross administers and enforces this agreement. Rape and other forms of sexual torture violate more than just the rights of prisoners. Rape is a violation of the body as well as a violation of rights.²⁰ Part II, Article 14 of the Geneva Convention states that "Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men."²¹ Male prisoners of war, as we have seen, are similarly protected against sexual violence though, again, this is not explicitly mentioned in the Geneva Convention. While there may be a temptation to argue that torture may obtain useful information that could save lives or bring a swift end to the war, such an argument rests on the overt neglect of an individuals' rights. Human rights and just war theory cannot be swayed by utilitarian reasoning. Moreover, the analysis of rape must extend beyond rights-based analysis. As the discussion of proportionality below demonstrates, rape must be seen as a crime against the body and culture of the victim as well as a violation of rights.

This principle of discrimination and its application to rape and sexual violence has been widely acknowledged in international law though not rigorously enforced. Combatants who are adequately trained and who know that every rape will be prosecuted and punished are less likely to commit rapes during war. Commanders

must give clear orders and hold those under their command accountable for any violations, especially violations that involve sexual assault.

Rape in war is also a violation of proportionality. Proportionality *in* war (as opposed to proportionality *of* war) measures each act or strategy in an effort to discern whether the act causes more harm than it aims to prevent. A particular act of war that causes a great deal of harm while only bringing about a small amount of good, or even no good effect at all, cannot be justified according to the principle of proportionality in war. Of course, as Claudia Card points out, war itself distorts assessments of proportional violence. This distortion is particularly apparent in the case of rape. In both peacetime rape and wartime rape, victims' accounts vary sometimes quite dramatically from alleged perpetrator's accounts. This phenomenon is further complicated by the fact that rape itself is difficult to define. As Card elaborates, "Apart from the gap between the perceptions of perpetrator and victim, the magnitude of what soldiers and officers learn to regard as ordinary, if not justified, in wartime may also be a factor. War is, after all, the deliberate infliction of intolerable harm."²² As My Lai and Abu Ghraib illustrate, soldiers charged with an ambiguous task, whether it be to wipe out the Viet Cong or to obtain information from terrorists, might misjudge what tools are appropriate to use. If applied consistently and accurately, however, the principle of proportionality should ensure that rape and other forms of sexual violence are never employed as a means of warfare or interrogation. The harm of rape or other forms of sexual violence always extends beyond any possible benefit. The most obvious harm of rape and sexual violence is the violation of the right to bodily integrity of the victim. But other harms also accrue when rape is used against an individual or a group of people.

Rape of enemy civilians may be exacerbated if the victim's home community responds by rejecting her as blameworthy, unmarried, or otherwise tainted. Communities often ostracize or alienate rape victims. In Bangladesh, for instance, women who found themselves pregnant through rape, more often than not wanted nothing to do with the children knowing that they would have the features of the Punjabi rapists. The victim/mother would never be accepted into Bengali culture again.²³ Such responses have led some women to suicide while others live a lifetime of recalled memories, physical pain, psychological and emotional trauma, and likely socio-economic hardship.²⁴ This example shows that rape might violate the principle of discrimination as well as the principle of proportionality insofar as it aims at destroying the morale of not just the opposing force but the entire nation. In addition, rape used as a tool or weapon in war violates proportionality when it is used systematically or massively. The violence is both misplaced (discrimination) and grossly overdone.

In a similar vein, the American Civil Liberties Union (ACLU) and the Associated Press, acting under the Freedom of Information Act, have filed for release of documents related to the detention of prisoners held at Abu Ghraib in Iraq, Guantánamo Bay, and in Afghanistan. The ACLU charges that the sexual abuse of prisoners at Abu Ghraib is not only widespread and systematic but "part of a larger program to abuse detainees that was put in place by high ranking officials."²⁵ Sexual abuse of prisoners not only violates the Geneva Convention, it is a clear violation of the moral principle of proportionality in just war theory.

Rape during war situations may also violate proportionality in another way. According to some feminists, rape during war is the extreme of the machismo that the military requires, fosters, and celebrates. According to Betty Reardon, men are conditioned to use violence in the form of competition amongst “equals” and as a means of keeping women as inferiors subordinate.²⁶ Similarly, in her groundbreaking book *Against our Will*, Susan Brownmiller argues that war affirms what men already know, i.e., that the world is man’s:

War provides men with the perfect psychologic backdrop to give vent to their contempt for women. The very maleness of the military—the brute power of weaponry exclusive to their hands, the spiritual bonding of men at arms, the manly discipline of orders given and orders obeyed, the simple logic of the hierarchical command—confirms for men what they long suspect, that women are peripheral, irrelevant to the world that counts, passive spectators to the action in the center ring.²⁷

Three possible objections to this strong account of rape as a violation of the *jus in bello* principle of proportionality may be identified. The first is that soldiers are charged with obedience to commanders. This objection mistakenly assumes that soldiers are not themselves responsible for the actions that they have been commanded to carry out. On the contrary, soldiers are in fact morally required to disobey unlawful orders. As Michael Walzer specifies, there are situations wherein the common soldier would recognize certain acts as unlawful. Walzer’s example is the My Lai massacre. There was not “heat of battle” or duress at My Lai but some soldiers argued that they were merely following orders (those who dissented clearly recognized the unlawfulness of the actions). The orders were at best ambiguous, as Walzer explains, “[Captian Medina, the company commander] is quoted as having told his company to leave nothing living behind them and to take no prisoners: ‘They’re all V.C.’s, now go and get them.’”²⁸ Clearly, Medina is at fault here for not giving clear and just orders, but the individual soldiers who elected to rape their victims before killing them exercised enough thought to make their own decisions to act immorally and contrary not only to the principles of just war but to common standards of decency and humanity.

The second possible objection to the strong account of proportionality is that duress might excuse gross misconduct in some situations. Walzer notes that common soldiers have been excused for serious crimes committed against civilians on the basis of duress. However, the nature of rape makes it particularly difficult to accept duress as circumstance enough to excuse rape. There may be a culture of sexual violence in the military that makes it difficult for individual soldiers to resist—Brownmiller’s “ideology of rape”—and even more difficult for victims to attain justice, but that culture does not constitute the conditions understood by duress. Duress in war arises from the heat of military battle. The enmity and hostility, not the peer pressure from one’s fellow combatants, create the conditions that might compel a soldier to act in an unlawful manner during war.

Finally, ignorance has been used as a defense for the crime of rape in war. When soldiers unwittingly kill innocent civilians, we blame their commanders who should have been in a position to know the possible outcome of actions ordered. Traditionally, “Ignorance,” Walzer says, “is the common lot of the common soldier, and it makes an easy defense, especially when calculations of usefulness

and proportionality are called for."²⁹ But the same cannot be said for rape. A soldier might claim that he was unaware that his victim was a noncombatant but that does not excuse the use of rape as a means within the conflict situation. Further, a soldier might claim that he was unaware that his actions of sexual aggression constituted rape. However, one would be hard pressed to demonstrate that consent for sexual intercourse with a noncombatant from the opposing side was justly obtained. The very nature of the enmity destroys the possibility of uncoerced consent.

Walzer adds a third principle to *jus in bello*. Combatants ought not to use any means of combat that grossly violates humankind's moral conscience. Rape, especially mass rape, does just that. Individual rapes also violate standard conceptions of morality but are somewhat more complicated because of the ambiguity that attaches to rape in this form. There is no accepted definition of rape although we might offer something like "coerced sexual intercourse" as a definition, but that too remains ambiguous. Some might consider economic need a form of coercion while others claim only physical force can serve as the measure of coercion in rape cases. This problem leaves the military quite a bit of leeway in its handling of rape cases and, unfortunately, that has provided an excuse for not prosecuting or punishing some rapists.³⁰

The question, then, is when is rape and sexual violence that is not part of a mass rape campaign a war crime and when is it part of a crime against humanity? As I have suggested, the principles of just war theory provide some useful guidance in that determination. Isolated or individual acts of sexual violence that target enemy civilians violate the *jus in bello* principles of discrimination and proportionality; and insofar as they truly are acts of individuals or small groups are likely best treated as war crimes. When these acts form part of a pattern that is more widespread and systematic, that is ordered or not hindered by superior officers, and that grossly violates humane treatment of prisoners or enemy combatants, then serious consideration ought to be given to treating the violations as crimes against humanity. This clearly has far-reaching implications not only for assessing past instances of injustice in war time situations but also for determining what sort of response the international community ought to take toward such events as the abuses by U.S. military personnel at Abu Ghraib.

JUS AD BELLUM PRINCIPLES APPLIED TO WAR RAPE

The ICTY and ICTR have revealed copious evidence of military and government officials encouraging or at times even ordering soldiers to rape. In some cases, the aim was to forcibly impregnate women thereby preventing possible births within an ethnic group and in other cases women were raped until death. In other words, rape was used as an instrument in genocidal campaigns aimed at destroying an ethnic group. Rape was also used with other forms of intimidation to forcibly remove people from a particular area in campaigns of "ethnic cleansing."³¹ Elsewhere I have argued that in some cases rape creates a war within a war that targets women on the basis of gender.³² But women are not the only targets of rape; in most of the examples of mass rape in recent decades, men and children

of both sexes also became victims. Moreover, rape that becomes the purpose of war clearly violates human rights on a massive scale. But the United Nations and the international community more generally have had a difficult time clearly and uncontroversially identifying mass rape as a crime against humanity or a crime of genocide in part because many of the recent campaigns have occurred within states rather than between states but human rights law is designed for the latter and in part because genocide is a notoriously difficult thing to prove. War through rape violates the principles of *jus ad bellum*. Any war with rape as its purpose would fail to meet the criteria of a just war. While this fact may itself be unsurprising, demonstrating how a war of rape violates each of the *jus ad bellum* principles could aid in more efficacious identification of mass rape campaigns as crimes against humanity or genocide. In other words, just war theory might be employed in instances wherein the international community is called upon to determine the extent of a human rights violation that would in turn activate already established international law and international criminal tribunals for those cases. The key factors would be the cause, authority, and intention of the rape campaign. If evidence emerges to demonstrate that rape is being used under the authority of the aggressive power with the intention of displacing or destroying an entire ethnic group, then rape is genocidal. In addition, proportionality as a *jus ad bellum* principle may highlight the social and cultural factors that created the conditions for violent ethnic tensions that become manifest in rape and sexual abuse especially targeting women.

The first principle of *jus ad bellum* is just cause. Leaders of nations or ethnic groups (in the case of civil war) almost always believe their cause is just and generally convince their people of the same. For this reason, a just cause has come to be understood as a defensive war. Of course, this raises a series of questions regarding what constitutes justifiable provocation. Cases of national self-defense or coming to the assistance of another nation or state that is under attack from an unjust aggressor clearly constitute a defensive war and thus fulfill the criteria of just cause. The grey area occurs in cases where the aggression is not so clear cut or when other forms of injustice or oppression pose a discernible threat such that national self-defense is warranted. The conditions of oppression themselves might constitute an "act of aggression" against a people. Alternatively, as Robin Schott argues, rapists may be "motivated by the desire for transgenerational revenge for acts committed" to ancestors.³³ This raises the question of how severe the oppression must be in order to justify military intervention.³⁴ When mass rape has been used, as in the former Yugoslavia and in Rwanda, the aggressors often use what might be called an "ethnic justification." That is, the aggressors cite current or past ethnic tensions (or oppressions) to attempt a justification of their actions. In Rwanda, for instance, the Tutsis had been the minority but held the majority of the wealth. This economic disparity coupled with a long standing ethnic tension, provided the aggressors with at least a starting point to attempt to call their war defensive. But not every account of defensive war is a just cause and, as we have seen, rape as a means of warfare can never be justified. Past injustice or oppression that is severe may constitute an act of aggression and thereby legitimate a defensive war or humanitarian intervention as a just cause

but responses to oppression that actively target innocents or civilians are not, by definition, defensive wars but aggressive wars that also violate the principle of proportionality. This also links to the *jus ad bellum* principle requiring at least a prospect of emergent peace. If mass rape campaigns are the aggressive act—and there is little doubt that they are—then the campaign is undertaken with the explicit purpose of stripping the victims of their rights and thus no prospect for peace is present in the undertaking of the campaign. As Duane Cady says, “War cannot be justly undertaken unless it is more likely than not to generate conditions of lasting peace, conditions that set right the problems that provoked the acts of aggression that triggered the war.”³⁵

In a related vein, Card suggests that “wars of self-defense” may eschew pernicious military values, especially dominance, if they are fought by people who are required to participate in war rather than those who want to participate.³⁶ However, many of the examples of mass rape in recent decades demonstrate that dominance can be extended to otherwise reluctant participants. That is, those who are required to participate are often forced or coerced into perpetrating inhumane acts by the same notion of dominance that contributes to the rape structure. While we ought not to entertain unrealistic assumptions about the strength of moral reasoning against violent coercion, there may nonetheless be reason to believe that the strength of just war theory may provide some impetus to resist participation in egregious moral acts like mass rape.

The second *jus ad bellum* principle is that the war should be declared by right authority. Following natural law, this would be the person or ruling group entrusted with the care of the community. Given the diversity of governing forms, the right authority might simply be thought of as the legitimate government of the state. Some of the mass rape campaigns are orchestrated or minimally left unchecked by legitimate state authorities—as, for example, was the crisis in Darfur, Sudan—but some fall under a different category. Just war theory is challenged to extend beyond speaking only of states to address ethnic and social groups as well.

Walzer defines a “legitimate government” as “one that can fight its own internal wars.”³⁷ Mass rape campaigns that occur between ethnic groups within a state demonstrate that the right authority did not sanction the campaign. Notice that this conclusion requires a distinction between ruling group and right authority (or legitimate government). The case of Rwanda is demonstrative here. The ruling Hutus massacred an estimated 400,000 Tutsi in an effort to wipe out the minority ethnic group. In doing so, however, they abdicated any authority they might have had for no ruling power can destroy its own subjects. As Walzer argues, “when a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply.”³⁸

In order to meet the criteria of just wars, wars must be fought for the right intention. The right intention focuses on correcting the wrong that results from the unjust aggression of the offending party. There must, in other words, be a reasonable chance for success. In many of the mass rape campaigns, the expressed intent was to eradicate an entire ethnic group through rape and massacre or through forced pregnancy. When pregnancy was the motive, the baby carried the ethnicity

of the father. One victim of the rape campaign in Yugoslavia stated, “The blame [for the mass rapes] can be equally placed on individuals and on the politics in general. I think it was the will of individuals but also the strategy of Serbian politics to perform ‘ethnic cleansing’ of the non-Serbian population in Croatia,”³⁹ and another described it as “planned in advance and intended to destroy the soul of a nation.”⁴⁰ Intending “to destroy, in whole or in part, a national, ethnical, racial or religious group” through rape constitutes genocide, in spite of the fact that rape is not explicitly mentioned in the definition of genocide.

We might also question the value of diversity. Genocide via mass rape presumes that diversity is not a value worth maintaining. While there may be some political virtue to having states consist of monolithic cultural groups, the ever changing infrastructure of global trade and communication makes that all but impossible. This is an important point because it expands the war crime of rape from being a crime against women to also being a crime against culture and, if diversity is a value that the global community embraces—which I think it must if there is to be any international agreements—then rape in warfare aimed at destroying a people becomes genocide.

The *jus ad bellum* principle of proportionality means that the cost in evil of going to war cannot outweigh the good that is achieved. Just war is reserved for those cases in which the proportional good of the outcome outweighs the potential destruction and loss of life of the act of war. I have already argued that mass rape violates proportionality as a *jus in bello* principle and that it violates the criteria that no means be used that grossly offend human conscience. Mass rape campaigns as a purpose or end of war cannot be said to be proportionate.

The approach to the *jus ad bellum* proportionality here should focus on the socio-cultural impact of mass rape campaigns. Those who engage in mass rape believe that killing women and forcing women to bear children of another ethnic group destroy the culture or ethnic group. This violates proportionality in part because it presumes that women are the passive instruments of culture and in part because it uses biological reproduction as a stand in for cultural reproduction. Liz Kelly argues that women become the prime target and the “territory to be conquered” when a state intends the elimination of a cultural group. This is because women and women’s bodies have been “constructed as the locus and carriers of culture.” Through forced impregnation, women are also the “vehicles through which the [conquering] nation/group can be reproduced.”⁴¹ Women’s bodies become purely instrumental to the genocide. Thus, culture and women are both misconstrued and war via rape is a disproportionate response to a mistaken assumption. This is a disturbing inversion of the traditional association of men with culture and women with nature, which is itself problematic. Here, women maintain their natural connection through childbirth but they passively reproduce culture by giving birth to the father’s child. In Yugoslavia, Rwanda, and Sudan, tradition understood that the child would have the ethnicity of the father.⁴² Culture/ethnicity, it was believed, would be destroyed though massive births of another ethnic group.

State sanctioned mass rape is one of the many scars that mar the twentieth and twenty-first centuries. Rape and sexual violence for too long have gone un-

checked and unpunished especially in wartime. When rape and sexual violence are systematic and widespread, aimed at demoralizing a people, and/or part of a program of sexual violence, they may constitute a crime against humanity. The individuals who perpetrate such acts as well as the commanding officers who give unjust or ambiguous orders, or who fail to stop the attacks, or who plan the attacks must be held accountable to the international community for their violations. Furthermore, when rape and sexual violence are used in a campaign intended to physically destroy a religious or ethnic group or themselves comprise such a campaign, the international community must be prepared to name the genocide, act to stop it, and punish the perpetrators. A standing international court to address sexually violent crimes against humanity and genocide as well as carefully articulated domestic criminal procedures for sex and gender related war crimes should be our minimal starting point.

CONCLUSION

While rape has long been a war crime, the lack of prosecution of individual soldiers and of states that sanction mass rape has done little to alleviate the plight of victims or ensure that other women and men will not suffer similar fates. The United Nation has made significant efforts to address the problem. In June 1993, a UN Conference on Human Rights was held in Vienna, but just prior to the conference, the Tribunal for Women's Human Rights, one of the NGO working groups, presented testimony from women from all over the world who had been victimized by sexual violence during conflict situations. This prelude forced the meetings in Vienna to take seriously violence against women during wartime. But, as Anna Llewellyn Barstow points out, "the legal definition of rape in wartime (systematic rape) was not exact, and no court was set up to deal with gender-related crimes."⁴³ While we continue to flounder with the International Criminal Court, to which the United States refuses to be a party, it may be beneficial to look for additional normative means to condemn gross violations of human rights.

The United Nations adopted the "Declaration on the Elimination of Violence against Women" in December 1994 and made special mention of violence that is condoned by the state. In 1995, the United Nations Fourth World Conference on Women, in Beijing, focused on violence against women and created the Beijing Platform for Action. They highlighted the effects of rape during war, and, in a very succinct and moving statement, the Beijing Platform for Action called for specific measures for bringing the perpetrators of rape, systemic or otherwise, to justice. The Platform for Action is now ten years old and yet rape and sexual violence continues to be used in war efforts in everything from interrogation of prisoners of war, abuse of civilian populations, and even in massive campaigns to displace peoples. The Beijing document forcefully argues that the international community has a responsibility to identify rape and sexual violence in all its purposes, forms, manifestations, and ends. It also urges the international community to "reaffirm that rape in the conduct of armed conflict constitutes a war crime and under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the

Crime of Genocide” and to “uphold and reinforce standards set out in international humanitarian law and international human rights instruments to prevent all acts of violence against women in situations of armed and other conflicts.”⁴⁴ Although limited in certain respects,⁴⁵ just war theory can be a useful tool in understanding and responding to war rape in all its many forms. It forces us to reject any attempts to legitimate the use of sexual violence, in whatever form, in all wartime activity—including the holding and interrogation of prisoners of war or suspected terrorists. Just war theory powerfully asserts the rights of all combatants against violation of bodily integrity. In addition, by uncovering the intents and degrees of sexual violence, just war theory aids human rights doctrines in the classification of crimes. By using the questions and framework of just war theory, we can begin to assess when rape and other forms of sexual violence constitute genocide, a crime against humanity, or war crime. Finally, just war theory may serve as an important normative justification for individual soldiers to resist orders and actions that demonstrate egregious moral breakdown as found in instances of mass rape and systematic sexual violence.

Endnotes

1. See Catharine MacKinnon, “Rape, Genocide, and Women’s Human Rights,” *Harvard Women’s Law Journal* 17 (1994) and my article “War Rape’s Challenge to Just War Theory” in *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, ed. Steven P. Lee (Springer, forthcoming), among others.

2. See the U.S. State Department press release <http://usinfo.state.gov/af/Archive/2005/Feb/02-194398.html>. Accessed March 6, 2006.

3. This last point is particularly timely as the Bush administration has demonstrated multiple efforts to redefine what is considered acceptable interrogation tactics in the “war on terror.” This article does not address whether just war theory justifies humanitarian intervention in cases of genocide, ethnic cleansing, and other crimes against humanity. While there is much current literature on that topic, I focus instead on how just war theory might usefully be employed in understanding and resisting war rape.

4. This is not to say, of course, that peacetime rapes do not have a political meaning. They surely do insofar as they are informed by and contribute to cultures of sexism and violence.

5. Most accounts of war rape will include rape of fellow combatants and allied civilians as well as forced prostitution of allied civilians. Elsewhere I have argued that the element of enmity does make these more akin to peacetime rapes than war rapes. In other words, the political meaning of war rape sees rape as contributing to the war cause. See my “War Rape’s Challenge to Just War Theory.”

6. I offer a more extensive discussion of the definition of rape and sexual violence in war in “War Rape’s Challenge to Just War Theory.”

7. The American Civil Liberties Union called for “an independent investigation into widespread and systematic abuse at U.S. detention centers in Iraq, Afghanistan and Guantánamo Bay.” See ACLU press releases dated February 15, 2006 and February 23, 2006 at <http://www.aclu.org/intlhumanrights/gen/24165prs20060215.html> and <http://www.aclu.org/intlhumanrights/gen/24249prs20060223.html>. Accessed February, 23, 2006.

8. Robin May Schott, “Philosophical Reflections on War Rape,” in *On Feminist Ethics and Politics*, ed. Claudia Card (Lawrence: University Press of Kansas, 1999), 194 and 196.

9. Schott, "Philosophical Reflections on War Rape," 194.

10. Elizabeth Neuffer, *The Key to my Neighbor's House: Seeking Justice in Bosnia and Rwanda* (New York: Picador, 2001), 273.

11. Neuffer, *The Key to My Neighbor's House*, 273.

12. Geneva Convention relative to the Protection of Civilian Persons in Time of War. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War; entry into force 21 October 1950. <http://www.unhcr.ch/html/menu3/b/92.htm>. Accessed September 10, 2004.

13. Geneva Convention relative to the Treatment of Prisoners of War. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War; entry into force 21 October 1950. <http://www.unhcr.ch/html/menu3/b/91.htm>. Accessed February 25, 2006. Article 121 further states that the death of a prisoner of war at the suspected hands of a guard should be "immediately followed by an official enquiry by the Detaining Power" and "If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible."

14. U.S. Uniform Code of Military Justice. http://www4.law.cornell.edu/cgi-bin/html_hl?DB=uscode10&STEMMER=en&WORDS=rape+&COLOUR=Red&STYLE=s&URL=/uscode/10/920.html#muscat_highlighter_first_match

15. The code also includes the offense of "carnal knowledge" whereby "Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person (1) who is not that person's spouse; and (2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct" (Section 920, Article 120). Interestingly, the code also allows for abortions in military facilities in the case of rape (Sec. 1093). See also Brownmiller 1975, 32.

16. <http://deoxy.org/wc/wc-nurem.htm> (September 13, 2004)

17. Cited in Diane F. Orentlicher, "Genocide," in *Crimes of War*, ed. Roy Gutman and David Rieff (New York: W.W. Norton Co., 1999), 154.

18. See David Wippman, "Can an International Criminal Court Prevent and Punish Genocide?" in *Protection against Genocide*, ed. Neal Riemer (Westport, CT: Praeger, 2000) for a good analysis of the limitations of international law with regard to crimes against humanity and genocide.

19. Todd Salzman, "'Rape Camps,' Forced Impregnation, and Ethnic Cleansing," in *War's Dirty Secret*, ed. Anne Llewellyn Barstow (Cleveland: Pilgrim Press, 2000), 87

20. Michael Walzer rightly says that "rape is a crime . . . because it violates the rights of the woman who is attacked" (Michael Walzer, *Just and Unjust Wars* [New York: Basic Books, 1977], 134). He emphasizes the important role that human rights talk has played in challenging oppressive practices. Here, and elsewhere, I am agreeing with Schott, Card, MacKinnon, and others (including Walzer, 134 footnote) who suggest that rape during war is a "rights violation" as well as a violation of aspects of the human person and human community that are not easily contained in the notion of rights.

21. Geneva Convention relative to the Treatment of Prisoners of War. <http://www.unhcr.ch/html/menu3/b/91.htm>. Accessed September 10, 2004.

22. Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (New York: Oxford University Press, 2002), 122.

23. Brownmiller, *Against Our Will*, 84.

24. UN Platform for Action (Beijing) (Accessed September 13, 2005) <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm>. (UN Platform, paragraph 135)

25. Quoted in "More Images of Abuse at Abu Ghraib" CNN.com, February 15, 2006. Accessed February 23, 2006.

26. Betty Reardon, *Sexism and the War System* (New York: Teachers College Press, 1985), 38.

27. Brownmiller, *Against Our Will*, 32

28. Walzer, *Just and Unjust Wars*, 310; see also Brownmiller, *Against Our Will*, 103–5.

29. Walzer, *Just and Unjust Wars*, 312.

30. For more on the see Brownmiller, *Against Our Will*, chap. 3 and my article "Human Rights, Radical Feminism, and Rape in War" in *Social Philosophy Today*, Volume 21, ed. John Rowan (Charlottesville, VA: Philosophy Documentation Center, 2005).

31. Roger Cohen, "Ethnic Cleansing," in *Crimes of War*, ed. R. Gutman and D. Rieff (New York: W. W. Norton, 1999), 136.

32. "War Rape's Challenge to Just War Theory."

33. Schott, "Philosophical Reflections on War Rape," 191

34. See Walzer, *Just and Unjust Wars*, 101–8

35. Duane Cady, *From Warism to Pacifism: A Moral Continuum* (Philadelphia: Temple University Press, 1989), 27.

36. Claudia Card, "Rape as a Weapon of War," *Hypatia* 11:4(1996): 5–18.

37. Walzer, *Just and Unjust Wars*, 101.

38. *Ibid.*

39. Anne Llewellyn Barstow, ed. "Former Yugoslavia: Women Speak" in *War's Dirty Secret: Rape, Prostitution, and other Crimes against Women* (Cleveland: Pilgrim Press, 2000), 58.

40. Barstow, "Former Yugoslavia," 62; Salzman "Rape Camps," 70.

41. Liz Kelly, "Wars against Women: Sexual Violence, Sexual Politics and the Militarised State," in *States of Conflict*, ed. Susie Jacobs, Ruth Jacobson, and Jennifer Marchbank (New York: St. Martins, 2000), 50; see also Simone de Beauvoir, *The Second Sex*, trans. H. M. Parshley (New York: Bantam Books, 1953), Part III Myths.

42. Rape and forced pregnancy were used in Sudan as explicit tactics to the aggression, to "impregnate women with light skinned babies" (NPR, Talk of the Nation, 27 July 2004). Similar accounts have been recorded from witnesses and victims to the atrocities in Rwanda and Yugoslavia.

43. Anne Llewellyn Barstow, "The United Nations' Role in Defining War Crimes against Women," in *War's Dirty Secret*, ed. Anne Llewellyn Barstow (Cleveland: Pilgrim Press, 2000), 237.

44. UN Platform for Action (Beijing) op. cit. Paragraph 145

45. In "War Rape's Challenge to Just War Theory" I argue that just war theory is limited in four key ways: "(1) insufficient attention to the bodily nature of rape during war; (2) inadequate ability to address violations that blur the distinction between *jus ad bellum* and *jus in bello*; (3) lack of measures for individuals to report violations across lines of state; and, (4) an apparent inability to address the cultural prescriptions that prohibit (for lack of a better word) reparation to survivors such that they can resume their place in community."