

Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond

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I. INTRODUCTION

That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power ever has paid to Reason.

—Justice Robert H. Jackson, U.S. Chief of Counsel at the Nuremberg Trials¹

In one of history's more brutal ironies, the treaty that established the Nuremberg trials—power's celebrated tribute to reason—was signed by the

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1. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 49 (1946) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

Allies on the same day that the United States dropped the second atomic bomb on Japan.²

The traditional reading of the Nuremberg trials as the supplication of power before reason has long distorted the political function that this juridical resolution to the Second World War played in reestablishing *order*. Commonly viewed as either the foundation of modern international humanitarian law or an ugly example of “victor’s justice,” the trials may be more properly seen as the emergence of law as ordering principle. The analysis of this relation between law and order—law *as* order—is the subject of this Article.

The historical emergence of international criminal law has been driven largely by tragedy. As a result, the development of norms for the ordering of violence has been primarily *reactive*. In Part II, I argue that although this body of law evolved with no real theory of what it was doing, sense can be made of it by reference to the function that it serves and the order that it legitimates. First, however, I will rehearse a brief history of war crimes and the legal contradictions to which they have given rise. In light of these contradictions, I will argue that the justification of war-crimes trials must be located not in law but in the notions of order that at once provide their rhetorical legitimation and normative *telos*. This is seen most clearly in the performative function that war crimes serve (as “theater”), demonstrating a return to order. But this order cannot be understood as the simple opposition of power and reason, violence and law, as Justice Jackson suggested. Instead, as I will argue, this conception of order is gendered in two important ways. First, though it claims to equate order through law (“peace”) with the absence of violence, it is actually premised on a “public” order that is defined through its relationship *with* violence. Secondly, it constitutes within that order a discernibly “public” morality; this in turn affirms a subjectivity that is implicitly ungendered but presumes a certain relation to the world that may be termed masculine.

The partiality of this dominant account provides the historico-theoretical framework for the analysis of the problematic war crime of rape in Part III. Rape is chosen not merely for its currency in the context of the ongoing trials relating to events in the former Yugoslavia, but because it highlights a critical point of tension in the nascent international criminal régime. For a variety of reasons, rape has been accepted (if not explicitly condoned) as a concomitant of war. Where it has been proscribed, this has been in terms that sterilize the gendered nature of the crime and mask the reflection that it casts on the peculiarly masculine nature of most armed conflict. And yet rape remains an ambiguous war crime because it also marks the scar between the private and the public in times of conflict; it is at once an intimate violation of a woman and a grotesque public display of domination. Such dualisms provide a theme for the

2. Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 279 (the date in the Japanese time zone was Aug. 9, 1945); see Gerry Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 1, 4 (Timothy L.H. McCormack & Gerry Simpson eds., 1997) [hereinafter *THE LAW OF WAR CRIMES*].

analysis of the gendered nature of war crimes that is the focus of this paper. Ultimately, I argue that the experiences of the former Yugoslavia demand a reconceptualization of war crimes that calls into question the modalities of power that legitimate the violence of the state, both at peace and at war.

The ongoing trials in the Tribunal for the former Yugoslavia serve as a constant backdrop to these excursions, which have implications at once theoretical and practical. In this light, the Tribunal marks a decidedly uncertain step forward in the development of international criminal law in general, and the protection of women's (human) rights in particular. Although the Tribunal has given unprecedented centrality to the experiences of women in war, it is by no means clear that it will be able to "do justice" to those experiences.

Lastly, by way of introduction, I note my own stake in this problem. Much has been written about the dangers of men speaking *for* feminism, or *for* women.³ This is in no way my aim. As I will argue, it is the silences of certain voices that define the problem I seek to explore in international criminal law. I do not seek to fill these silences. Rather, I aim to speak around them, *to* them, and in doing so, to bring into question the partiality of those voices that are heard.⁴

II. THE FUNCTION OF WAR CRIMES: HISTORY, THEATER, ORDER

The refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.

—Justice Robert H. Jackson⁵

Although prescribed rules for the conduct of hostilities can be found in most ancient human civilizations,⁶ and documented prosecutions of persons for

3. See, e.g., *MEN IN FEMINISM* (Alice Jardine & Paul Smith eds., 1987). For a general introduction to feminist legal methods, see generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

4. Another major difficulty in analyzing events such as those in the former Yugoslavia is the representation of atrocity. I respect but do not entirely agree with the argument that repetitive serial representations of such atrocities must "irrevocably [place] the reader in the position of voyeur." BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA* 32 (1996). I believe that it is vital that these stories be told, and that the risks attendant even to a sincere, sober account are less than the risks of falling into (another) convenient silence.

5. ROBERT JACKSON, *THE NÜRNBERG CASE 94* (Cooper Square Publishers 1971) (1947).

6. See generally Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in *THE LAW OF WAR CRIMES*, *supra* note 2, at 31 (discussing evolution of international criminal law). Examples of early writings on humanitarian limitations on the conduct of hostilities are found in Sun Tzu's *The Art of War*, written in the sixth century B.C. See *THE COMPLETE ART OF WAR* (Ralph D. Sawyer trans., 1996) (including text of *The Art of War* and Sun Pin's *Military Methods*). Herodotus described an incident in ancient Greece in which enemy envoys were killed as "confessedly a transgression of the [laws of men], as a law of the human race generally, and not merely as a law applicable exclusively to the barbarians." See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 154 n.16 (1992) (quoting Herodotus). In 405 B.C., Xenophon wrote of an incident during the 24-year war between Athens and Sparta, when the Spartan leader Lysander called together his Allies to determine the fate of Athenians who had agreed, *inter alia*, to cut off the hands of captured prisoners. Maridakis argues that in doing so, Lysander in effect constituted a war crimes tribunal. See Georges S. Maridakis, *Un Précédent du Procès de Nuremberg Tiré de l'Histoire de la Grèce Ancienne*,

violating accepted limitations on the conduct of armed conflict are found in the Middle Ages,⁷ the history of *international* criminal law can be traced back only a few hundred years. The earliest example that is often cited is the trial of Peter Von Hagenbach in 1474, convicted by a tribunal of twenty-eight judges from Austria and its allies for crimes against the "laws of God and man," following his reign of terror over the citizens of Breisach.⁸ The value of the case as a precedent for subsequent trials is questionable, however, as the judges and laws were restricted to those of the allied States of the Holy Roman Empire.⁹

International law as such did not exist until Europe emerged from the medieval period and the vertically structured hierarchies under Pope and Emperor came to be replaced by the horizontally organized system of sovereign states, formally established in the 1648 Peace of Westphalia.¹⁰ The treaty affirmed the right of rulers to determine the confessional allegiance of their states and subjects (*cujus regio, ejus religio*)¹¹ and the corresponding secular supremacy of territorial rulers over their dominions (*Rex in regno suo est Imperator regni sui*).¹² As a result, the (European) world was reformulated not merely in its political structure, but in its conception of the universe on which that structure was laid.¹³

The emergence of international law in such a system was based less in legal

5 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 1 (1952), cited in McCormack, *supra*. Similar histories can be found in Hindu, Roman, and Islamic societies. See C.E. BRAND, ROMAN MILITARY LAW 195-96 (1968) (detailing articles of war of Emperor Maurice); K.P. JAYASWAL, MANU AND YAJÑAVALKYA—A COMPARISON AND A CONTRAST: A TREATISE ON THE BASIC HINDU LAW 106-07 (1930); MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 83-87 (1955) (detailing rules governing *jihad*).

7. See BASSIOUNI, *supra* note 6, at 158-60, 196-97; JOSEPH W. BISHOP JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 4 (1974); M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 7-63 (1965); cf. WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 4, sc. 7, in 10 THE WORKS OF WILLIAM SHAKESPEARE 405 (AMS Press 1970) (James O. Halliwell ed., 1861) ("Kill the poys and the luggagel 'tis expressly against the law of arms: 'tis as arrant a piece of knavery . . . as can be offered."); Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1 (1992). For a complete examination of the law of war and Shakespeare's works, see THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE MIDDLE AGES (1993).

8. See BASSIOUNI, *supra* note 6, at 416; 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462-66 (1968).

9. See 2 SCHWARZENBERGER, *supra* note 8, at 463; McCormack, *supra* note 6.

10. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 34-38 (1986) (describing birth of present international community after the 1648 Peace of Westphalia); B.V.A. Röling, *Are Grotius' Ideas Obsolete in an Expanded World?*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 281, 281-89 (Hedley Bull et al. eds., 1990); cf. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra*, at 65, 75 (discussing existence of *states* prior to Peace of Westphalia, but distinguishing *nation*-states which did not emerge until eighteenth and nineteenth centuries). For a post-culturalist discussion of the implications of the development of international relations, see James Der Derian, *The Boundaries of Knowledge and Power in International Relations*, in INTERNATIONAL/INTERTEXTUAL RELATIONS: POSTMODERN READINGS OF WORLD POLITICS 3 (James Der Derian & Michael Shapiro eds., 1989).

11. See Bull, *supra* note 10, at 76-77.

12. See John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 157 (1993).

13. See Simon Chesterman, *Law, Subject and Subjectivity in International Relations: International Law and the Postcolony*, 20 MELB. U. L. REV. 979, 988-93 (1996).

doctrine than it was in a body of principles rooted in the "law of nature."¹⁴ Laws governing the conduct of war continued to develop, but the content varied from state to state and prosecutions were inconsistent.¹⁵ One of the first attempts to codify the laws of war was the United States' Lieber Code,¹⁶ but it was not until the adoption of the Hague Conventions of 1899¹⁷ and 1907¹⁸ that the subjects of the international legal system agreed to international laws of war binding on states. At the same time, despite the lack of collective machinery to enforce the conventions, there was evidence of a growing awareness of the humanitarian obligations on states¹⁹ and of demands for criminal sanctions in response to their violation.²⁰

It was not until the First World War, however, that widespread calls were made for the trial of those responsible for perpetrating atrocities of unprecedented brutality.²¹ There were numerous instances of war-crimes trials held by individual Allied States,²² but it was Turkey's attempts to exterminate the Armenians that garnered support for truly international action.²³ In May

14. See HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 599 (James Brown Scott ed. & Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625). This international society centered around the understanding that States and their rulers are "bound by rules and form a society or community with one another, of however rudimentary a kind." Bull, *supra* note 10, at 71. This conception, which Bull came to call the "anarchical society" of States, provided an alternative world view to both the entirely chaotic state of nature as described by Machiavelli and later Hobbes, and the attempts to bring this chaos under centralized control by restoring the institutions of Latin Christendom, or through the construction of new institutions seeking a perpetual peace through human progress as ultimately articulated by Immanuel Kant. This principle is echoed in Grotius' statements on the conduct of war: "What is permissible in war is viewed either absolutely or in relation to a previous promise. It is viewed absolutely, first from the standpoint of the law of nature, and then from that of the law of nations." GROTIUS, *supra*, at 599.

15. See McCormack, *supra* note 6; cf. THOMAS HOBBS, *LEVIATHAN* 141 (Richard Tucker ed., Cambridge Univ. Press 1991) (1651).

16. The Lieber Code, drawn up by Francis Lieber, was published in 1863 as the military code for the Union Army during the American Civil War. The Lieber Code: Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (1863) [hereinafter Lieber Code], reprinted in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 158 (Leon Friedman ed., 1972) [hereinafter LAW OF WAR]. Although the Lieber Code was not an international document, it was a significant influence on the Hague Conventions that were completed at the turn of the century. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 10 (1992).

17. Convention concernant les lois et coutumes de la guerre sur terre [Convention With Respect to the Laws and Customs of War on Land], July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949 [hereinafter First Hague, II].

18. Convention concernant les lois et coutumes de la guerre sur terre [Convention With Respect to the Laws and Customs of War on Land], Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 [hereinafter Second Hague, IV].

19. See, e.g., ERIK CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 20-22 (1954) (discussing efforts to codify law of war); JAMES WILFORD GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 19-35 (1920) (analyzing binding nature of Hague Conventions and Declaration of London).

20. See, e.g., JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* 8-22 (1982) (discussing early calls for trial of German war criminals).

21. See, e.g., ERIC HOBSBAWM, *AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY* 1914-1991, at 24-31, 49-50 (1994) (discussing unprecedented scale and barbarism of First World War as opening act of twentieth century).

22. See BASSIOUNI, *supra* note 6, at 201-02.

23. See ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* 71-74 (1990) (comparing international response to Turkish genocide of Armenians with response to Nazi genocide of Jews and Gypsies); Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War*

1915, the Allies issued a joint declaration that condemned the massacres and stated: "In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres."²⁴ Despite the significance of the declaration in introducing the notion of "crimes . . . against humanity,"²⁵ the failure of the Allies to make good on their threats found a monument in Hitler's chilling dictum: "Who, after all, speaks today of the annihilation of the Armenians?"²⁶

The Treaty of Versailles, signed at the end of the war, contained provisions for an international tribunal that was to try the German Emperor for "a supreme offense against international morality and the sanctity of treaties," and other persons "accused of having committed acts in violation of the laws of war."²⁷ The proposed tribunal never met, however, with Dutch authorities refusing to extradite the former Emperor after the war, alleging that the offenses with which he was charged were political and not punishable under Dutch law.²⁸ As a compromise measure, the Allies accepted an offer by Germany to try a select number of persons in Germany.²⁹ The Leipzig Trials that followed saw only twelve trials, with six acquittals and a maximum sentence of four years' imprisonment.³⁰ Although some commentators have pointed to the positive aspects of the German Court's preparedness to apply the "Law of Nations" as part of German domestic law,³¹ the results of the trials were so unsatisfactory to the Allies that they dropped the matter.³² The trials are now discounted as a "judicial farce."³³

The failure of the Leipzig trials provided a major impetus for interwar

I Armenian Case and Its Contemporary Legal Ramifications, 14 YALE J. INT'L L. 221, 223-29 (1989).

24. Dadrian, *supra* note 23, at 262.

25. See BASSIOUNI, *supra* note 6, at 168.

26. KEVORK B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE 2* (1985). Following the conclusion of the war, the Treaty of Sèvres, which included special provisions for the trial of those responsible for the Armenian massacre, was never ratified. The Treaty of Lausanne, which replaced it, included a "Declaration of Amnesty" for crimes committed during the war. Treaty of Peace with Turkey, July 24, 1923, 28 L.N.T.S. 11 [hereinafter Treaty of Lausanne].

27. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, arts. 227-28, 2 Bevens 43, reprinted in INTERNATIONAL CRIMINAL LAW 225 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965) [hereinafter Treaty of Versailles].

28. See ROBERT WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 31 (1960).

29. See McCormack, *supra* note 6, at 48-50. Some commentators have argued that the Allies' reluctance to prosecute alleged war criminals themselves was based on a fear that such prosecution would stir an uprising in Germany, or start a new war with the Allies. See WILLIS, *supra* note 20, at 113; WOETZEL, *supra* note 28, at 31; Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223, 225 (1992).

30. See Treaty of Versailles, *supra* note 27, art. 226.

31. See WILLIS, *supra* note 20, at 138; McCormack, *supra* note 6, at 50.

32. See Howard Levie, *Criminality in the Law of War*, in 1 INTERNATIONAL CRIMINAL LAW 233, 234 (M. Cherif Bassiouni ed., 1986).

33. See YORAM DINSTEIN, *THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* 11 (1965); see also Sheldon Glueck, *War Criminals—Their Prosecution and Punishment*, 5 LAW. GUILD REV. 1, 9 (1945) (describing trials as "tragi-comedy").

attempts to establish an international criminal court,³⁴ but more importantly affirmed the Allies' resolve to punish war criminals for the atrocities committed during the Second World War.³⁵ It is here that the modern prosecution of individuals for crimes "against the peace and security of mankind" begins—with the war-crimes trials *par excellence* of Nuremberg.

A. War Crimes as History

The preceding historical introduction provides the basis for a brief discussion of the Nuremberg trials. These trials were important, not merely because they established the foundations for international criminal law, but also for the way in which that juridical role was connected to a discrete political function in demonstrating (and, as I shall argue, *constituting*) the order that succeeded the horrors of the Second World War. In this sense, the history of war-crimes trials can be seen not merely as reactions against the brutality of war, but also as establishing a particular kind of order that is defined through its relationship to that violence. In this part, I am concerned with the dominant history of war crimes: a tragedy in which rape played a very small part. Once the historico-theoretical framework developed in Part II is in place, I turn in Part III to the questions of how and why rape has been marginalized in that history. The answers to these questions suggest that focusing on rape may make it possible to destabilize the categories reified by the international criminal régime *precisely because rape does not fit into them*.

The difficulty of analyzing the political and legal issues raised by the Nuremberg trials is a reflection of the problems associated with speaking about acts that, for many people, define that which is evil.³⁶ This difficulty revisits the

34. The League of Nations proposed a statute for an international criminal court as part of its attempt to deal with crimes involving international terrorism during the 1930s. See *Report Adopted by the Committee for International Repression of Terrorism*, League of Nations Doc. C.222 M.162 1937 V, app. II (1937). The Convention did not go into effect, however, because an insufficient number of states ratified it. See *Convention for the Creation of an International Criminal Court*, League of Nations Doc. C.547(I) M.384(I) 1937 V (1937), reprinted in *INTERNATIONAL LEGISLATION 1909–1945*, at 878 (1941) (never entered into force).

35. The London International Assembly, composed of distinguished jurists representing the fledgling United Nations, began its work on Nazi war crimes in 1941, taking the first steps toward the prosecution of war criminals. "The LIA bitterly referred to the lessons of World War I—'[t]he punishment of the war criminals of World War I was a complete failure'—and noted that its primary objective was the trial and conviction of all war criminals." BASSIOUNI, *supra* note 6, at 179 (quoting LONDON INTERNATIONAL ASSEMBLY, *THE PUNISHMENT OF WAR CRIMINALS: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY* (1944)). For other early calls for the trial of war criminals, see George Finch, *Retribution for War Crimes*, 37 AM. J. INT'L L. 81 (1943); Sheldon Glueck, *Tribunal for War Offenders*, 56 HARV. L. REV. 1059, 1089 (1943).

36. A recent example is provided by the debates surrounding a curious literary hoax in Australia. A young author writing under the name of Helen Demidenko won a series of literary prizes for her first novel, *The Hand that Signed the Paper* (1994). The work ambiguously purported to be a truthful account of the daughter of Ukrainian immigrants coming to terms with the fact that her father and uncle may have participated in the Holocaust (in the novel, the narrator's uncle was the subject of ongoing war crimes investigations). Accusations of anti-Semitism and historical inaccuracy arose, but were rejected by the judges of the literary prizes on the basis that this was a genuine attempt to understand the actions of those who took part in the slaughter of Jews, all the more remarkable for the candor with which the author dealt with such

dilemma faced by the Tribunal itself: whether the retrospective extension of international criminal responsibility to perpetrators of crimes under the applicable Charter³⁷—a breach of strict legal positivism—was a greater or lesser evil than allowing such perpetrators to go unpunished. Such questions were commonly resolved by moral (and often tautologous), rather than strictly legal, arguments: “[S]o far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished.”³⁸

Within the legal community it is widely accepted that although adherents of the various schools of naturalism, relative positivism, pragmatism, and utilitarianism found common ground in defending the legitimacy of the Charter, most acknowledged its technical legal deficiencies.³⁹ That common ground was, however, viewed from divergent perspectives. Whereas natural-law theorists relied on metaphysical essences and transcendental beliefs, legal pragmatists and utilitarianists had recourse to relativism, empiricism, and realism.⁴⁰ Ultimately, however, such issues were seen as irreducible to problems of legal technicalities. Friedmann, for example, summarizes approaches to the Charter’s legality from transcendental ethics, intuitionist ethics, and various relativistic approaches, concluding that “no legally compelling solution can be found for this type of problem. Whatever the technical device, a subsequent and differing

personal issues. It was subsequently revealed that the author’s name was in fact Helen Darville and that she was of English extraction. The *nom de plume* Demidenko had been appropriated from fragmented reports of the Babi Yar massacre in the Ukraine. The literary debate, which had concerned Australia’s much-prided multiculturalism, was quickly subsumed by the political question of what these events and the reaction to them showed of Australia’s isolation from history in general and the Holocaust in particular. See generally ROBERT MANNE, *THE CULTURE OF FORGETTING: HELEN DEMIDENKO AND THE HOLOCAUST* (1996).

37. Charter of the International Military Tribunal, *supra* note 2, art. 6; see also Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 5, T.I.A.S. No. 1589, 4 Bevans 20 (amended Apr. 26, 1946), *reprinted in* BASSIOUNI, *supra* note 6, at 606.

38. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 462. Moreover, in commenting on the legal rationalizations in the *Eichmann Case*, Hannah Arendt noted that the court never rose to the challenge of the unprecedented, not even in regard to the unprecedented nature of the origins of the Israel state, which certainly was closest to its heart and thought. Instead, it buried the proceedings under a flood of precedents—during the sessions of the first week of the trial, to which the first fifty-three sections of the judgment correspond—many of which sounded, at least to the layman’s ear, like elaborate sophisms.

HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 263 (1965).

39. For a legal positivist critique of the Nuremberg trials, see AUGUST VON KNIEREM, *THE NUREMBERG TRIALS* (1959); Whitney Harris, *Book Review of The Nuremberg Trials by August von Knierem*, 54 AM. J. INT’L L. 443 (1960); see also Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965); Herbert Kraus, *The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years*, 13 DEPAUL L. REV. 233 (1964); Otto Pannenbecker, *The Nuremberg War Crimes Trial*, 14 DEPAUL L. REV. 348 (1965); H.O. Pappe, *On the Validity of Judicial Decisions in the Nazi Era*, 23 MOD. L. REV. 260 (1960); Bert V.A. Röling, *The Nuremberg and Tokyo Trials in Retrospect*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 32, at 590. For other critical views, see generally NUREMBERG: GERMAN VIEWS OF WAR TRIALS (Wilbourn E. Benton & Georg Grimm eds., 1955).

40. For a diverse range of views justifying the legitimacy of the Charter, see generally SHELDON GLUECK, *WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT* (1944); JOSEPH B. KEENAN & BRENDAN F. BROWN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); SCHWARZENBERGER, *supra* note 8; ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1983); WOETZEL, *supra* note 28; Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530 (1943); H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT’L L. 58 (1944); Georg Schwarzenberger, *The Judgment at Nuremberg*, 21 TUL. L. REV. 329 (1947); Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT’L L. 405 (1948).

set of values has to be substituted for the values governing the offensive action."⁴¹

The vast majority of debate surrounding the validity of the trials thus claimed moral, ethical, and equitable considerations rather than dealing systematically with the legal issues arising under international law.⁴² Indeed, it is argued that the attempt to do so is regressive:

[T]he international moral order must be regarded as the cause, not the effect, of positive law; . . . such law does not derive its essence from physical power, and . . . any attempt to isolate such law from morals is a symptom of juridical schizophrenia caused by the separation of the brain of the lawyer from that of the human being.⁴³

The splitting referred to here in such extreme language is the doctrinal aftershock of the primitive international legal system's being forced to develop by practice rather than theory. In many ways, contemporary debate over the validity of "crimes against humanity" evinces a similar resistance to theoretical interrogation: "We do not address those who are ideologically or politically predisposed to the rejection of the idea [of an International Criminal Court]. We wish to address the many legitimate questions raised in good faith by those who support the idea"⁴⁴ From a strictly legal perspective, the two central questions of the laws' being imposed *ex post facto* (with retroactive effect) and directed unilaterally at the "captive enemies" are far from adequately addressed.

The retroactivity of the law enforced by the Military Tribunals at Nuremberg and Tokyo was justified essentially by unstated conceptions of justice (presumably divined by reference to some "higher law") and the removal of the Tribunal's power to consider the validity of those laws.⁴⁵ One of the crucial sites of contestation in the definition of crimes against humanity, however, centers on this reliance on a *universal* morality to legitimize a legal order restricted to *particular* historical circumstances. This was the case in

41. W. FRIEDMANN, *LEGAL THEORY* 42 (5th ed. 1967).

42. *But see* VON KNIEREM, *supra* note 39 (providing legal positivist critique of Nuremberg Trials); WOETZEL, *supra* note 28 (advocating development of international criminal court as response to constant violations of classical international law by warring nations).

43. KEENAN & BROWN, *supra* note 40, chs. V-VI. Compare D'Amato's views on the subject: Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle.

Anthony D'Amato, *The Moral Dilemma of Positivism*, 20 VAL. UNIV. L. REV. 43, 43 (1985).

44. M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 160 (1992).

45. Bassiouni identifies four basic answers to the contention that the retroactivity of the "principles of legality" rendered them invalid: (1) a tautological argument that the Tribunal was bound by its own law and could not inquire into its own validity or the validity of its law; (2) "Crimes against humanity" was an extension of "war crimes" and as such did not violate the "principles of legality"; (3) the Charters were declarative of international law; and (4) "Principles of legality" are non-binding principles of national criminal justice. *See* BASSIOUNI, *supra* note 6, at 114-29.

Nuremberg and Tokyo,⁴⁶ and remains problematic in the constitution of the more recent tribunals for the former Yugoslavia and Rwanda.⁴⁷ Such problems also arise in domestic prosecutions of alleged war criminals. The irony of an Australian Federal Law's relying on the exercise of a global power to try alleged war criminals for acts committed "*in Europe* in the period *beginning* on 1 September 1939 and *ending* on 8 August 1945"⁴⁸ was apparently lost on the High Court of Australia when it upheld Australia's war crimes legislation in the *Polyukhovich* case.⁴⁹

Similarly, the significance of the Nuremberg and Tokyo Tribunals' enforcement of "victor's justice" has never been adequately resolved. There was never any question about the Allies' application of the same laws to their own conduct, though this was raised by defense attorneys at Nuremberg⁵⁰ and

46. This was brought out in the Nuremberg trial in relation to acts prior to 1939 and the problematic distinction between war crimes and "Crimes against Humanity." "[R]evolting and horrible as many of these crimes were," they were not proved to have been committed in execution of, or in connection with, "war crimes." As such, they were not Crimes against Humanity within the meaning of the Charter. See 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 498. In this context, Edward Morgan has observed the curiosity of the Tribunal's distinction between crimes under the Charter that have no geographic location and those that have taken place in Germany by reference to the date of their occurrence. See Edward Morgan, *Retributory Theater*, 3 AM. U. J. INT'L L. & POL'Y 1, 42 (1988); see also BASSIOUNI, *supra* note 6, at 176-91.

47. The International Tribunal 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 for the former Yugoslavia") was established by the Security Council "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace." S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. para. 2, U.N. Doc. S/Res/827 (1993), reprinted in 32 I.L.M. 1203 (1993). The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994." S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. para. 1, U.N. Doc. S/Res/955 (1994), reprinted in 33 I.L.M. 1600 (1994).

48. See War Crimes Act, 1945, § 5 (Austl.) (as amended by the War Crimes Amendment Act, 1988 (Austl.)) (emphasis added).

49. See *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501. Mr. Polyukhovich was charged in relation to the murder of Jews in the Ukraine. He was charged under Australia's amended war crimes legislation, which extended its application to crimes committed by citizens of Axis powers against their civilian population and allowed for trials in criminal rather than military courts. See *id.* The constitutionality of this legislation was challenged, and it was upheld by Australia's High Court as a valid law under the external affairs power. See AUSTRAL. CONST. § 51. Polyukhovich was subsequently committed for trial, but the indictments were quashed for lack of evidence without going before a jury. See Gillian Triggs, *Australia's War Crimes Trials: All Pity Choked*, in THE LAW OF WAR CRIMES, *supra* note 2, at 123 (discussing Australia's "spasmodic, selective and short" history of prosecuting war crimes).

Contrast the selective exclusion of acts carried out by the French military in Algeria prior to French adoption of the crimes against humanity provisions of the London Agreement. During the trial of Klaus Barbie, charges against him were specifically narrowed to exclude such acts from the meaning of "crimes against humanity." See Guyora Binder, *Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1335, 1337-39 (1989).

50. See BASSIOUNI, *supra* note 6, at 460-62 (discussing "*tu quoque*" defense). Bradley Smith has also pointed out the dilemmas posed by the Allied effort to pass judgment on German behavior:

Surely much of Allied war crimes policy as well as large portions of the basic American plan

has been the subject of limited domestic prosecution.⁵¹ M. Cherif Bassiouni refers to this as a “moral flaw” whose “lack of impartiality taints the [International Military Tribunal] and Subsequent Proceedings under [Control Council Law] 10, the Tokyo trials, and other post-Second World War trials with the one-sidedness of victor’s law.”⁵² The politicization of these laws was put most bluntly in the comment on the *ex post facto* debate by Justice Jackson: “I think it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding.”⁵³

This problem is said to be avoided in the International Tribunal established to try suspected war criminals in the former Yugoslavia, which is described as “the first truly international criminal tribunal.”⁵⁴ However, despite the fact that neither the Yugoslavian Tribunal nor the Rwandan Tribunal represents either victor or combatants *per se*—though from the outset the former was clearly aimed at alleged *Serbian* war criminals⁵⁵—the issue of partiality remains unaddressed in the choice of prosecuting these war criminals and not, for example, pursuing Khmer Rouge leaders in Cambodia or the Iraqi military elite

appear to be mistakes plied on folly. The actions of the negotiators and the prosecutors are also replete with blindness, miscalculation and a suicidal passion for complexity. Perhaps, more basically, the whole notion of Allied action to bring justice to a war-torn world ran headlong against the main thrust of the war itself.

BRADLEY SMITH, REACHING JUDGMENT AT NUREMBERG 301 (1977).

51. See Simpson, *supra* note 2, at 5–6; see, e.g., United States v. Calley, 46 C.M.R. 1131 (1973), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). Lt. Calley was charged in relation to the infamous My Lai massacre during the Vietnam war. The trial initially took place under martial law and was heard in federal courts only on appeal.

52. BASSIOUNI, *supra* note 6, at 84; see also Karl Jaspers, *The Significance of the Nurnberg Trials for Germany and the World*, 22 NOTRE DAME LAW. 150 (1946).

53. Report of Robert Jackson, United States Representative to the International Conference on Military Trials 329 (1949) [hereinafter Jackson’s Report]; cf. Cavicchia, *supra* note 29, at 242–43 (suggesting inherently politicized war-crimes trials could damage reputation of International Criminal Court).

54. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 78 (1994). The Tribunal for Former Yugoslavia was established by unanimous vote of the Security Council acting under Chapter VII of the Charter of the United Nations. See S.C. Res. 827, *supra* note 47. The Rwandan Tribunal was established with 13 in favor, 1 against (Rwanda) and 1 abstention (China). See S.C. Res. 955, *supra* note 47. Rwanda voted against the resolution, expressing dissatisfaction on the grounds that (i) the Tribunal’s competence was limited; (ii) its composition and structure were inappropriate and ineffective, and it “would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people”; (iii) it proposed to try not only genocide, but also crimes that come under the jurisdiction of internal tribunals; (iv) certain countries that “took a very active part in the civil war in Rwanda” were able to propose candidates for judges and participate in their election; (v) some of the accused could be imprisoned outside Rwanda; (vi) capital punishment had been ruled out, though it was provided for in the Rwanda penal code; (vii) the Tribunal should have sat in Rwanda. See U.N. SCOR, 49th Sess., 3453d mtg. at 14–16, U.N. Doc. S/PV.3453 (1994) (remarks of Mr. Bakuramutsa of Rwanda), cited in Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L L. 11, 66 (1995).

55. See S.C. Res. 827, *supra* note 47, pmb. (referring specifically to “practice of ‘ethnic cleansing’”); cf. *Tribunal To Cite Bosnian Serb Chief as War Criminal*, N.Y. TIMES, Apr. 24, 1995, at A1; *UN To Try Serbian War Crimes in Bosnia*, THE AGE (Melbourne), Apr. 21, 1995, at 10; see also *infra* note 167.

after the Gulf War.⁵⁶ Indeed, it appears that the United Nations was more than prepared to forgo bringing war criminals to “justice” in order to preserve hopes of peace in the Balkans.⁵⁷

A permanent International Criminal Court such as that proposed in the International Law Commission’s 1994 Draft Statute⁵⁸ would presumably remove both these legal question marks (at least resituating the two jurisprudential problems as jurisdictional and prosecutorial, respectively). It might even resolve the problem of such tribunals dispensing justice as an extension of executive power. Similarly, movement toward the adoption of a Code of Crimes would strengthen the consistency that is crucial to the legitimacy of any international criminal law régime.⁵⁹

Much has been written on each of these topics. My concern here, however, is with the nature of the order that such a régime might uphold—a topic that has received far less critical attention and that goes to the heart of the atheoretical pragmatism that has characterized the evolution of this body of law. To make sense of the history of war crimes, then, it is necessary to examine the structure within which such crimes operate: What values underpin this recourse to law? And why is there such faith that law can defend these values? In the following sections, I will approach this through a consideration of the functions that war-crimes trials have traditionally served: as a performative act (as “theater”) and as an ordering principle.

56. See David A. Martin, *Reluctance to Prosecute War Crimes: Of Causes and Cures*, 34 VA. J. INT’L L. 255 (1994); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122; Simpson, *supra* note 2, at 7. On the issue of U.S. attempts to prosecute alleged Iraqi war criminals, see Louis Rene Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 DICK. J. INT’L L. 425 (1992); Kenneth A. Williams, *The Iraq-Kuwait Crisis: An Analysis of the Unresolved Issue of War Crimes Liability*, 18 BROOK. J. INT’L L. 385 (1992); see also Roberts, *supra* note 54, at 48–56. Gareth Evans has argued that

The creation of [an International Criminal Court] would certainly further underline the resolve of the international community to respond to breaches of humanitarian law and gross violations of human rights, and have an even stronger general deterrent effect—*provided the commitment of the international community to pursue perpetrators was firm and clear, which may not be easily achievable in the short term.*

GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990S AND BEYOND 43 (1993) (emphasis added).

57. See, e.g., John Sweeney, *UN Cover-up of Massacre*, GUARDIAN WKLY. (London), Sept. 17, 1995, at 4 (discussing allegations of UN reluctance to report Serb brutality in fall of Srebrenica).

58. See *Report of the International Law Commission, Draft Statute for an International Criminal Court*, U.N. GAOR, 46th Sess., Supp. No. 10, at 43, U.N. Doc. A/49/10 (1994); see also *Preparatory Committee on International Criminal Court Concludes First Session*, Press Release of Apr. 12, 1996, U.N. Information Cen. Doc. L/2787 (1996) (discussing draft summary).

59. See generally Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They’re Going*, 30 COLUM. J. TRANSNAT’L L. 375 (1992); Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1 (1994).

B. *War Crimes as Theater*⁶⁰

The International Military Tribunal in Tokyo looked last week like a third-string road company of the Nurnberg show. . . . Much care had gone into fitting the courtroom with dark, walnut-toned paneling, imposing daises, convenient perches for the press and motion-picture cameramen. The klieg lights suggested a Hollywood premiere.

Nurnberg's impresarios had used simpler furnishings, relied on the majesty of the concept to set the tone. The German production had a touch of Wagner—elaborate vaunting of guilt, protestations of heroic innocence. Tokyo's had the flavor of Gilbert & Sullivan.

—TIME, May 20, 1946.⁶¹

Many commentators have acknowledged the importance of war-crimes trials as a public demonstration of justice.⁶² In this section and the one that follows, however, I consider such trials as “theater” in two distinct ways: the explicit performative function of the war-crimes trial as a feast for public consumption (an aspect that has led to the denigration of some as “show trials”⁶³), and the more subtle ways in which the *invocation* of justice constitutes a particular conception of order in the public realm.⁶⁴ These themes form the basis of the discussion of the crime of rape in Part III, in which the gendered nature of this “order” is considered.

The desire to present justice as a *fait accompli* for the viewers at home perhaps reached its most superficial and racist in the Tokyo trials,⁶⁵ but it was

60. Note that the use of the word “theater” refers to the public display of the war-crimes trial and its sometimes cathartic function. It is in no way intended to trivialize the subject matter.

61. *War Crimes*, TIME, May 20, 1946, at 24.

62. See, e.g., ARENDT, *supra* note 38, at 10; cf. RENÉ GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., 1972) (discussing more general theory of function of criminal law); Binder, *supra* note 49.

63. Perhaps the most spectacular example of such a trial is the Demjanjuk affair. John Demjanjuk was suspected to be Ivan the Terrible, the operator of the gas chambers in the Extermination Camp at Treblinka. He was extradited from the United States to Israel and, despite questionable identification evidence, was convicted in the District Court of Jerusalem under the Nazis and Nazi Collaborators (Punishment) Law, 57 SEFER HACHUKIM 281 (1950). In the course of the appeal, documents were produced that established that another man, Ivan Marchenko, was in fact the man described in the indictment. Demjanjuk was acquitted. See Cr.A. 347/88, *Demjanjuk v. The State of Israel*, P.D. 447 (July 29, 1993). His defense attorney wrote a book on the experience. YORAM SHEFTEL, *DEFENDING “IVAN THE TERRIBLE”: THE CONSPIRACY TO CONVICT JOHN DEMJANJUK* (Haim Watzman trans., 1996).

64. Cf. R.B. PAL, *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSIDENT JUDGMENT OF JUSTICE* PAL 697-701 (1953) (expressing concern that Tribunal's emphasis on retribution and revenge against individual leaders detracts from higher purpose of Tribunal which is to serve justice and promote peace).

65. In comparison to the volumes written about the Nuremberg trials that followed the end of the Second World War, little has been written about the proceedings of the other International Military Tribunal established in Tokyo. Whereas the complete Nuremberg judgment was published in 1947 in both English and French, the full judgment of the Tribunal for the Far East remained available only in mimeographed form until 1977. Much of what has been written since the trial is highly critical of the “victor's justice” that was seen to have characterized the proceedings, with suggestions that the trial was a means of extracting revenge for the bombing of Pearl Harbor or expiating guilt for the use of atomic weapons in Japan. See generally RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951* (1987); PAUL W. SCHROEDER, *THE AXIS ALLIANCE AND JAPANESE-AMERICAN RELATIONS* 228 (1958); *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* (C. Hosoya et al. eds., 1986). If Nuremberg provides the moral and legal foundations for the modern prosecution of war crimes, Tokyo remains a shadowy

in the European reaction to the horrors of Nazism that the conflicting tensions of justice and politics were most manifest:

The purpose was not to punish all cases of criminal guilt, but to give expression to the abhorrence of what had happened. The exemplary punishments served the purpose of restoring the legal order, that is of *reassuring the whole community that what they had witnessed for so many years was criminal behaviour*.⁶⁶

This assertion of a “reassurance” role for war-crimes trials suggests that beyond the simple assertion of victor’s justice discussed above,⁶⁷ it is possible to recognize additional functions that the trials served at the conclusion of hostilities.⁶⁸ Some are clearly articulated; others are implicit in the rhetoric surrounding the trials and their political ends. In this section I will discuss three such functions: retribution for the sins committed by the defeated enemy, deterrence of future evils, and the exposition of moral and political outrage that is seen as a necessary cathartic stage in the return to *order*.⁶⁹

1. *Retribution*

The retributory theme was evident most clearly in the Allies’ early preparations for the Nuremberg trials. In 1942, the U.S. representative to the International Conference on Military Trials reported that the Allies had reaffirmed “their solemn resolution to insure that those responsible for these crimes shall not escape retribution.”⁷⁰ By 1943, Stalin and Roosevelt had publicly affirmed their commitment to punishing the “criminals”⁷¹ for their “acts of savagery.”⁷² But the conclusion of the Moscow Declaration of November 1, 1943 captured the Allies’ ambivalence about the relative worth of a juridical or a purely military resolution: “Most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver

reminder of its limitations.

66. Bert V.A. Röling, *Aspects of Criminal Responsibility for Violations of the Laws of War*, in 1 *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 199, 206 (Antonio Cassese ed., 1979) (emphasis added).

67. See *supra* text accompanying notes 50–57.

68. The importance of the fact that Tribunal for the former Yugoslavia commenced work while the conflict continued is discussed *infra* notes 115–25 and accompanying text.

69. In this section I am primarily concerned with the notion of order as the exposition of a moral reaction against disorder. In Section II.B, I turn to the more explicitly politicized notions of order validated by the Tribunal for the former Yugoslavia. See *infra* notes 115–19 and accompanying text. Bridging the two is the cathartic experience that war crimes may engender, at once performative and constitutive. See *infra* notes 94–102 and accompanying text.

70. Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 *NOTRE DAME L. REV.* 845, 884 (1995).

71. See Joseph Stalin, *Russia’s War Achievements: The Task of Restoration and Organization Ahead*, Speech Before Meeting of Moscow Workers, in 10 *VITAL SPEECHES OF THE DAY* 105, 108 (1943) (delivered on eve of twenty-sixth anniversary of 1917 revolution), quoted in Tompkins, *supra* note 70, at 884.

72. Roosevelt declared it “fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished.” Jackson’s Report, *supra* note 53, at 10.

them to their accusers in order that justice may be done."⁷³ Even in the closing moments of the war, it was far from clear that the Allies would pursue legal avenues to punish the Nazi leadership. The British, for example, favored the summary execution of a dozen or so leading members of the Nazi apparatus.⁷⁴ Such an approach enjoyed the virtues of simplicity and candor, sparing the Allies the tedious process of organizing the mechanisms and material necessary to present a watertight case, and precluding the legal rationalizations and dilatory tactics that the guilty might employ to delay their judgment. In addition, the victors would not be required to "disguise a punishment exacted by one sovereign upon another by appeal to the neutral instrument of the law."⁷⁵

The final decision to cede "Power . . . to Reason"⁷⁶ was formalized on a particularly inauspicious date. As has been noted above, the Allies signed the London Agreement, the foundation of the Nuremberg trials and the basis for modern international humanitarian law, on August 8, 1945—the same day that the United States dropped the atomic bomb that destroyed Nagasaki.⁷⁷

Retribution will presumably be a more important issue when it is the prosecuting power that has (at least in part) suffered the alleged wrongs.⁷⁸ This can be seen in the argument of Justice Jackson at Nuremberg that "[e]ither the victors must judge the vanquished or we must leave the defeated to judge themselves,"⁷⁹ and in the statement of the French judge Donnedieu de Vabres that the Allies "who had risked everything could not admit neutrals" to the bench.⁸⁰ As such, retribution is a less important factor in the prosecutions

73. See Tompkins, *supra* note 70, at 884.

74. The proposal apparently enjoyed Soviet support—indeed, Stalin, in a "semi-jocular" recommendation, suggested that 50,000 German general staff officers be shot. See TAYLOR, *supra* note 16, at 29–30; István Deák, *Misjudgment at Nuremberg*, N.Y. REV. BOOKS, Oct. 7, 1993, at 46, 48; Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 836–45 (1990).

75. Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 457 (1995). In the case of the Israeli prosecution of Adolf Eichmann, the difficulties in extraditing him from Argentina led to "frequent" mention of the alternative of "kill[ing] him right then and there, in the streets of Buenos Aires." ARENDT, *supra* note 38, at 265. Arendt notes a successful instance of such instant justice in 1921, when the Armenian Tehlirian, in the middle of Berlin, shot dead Talaat Bey, one of the major participants in the Armenian pogroms of 1915. *Id.*; see *supra* text accompanying note 23.

76. See JACKSON, *supra* note 5.

77. See *supra* note 2; see also B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND* 110–16 (Antonio Cassese ed., 1993). On the legality of the use of nuclear weapons, see generally NUCLEAR WEAPONS AND LAW 19–50 (Arthur Selwyn Miller & Martin Feinrider eds., 1984).

78. This significance can be seen, for example, in arguments made during the prosecution of Adolf Eichmann:

When I stand before you, judges of Israel, in this court, to accuse Adolf Eichmann, I do not stand alone. Here with me at this moment stand six million prosecutors. But alas, they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *J'accuse* against the man who sits there. . . . Their blood cries to Heaven, but their voice cannot be heard. Thus it falls to me to be their mouthpiece and to deliver the heinous accusation in their name.

ARENDETT, *supra* note 38, at 260 (quoting Gideon Hausner's opening address for prosecution). Arendt identifies the failure of the Jerusalem court to admit witnesses for the defense as the most serious aspect of the victor's justice that marred the conviction of Eichmann. See *id.* at 274.

79. ARENDT, *supra* note 38, at 274 (quoting Jackson).

80. *Id.* (quoting Vabres).

concerning the former Yugoslavia, except perhaps insofar as it relates to the violation of a certain "new" notion of order that was seen to follow the collapse of the USSR⁸¹ and to public outrage at the atrocities covered prominently by the media.⁸²

2. Deterrence

The desire that the Nuremberg trials serve a deterrent function was a corollary of the view that the Second World War might have been prevented if the initiators of the First World War had been justly punished.⁸³ Similarly, the Tokyo trials and other war crimes tribunals that allocated individual responsibility were justified on the basis of their capacity to punish individual actors and, presumably, to deter other individuals from performing such acts in the future.⁸⁴

The applicability of international law to individuals came to constitute the first of the "Nuremberg Principles" adopted by the UN General Assembly in 1950.⁸⁵ Over the course of the Nuremberg and Tokyo Trials, this principle was

81. Perhaps the definitive example of the rhetoric accompanying the (brave) new world order that was intended to follow the decline of the USSR comes from the then President of the United States, George Bush: "[T]he ideals that have spawned new freedoms throughout the world have received their boldest and clearest expression in our great country the United States. Never before has the world looked more to the American example. Never before have so many millions drawn hope from the American idea." George Bush, *The Possibility of a New World Order*, Speech at Maxwell Air Force Base, Montgomery, Alabama (Apr. 13, 1991), in 57 VITAL SPEECHES OF THE DAY 450, 452 (1991); see also Francis Fukuyama, *The End of History? The National Interest*, Sept. 1989, at 3, 4 (article by deputy director of U.S. State Department's policy planning staff on coming of age of world of Western liberal values); William Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L.J. 88 (1992) (discussing need for punishment of international criminals). Fukuyama's argument has since been expanded into a book. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). For a critical discussion of the assertion that "we won the Cold War," see NOAM CHOMSKY, *YEAR 501: THE CONQUEST CONTINUES* 61-64 (1993).

82. See, e.g., James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 639-41 (1993).

83. See *supra* notes 29-35 (discussing Leipzig trials); see also David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L.J. 86, 86 (1989) ("[U]nless crimes against humanity are vigorously prosecuted they are destined to be repeated.").

84. See, e.g., Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 198-99 (1947) (quoting closing arguments of Sir Hartley Shawcross, British Chief Prosecutor). Shawcross stated: The Charter of [the Nuremberg] Tribunal embodies a beneficent principle—much more limited than some would like it to be—and it gives warning for the future—I say, and repeat again, gives warning for the future, to dictators and tyrants *masquerading as a State* that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.

Id. (emphasis added); see also Brenton Saunders, Comment, *The World's Forgotten Lesson: The Punishment of War Criminals in the Former Yugoslavia*, 8 TEMP. INT'L & COMP. L.J. 357, 374-75 (1994) (arguing that lack of prosecution of war crimes since World War II has led to inadequate deterrence, sending message "that war crimes will go unpunished."). But see JOHN ALAN APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 10 (Greenwood Press 1971) (1954) (supporting punishment for war crimes as matter of justice, but "strongly suspect[ing] that international penal justice [for war crimes] may fail" as deterrent).

85. See *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950),

variously justified by reference to the precedent established by piracy as an international crime;⁸⁶ to international duties that “transcend the national obligations of obedience imposed by the individual state”;⁸⁷ and to the consequences of allowing individuals to hide behind the veil of sovereignty:

This principle of personal liability is a necessary as well as logical one if International Law is to render real help to the maintenance of peace. An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare Only sanctions which reach individuals can peacefully and effectively be enforced.⁸⁸

More recently, the need to attribute liability to persons responsible for acts that have offended international norms has been invoked once again.⁸⁹ Theodor Meron has observed that the mere threat of war-crimes trials in past wars (as in the case of the Persian Gulf War) has proven to be an ineffective deterrent, and that the trials in the former Yugoslavia have provided a unique opportunity to use war-crimes trials as part of the resolution of a dispute.⁹⁰ This view is consistent with the linkage made in eventual peace negotiations between political participation and cooperation with the International Tribunal under the Dayton/Paris Peace Agreement.⁹¹ Whether such trials will in fact engender the desired response in potential war criminals in other trouble spots remains, of course, to be seen.

Of crucial importance here is the failure to prosecute the most prominent alleged war criminals. The Dayton Agreement, which was remarkable for the

reprinted in 44 AM. J. INT'L L. (OFFICIAL DOCUMENTS SUPPLEMENT) 126. Principle I reads: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” *Id.*; see also United Nations, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* (1949) (preparatory memorandum by the Secretary General to assist work of International Law Commission).

86. See JACKSON, *supra* note 5, at 88. The analogy with piracy is questionable at the least. See, e.g., A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 421 (1963).

87. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 466 (“[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.”).

88. JACKSON, *supra* note 5, at 88; cf. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 466 (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”).

89. The Security Council Resolution calling for the establishment of a tribunal for the former Yugoslavia indirectly relied upon the Geneva Convention of August 12, 1949, to justify the statement that “persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches” (to whom such persons are generally responsible was left unstated). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, paras. 37–40, U.N. Doc. S/25704 (1993), 32 I.L.M. 1159, 1168 [hereinafter *Report of the Secretary General*]. Earlier resolutions also enunciated this proposition. See, e.g. S.C. Res. 764, U.N. SCOR, 47th Sess., 3093rd mtg., para. 10, U.N. Doc. S/Res/764 (1992); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., para. 1, U.N. Doc. S/Res/771 (1992).

90. See Meron, *supra* note 56, at 122–23.

91. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Republic of Bosnia and Herzegovina–Republic of Croatia–Federal Republic of Yugoslavia, U.N. Doc. A/50/790-S/1995/999 (1995), reprinted in 35 I.L.M. 89 [hereinafter *General Framework Agreement*]; see Paul Szasz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301, 313–14.

lack of any “amnesty-for-peace” clause, has been compromised by the failure to bring former Bosnian Serb President Radovan Karadzic and General Ratko Mladic before the Tribunal. Incoming Chief Prosecutor Louise Arbour has recently warned that unless the Tribunal is given assistance in bringing indicted war criminals to trial, “its perceived failure may exacerbate the tensions that it was designed to appease.”⁹²

At the time of writing, over seventy individuals had been indicted with war crimes. Only seven were in custody at the Hague.⁹³

3. *Catharsis*

It is the desire for the war-crimes trial to allow the international community to purge itself through catharsis, however, that underlies the preceding two functions. The motivation for these most recent trials cannot be understood outside the history of European approaches to war crimes.⁹⁴ Both the failures of Leipzig and the horrors of Auschwitz informed the Allies’ resolve to form the Nuremberg Tribunal. Fifty years ago, Justice Jackson, one of the main advocates for a juridical rather than an exclusively military settlement of Nazi atrocities,⁹⁵ stated in his opening address to the Tribunal: “The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated.”⁹⁶ As Richard Goldstone, the South African judge and former Chief Prosecutor at the Hague tribunals for both Yugoslavia and Rwanda, recently commented, however, “[t]he hope of ‘never again’ became the reality of again and again.”⁹⁷

More than any other conflict, events in the former Yugoslavia offended this collective memory. The doubly sanitized term, “ethnic cleansing,”⁹⁸ did little to muffle the resonance of these events with the pogroms of the Second World War⁹⁹—not least because this carnage was taking place in Europe.¹⁰⁰ When

92. Ed Vulliamy, *Hague’s New Top Prosecutor Demands Help for Tribunal*, GUARDIAN (Manchester), Oct. 4, 1996, at 14; see also Robert Fisk, *Bosnia Judge Condemns West*, INDEPENDENT (London), Sept. 17, 1996, at 1 (reporting Judge Richard Goldstone’s belief that failure would undermine international justice).

93. See Ian Geoghegan, *New Bosnia War Crimes Chief Calls for More Arrests*, REUTERS, Sept. 30, 1996, available in LEXIS, News Library, Reuters World Service File.

94. Cf. Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262, 264 (1993) (arguing that atrocities in the Balkans put into question “the most fundamental norms of civilized human behavior which have been painstakingly won and reaffirmed since the Second World War”).

95. See Douglas, *supra* note 75, at 459–63.

96. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 49.

97. *Were They Just Obeying Orders?*, GUARDIAN (Manchester), May 7, 1996, at 10.

98. See *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex 1, paras. 55–56, U.N. Doc S/25274 (1993) (“The expression ‘ethnic cleansing’ is relatively new. Considered in the context of the conflicts in the former Yugoslavia, ‘ethnic cleansing’ means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area. ‘Ethnic cleansing’ is contrary to international law.”).

99. Cf. Paul Parin, *Open Wounds: Ethnopschoanalytic Reflections on the Wars in the Former Yugoslavia*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 35, 37–40 (Alexandra

photographs of concentration camps reminiscent of the Holocaust emerged, accompanied by harrowing accounts of massacres, torture, and rape, embarrassment and, perhaps, guilt, eventually forced the international community into action.¹⁰¹ And, once again, this action was compromised by the desire to pursue objectives at once judicial, military, and political.¹⁰²

It is this third function of the war-crimes trial—as heralding a return to order, or perhaps as *constitutive* of an order—that will be pursued in depth in the next section.

C. War, Crime, and Order

The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. It may well be essential to hang Goering, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug . . . We are simply not equipped to deal, on a human political level, with a guilt that is beyond crime.

—Hannah Arendt¹⁰³

In the lead-up to the Nuremberg trials, conflicts emerged among the Allies as to the relative importance of prosecuting the two broad species of crimes articulated in the London Charter.¹⁰⁴ The United States (through Justice

Stiglmyer ed., 1994) [hereinafter MASS RAPE] (discussing hatred between Serbs and Croats as being “ignited by an especially repellent ‘unresolved past’—atrocities committed under the Ustasha State in particular live on in the memory of survivors but were “never elucidated and put in order.”).

100. The comparative importance accorded to the tribunals for the former Yugoslavia and Rwanda is also indicative of this Eurocentric bias. See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243, 245 (1994).

101. See *id.* James Crawford, Chair of the ILC Working Group for an International Criminal Court, has argued that these more recent moves towards an international criminal regime are the product of three crucial factors:

the large-scale breakdown of state order in particular societies leading to massive violations of human rights, support for action in the Security Council, associated with an unwillingness by any permanent member to veto that action, and the intensive and detailed media coverage of the atrocities, giving rise to public demand that “something” be done.

James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT’L L. 404, 407 (1995); see also *infra* note 168.

102. See *infra* notes 124–25 and accompanying text.

103. HANNAH ARENDT, KARL JASPER’S CORRESPONDENCE 1926–1969, at 54 (Lotte Kohler & Hans Saner eds., 1992) (footnote omitted); cf. *infra* notes 138–42.

104. See Charter of the International Military Tribunal, *supra* note 2, art. 6:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be 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 or 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;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement,

Jackson, its Chief of Counsel) wanted the crime of aggression to serve as the focus of the Allies' case. It argued that belligerent militarism remained the greatest threat and could be understood as the proximate cause of the Nazis' other crimes.¹⁰⁵ The French resisted the inclusion of crimes against peace, however, arguing that war crimes and crimes against humanity should be paramount.¹⁰⁶ These divergent approaches can be seen, in part, as relating to the perceived foundations of international law that were said to underpin the Tribunal,¹⁰⁷ but also as signifying distinct ways of attempting to comprehend in legal form the events that Arendt characterized as "explod[ing] the limits of the law."¹⁰⁸

Ultimately, it was those who had been found guilty of "those quite uncommon atrocities that actually constituted a 'crime against humanity' or, as the French prosecutor François de Menthon called it, with greater accuracy, a 'crime against the human status'"¹⁰⁹ who received the greatest penalties. Death sentences were handed down at Nuremberg not for crimes against peace, but for war crimes, crimes against humanity, or both.¹¹⁰ At the same time, the notion that aggression was "the supreme international crime" was silently abandoned.¹¹¹ Just as the Tribunal shaped the future of international criminal law, so this distinction accurately foreshadowed the future treatment of the putative crime of aggression. Whereas Jackson hoped that this crime would emerge as the great legacy of the Nuremberg trials,¹¹² the formation of the United Nations and its subsequent domination by the politics of the Cold War saw that function assumed by the Security Council.¹¹³

deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the count where perpetrated.

Id.; see also Charter of the International Military Tribunal for the Far East, *supra* note 37, art. 5.

105. See TAYLOR, *supra* note 16, at 76-77.

106. See *id.* at 65-67.

107. See Douglas, *supra* note 75, at 460 ("[I]nternational law and custom seemed less ambiguous in their condemnation of extermination than in their rejection of aggressive militarism . . .").

108. ARENDT, *supra* note 103, at 54.

109. ARENDT, *supra* note 38, at 257.

110. Twenty-four Nazi leaders each were ultimately indicted on two or more counts. Charges were dropped against Gustav Krupp, who was deemed too ill to be tried, and Robert Ley, who committed suicide. The Tribunal handed down twelve death sentences, seven prison terms (three for life, two for twenty years, one for fifteen years, and one for ten years), and three acquittals. All those sentenced to hang were found guilty of crimes against humanity and in most cases of other crimes also. See Quincy Wright, *The Law of the Nuremberg Trial*, in INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 239, 242-43.

111. See ARENDT, *supra* note 38, at 257; see also TAYLOR, *supra* note 16, at 635-38. On the approach to aggression taken in the Tokyo trials, see Röling, *supra* note 66, at 208-19.

112. For Jackson's view on the initiation of aggressive war, see TAYLOR, *supra* note 16, at 635.

113. See Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 291 (1994) ("Nuremberg did establish a rule of law concerning aggressive war; it is codified in the United Nations Charter However, this rule of law is not justiciable Great power politics is now dressed up in the rhetoric of the rule of law and sanctified by the U.N. Charter."); cf. O'Brien, *supra* note 82, at 645 ("Crimes against peace are appropriately omitted from the Yugoslav statute. Their inclusion would almost inevitably require the tribunal to investigate the causes of the conflict itself . . . which would involve the tribunal squarely in the political issues surrounding the conflict."). See generally Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271

Despite the decreased emphasis on crimes against peace, however, war-crimes trials have continued to serve a legitimating role that is intimately linked to particular conceptions of order. This notion of order is closely related to the military projects that have provided their political context.¹¹⁴ This is fairly clear with regard to what I have earlier called the first and second functions of war-crimes trials: retribution and deterrence. In different ways, these aims reflect military objectives pursued by legal means, explicitly linked to the maintenance of order. But it is in relation to my third category that this order itself is called into question.

In some obvious situations, then, the war-crimes trial serves as the validation of a peace achieved through military means, with the invocation of law marking the ascendancy of reason over power. Nuremberg is, of course, the paradigmatic example, and the Tribunal for the former Yugoslavia may be another. But it is also clear that war-crimes trials, beyond their role in the conclusion of hostilities, validate the order by reference to that which defines it: the State, the nation, and the citizen-subject. I will consider these two ends in turn.

1. *Law and Order*

The desire for the Tribunal for the former Yugoslavia to validate, in some way, the post-Cold War international order is reflected in the preambles to the Security Council Resolutions that established it. The expressions of "grave alarm,"¹¹⁵ and the faith in the utility of war-crimes trials in "ensuring that such violations are halted and effectively redressed,"¹¹⁶ suggest a belief in the ability of such trials to draw a line between the Hobbesian state of war and a post-Grotian peace under law.¹¹⁷ Of particular importance in this context is the legal foundation on which the Tribunal rests.¹¹⁸ The Tribunal's authority emerges from a determination by the UN Security Council that breaches of humanitarian law in the former Yugoslavia constitute a "threat to international peace and security" within the meaning of Chapter VII of the UN Charter.¹¹⁹ We have,

(1985) (discussing historical origins of UN Charter provision against threats or uses of force); Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 (1988) (analyzing status of "threats of force" under international law and discussing Security Council's role with respect to threats of force).

114. Kenneth Anderson argues that the pursuit of symbolic justice may undermine the task of achieving "substantive justice," which

can come for the millions of people affected by ethnic cleansing only by massive outside intervention—war, in other words, and making sure that the just side wins . . . Nuremberg was a lovely hood ornament on the ungainly vehicle that freed Europe from the Nazis; it was not, however, a substitute for D-Day.

Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT'L L. 385, 405 n.56 (1993).

115. S.C. Res. 827, *supra* note 47, pmbi., 32 I.L.M. at 1203.

116. *Id.*

117. *See supra* note 14; cf. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 283 (1987).

118. *See supra* note 54 and accompanying text.

119. S.C. Res. 827, *supra* note 47, pmbi., 32 I.L.M. at 1204; cf. S.C. Res. 955, *supra* note 47, pmbi., 32 I.L.M. at 1600 (using similar language when establishing Rwandan war crimes tribunal).

then, the equation of law and order, through the legitimation of law *as* order.

In Nuremberg and Tokyo, this law was clearly backed up by military strength—it was reason that stayed the hand of *vengeance*.¹²⁰ Indeed, it has been argued that it is not possible to have a juridical resolution that is not premised on such “victor’s justice”:

[T]o reduce the world to a courtroom, to legal memoranda and pleadings and paperwork, is possible only once an army sits atop its vanquished enemy The Yugoslavia tribunal invokes the law as a rhetorical device to make the UN appear to do more than it has, but everyone knows that those who would conduct the trial have not paid the price

The Yugoslavia Tribunal seeks to make history; but the true lesson of Nuremberg is that *the power of law to reduce history to its terms can only be accomplished where history—victory and surrender—has been made elsewhere*.¹²¹

The failure to apprehend the most prominent of the alleged war criminals and the speed with which elections were held in war-ravaged Bosnia under the Dayton Accord¹²² seem to support the theory that the primary objective of the United Nations is to promote the *appearance* of order.¹²³ Regardless of such allegations—which at times verge on accusations of *mala fides*—the more subtle and interesting question is the nature of the order that is conceived as being the goal of these operations.

As the United Nations struggles to establish Bosnia as a viable and democratic state, with effective partition keeping the warring factions at bay, it is not insignificant that primary responsibility has been taken by the Organization for Security and Cooperation in Europe (OSCE), a predominantly military organization.¹²⁴ Although various methods have been adopted by the

References to peace and security recur frequently:

[Establishing the International Tribunal by Security Council Resolution rather than by treaty and without the involvement of the General Assembly] would constitute a measure to maintain or restore international *peace* and *security*, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

Report of the Secretary General, 32 I.L.M. at 1168 (emphasis added); *see also id.* para. 26, 32 I.L.M. at 1169 (“[T]he establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.”).

120. *See supra* notes 70–77 and accompanying text.

121. *See Anderson, supra* note 113, at 1076. Telford Taylor has also warned against exclusive reliance on legal mechanisms to achieve political ends:

[I]n terms of enforcement, whether the charge is war crimes or crimes against humanity, I think it is a mistake to expect that the device of a criminal trial is the major way in which the enforcement of those limitations and obligations is going to be achieved [T]he idea that trials alone (or statutes and treaties) can bring about the reforms and remedies that we hope for is misplaced reliance.

Telford Taylor, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC’Y INT’L L. 56, 70 (1986).

122. *See Geoghegan, supra* note 93.

123. During the early years of the crisis, this was reflected most clearly in U.S. foreign policy. The Bush administration in fact issued a directive that the conflict was to be presented as an impenetrable civil war in which no intercession was possible. *See George Kenney, See No Evil, Make No Policy*, WASH. MONTHLY, Nov. 1, 1992, at 33.

124. *See, e.g., S.C. Res. 1031, U.N. SCOR*, 50th Sess., 3607th mtg., para. 6, U.N. Doc. S/Res/1031 (1995); *see also Szasz, supra* note 91, at 304–05 (noting poorly defined legal roles of states);

international community (economic sanctions, military intervention, political maneuvering), there has been a continual tension between the desire to achieve a swift and “clean” resolution to the conflict and the understanding that a long-term resolution demands some form of reconciliation within the putative Bosnian state.¹²⁵

It is the former impulse that has long dominated international politics and which, in Part III, I identify with what may be termed a masculinist world view. In such a world view, the cathartic experience of the war-crimes trial acts to legitimate an order achieved through military force. Such an approach to justice is premised on the legitimation of violence in two ways. First, it explicitly validates certain acts of violence as lawful and acceptable. Second, it binds the dominant conception of order (equated with “peace”) to the continual possibility of and respect for violence.¹²⁶

Such an approach—dominated by force, instrumental power, and the perpetual opposition of unitary actors—may be characterized as a masculinist conception of international “order.”¹²⁷ In many ways, it mimics the dichotomy made in domestic law between public and private order.¹²⁸ Feminist legal theorists have exposed the role of this conception in institutionalizing patriarchal power structures within the state,¹²⁹ but the implications of privileging such a notion of order at the international level have received comparatively little

cf. S.C. Res. 1022, U.N. SCOR, 50th Sess., 3595th mtg., U.N. Doc. S/Res/1022 (1995) (noting responsibility of other states).

125. The initial European response to the war in Slovenia and Croatia in the summer of 1991 followed historical alliances, with France and Great Britain aligning with Serbia, Germany and Austria with Croatia. When the United Nations began discussing military intervention in April 1993, these alliances, together with reservations about the new Germany, ensured European inaction. See Alexandra Stiglmayer, *The War in the Former Yugoslavia*, in MASS RAPE, *supra* note 99, at 1, 22.

126. See KENNEDY, *supra* note 117, at 281–86.

127. See generally CYNTHIA ENLOE, *BANANAS BEACHES & BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* (1989) (arguing that masculinist conception leads to faulty understanding of how international political system actually works); CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* (1993) (arguing that women’s situation after sacrifice in war does not change) [hereinafter ENLOE, *THE MORNING AFTER*]; GENDERED STATES: FEMINIST (RE)VISIONS OF INTERNATIONAL RELATIONS THEORY (V. Spike Peterson ed., 1992) (discussing feminist approaches to international order) [hereinafter GENDERED STATES]; Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT’L. & CONTEMP. PROBS.* 293 (1993) (applying feminist legal theory to international law); Anne Sisson Runyan & V. Spike Peterson, *The Radical Future of Realism: Feminist Subversions of IR Theory*, 16 *ALTERNATIVES* 67 (1991) (reviewing contemporary feminist critiques of the state, interstate system, and preeminent and patriarchal ideology of realism that constructs and reflects modern international relations); Christine Sylvester, *The Emperors’ Theories and Transformations: Looking at the Field Through Feminist Lenses*, in *TRANSFORMATIONS IN THE GLOBAL POLITICAL ECONOMY* 230 (Dennis C. Pirages & Christine Sylvester eds., 1990) (juxtaposing mainstream theories of international relations and political economy with feminist critiques).

128. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT’L L.* 613, 625–29, 644 (1991) (concluding that dichotomy between male and female is not as strict in international law as it is in domestic sphere and that coupling this with differing process and aims of international law may render it more open to feminist analysis than other areas of law).

129. A prime example of this is the institutionalization of militarism. See generally CYNTHIA ENLOE, *DOES KHAKI BECOME YOU? THE MILITARISATION OF WOMEN’S LIVES* (1983) (discussing multiple roles of women interacting with military).

attention.¹³⁰ This is the first of the two themes that link this interrogation of order in Part II with the analysis of rape as a war crime in Part III of this Article.

2. *Ordering the Subject*

In addition to the utility of war crimes in validating an “order,” however, they may also be used to constitute the subjects that define that order. Where Nuremberg provides the paradigm of the former project (with Tokyo as a warning as to its inherent dangers¹³¹), the latter is most clearly seen in the domestic prosecutions of war crimes.¹³²

The cathartic effect of the war-crimes trial is therefore not limited to a unique moment of redemption; such a cultural moment may serve as a “pedagogical event”¹³³ with an ongoing historical and moral function. In this way the war crimes trial acts as an event that transmutes the “historical past . . . into a judicial present.”¹³⁴ Far more than an act of closure in the dark chapter of a nation’s history, the war-crimes trial may in fact be *definitive of* the public morality that it legitimates.¹³⁵ Here, Arendt’s description of the guilt “beyond crime” at Nuremberg¹³⁶ makes a stark contrast with her account of the trial of Adolf Eichmann in Jerusalem fifteen years later.¹³⁷ It was precisely Eichmann’s humanness, his *banality*¹³⁸ that undermined all attempts to turn his trial into an exorcism of the Jewish State.¹³⁹

130. See R.B.J. Walker, *Gender and Critique in the Theory of International Relations*, in *GENDERED STATES*, *supra* note 127, at 179, 179–202 (reporting that “feminist voices have begun to make themselves heard” and highlighting questions for discussion).

131. See MINEAR, *supra* note 65.

132. See GIRARD, *supra* note 62; Binder, *supra* note 49, at 1371.

133. See Alice Kaplan, *Introduction to ALAIN FINKIELKRAUT, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY* at ix, xvi (1992).

134. FINKIELKRAUT, *supra* note 133, at 2.

135. This is reflected in the use that is made of *time*. War crimes at once claim a universal jurisdiction but are restricted to the historical specificity of the moment—in this way, their prosecution attempts to confine the moment in its historical abnormality while simultaneously making its lesson universal and timeless. See Simpson, *supra* note 2, at 8.

136. See ARENDT, *supra* note 103, at 54.

137. Cr.C. (Jm.) 40/61, *The Attorney General v. Eichmann*, 45 P.M. 3 (1965), *reprinted in* 36 I.L.R. 5, 18 (1968); *aff’d on other grounds*, Cr.A. 336/61, *Eichmann v. The Attorney General*, 16 P.D. 2033 (1962), *reprinted in* 36 I.L.R. 5, 277 (1968).

138. See ARENDT, *supra* note 38, at 276 (“The trouble with Eichmann was precisely that so many were like him, and that the many were, and still are, terribly and terrifyingly normal.”). Another commentator has noted:

This is why it is not so much the natural innocence of creatures that Kafka and Walser allow to prevail against divine omnipotence as the natural innocence of being tempted. Their demon is not a tempter but a being infinitely susceptible to temptation. Eichmann, an absolutely banal man who was tempted to evil precisely by the powers of right and law, is the terrible confirmation through which our era has revenged itself on their diagnosis.

GIORGIO AGAMBEN, *THE COMING COMMUNITY* 32 (1993).

139. See ARENDT, *supra* note 38, at 260. Leonard Cohen captured this in his poem, “All There Is To Know About Adolf Eichmann”:

Number of Fingers: Ten.

Number of Toes: Ten.

Intelligence: Medium.

Edward Morgan has broadened this analysis of war-crimes trials (as “theater”) to suggest that the symbolic purpose of the punishment of the war criminal lies in the “ritualized retelling of the tribulations of history.”¹⁴⁰ The rehearsal of these horror stories serves not only to educate ourselves about our history and the extremes of human nature, but also to “dramatize and reverberate through time the oppression, and the freedom, felt by each and every one of us, in whatever capacity we choose to conceive of ourselves.”¹⁴¹ This is ultimately referable to the ratiocination of a conception of the individual as rational, autonomous, and responsible to one’s fellow human beings.¹⁴²

I have considered these notions of subjectivity that underpin international law and international relations elsewhere.¹⁴³ For present purposes, I am concerned with the extent to which the subjectivity deployed by the articulation of an international crime is rendered partial by its gendered nature. This question of the partiality of the subject(s) of criminal law runs parallel to the question of the partiality of the law’s order and provides the second theme that will run through Part III of this Article.

In this part, I have sketched out a brief history of war crimes and the functions that they have served. Of particular interest was the notion that war crimes serve a *performative* function (as “theater”) as retribution, as deterrence, and more generally as the cathartic experience of absolution that is needed to validate the order so grievously shattered by the violations prosecuted. On closer examination, the significance of this “order” was seen to go beyond rhetorical legitimation, while at the same time providing their normative *telos*.

I suggested that this notion of order was gendered in two important ways. First, it was shown to be falsely premised on the absence of violence; in fact, it depends greatly on particular notions of a “public” order defined through its relationship with violence. Second, it affected the partiality of the subjects of that order, defining a particular “public” morality within which those subjects operate. In Part III, I apply this historical and theoretical analysis to the war crime of rape, before evaluating the extent to which the prominence of that crime has led to a reconsideration of notions of order in the Tribunal for the former Yugoslavia.

What did you expect?

Talons?

LEONARD COHEN, *SELECTED POEMS, 1956–1968*, at 122 (1969); cf. WILLIAM SHAKESPEARE, *OTHELLO* act 5, sc. 2, in 15 *THE WORKS OF WILLIAM SHAKESPEARE* 173 (AMS Press 1970) (James O. Halliwell ed., 1861) (“I look down towards his feet—but that’s a fable. If that thou be’st a devil, I cannot kill thee.”).

140. Morgan, *supra* note 46, at 4.

141. *Id.* at 64.

142. *See id.* at 43.

143. *See* Chesterman, *supra* note 13.

III. THE GENDER OF WAR CRIMES: RAPE IN WAR, RAPE AS WAR

I then told him that, in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have the details as early as possible so that the offenders could properly be hanged.

—General George S. Patton Jr.¹⁴⁴

Rape has long been an accepted concomitant of war, even if it has not always been explicitly condoned: “*Unquestionably* there shall be some raping. Unconscionable but nevertheless inevitable.”¹⁴⁵

And so, as Susan Brownmiller observes, it has been:

Rape has accompanied wars of religion: knights and pilgrims took time off for sexual assault as they marched toward Constantinople in the First Crusade. Rape has accompanied wars of revolution Rape was a weapon of terror as the German Huns marched through Belgium in World War I. Rape was a weapon of revenge as the Russian Army marched to Berlin in World War II. . . . Rape got out of hand—“regrettably,” as the foreign minister was later to say—when the Pakistani Army battled Bangladesh. Rape reared its head as a way to relieve boredom as American GI’s searched and destroyed in the highlands of Vietnam.¹⁴⁶

In this part, I briefly consider the history of rape in war. Given the prevalence of rape and its explicit utilization as a policy of the war in former Yugoslavia, I contextualize this by reference to the function that rape has played in previous conflicts. Ultimately, this is reducible not to military strategy, but rather to the conceptions of power that manifest and are valorized in war. From this perspective, the problematic status of rape as a war crime in international criminal law is more clearly understood as an inadequate attempt to grapple with gendered power relations through the putatively asexual mechanism of the law. Drawing on the analysis in Part II of international criminal law as constituting a particular conception of order, rape is thus seen as marking the scar between “public” and “private” order.

As I have argued in Part II, this “public” order operates within a highly masculinist paradigm. In this part, then, I seek to interrogate these notions of order and morality by reference to the silences that they gloss over, and the voices they have not heard. I then critically examine the possibilities presented by the Tribunal for the former Yugoslavia to overcome some of these inadequacies.

A. *Rape in War*

The body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor’s trooping of the colors. The act that is played out upon her is a message passed between men—vivid proof of victory for one and loss and defeat for the other.

—Susan Brownmiller¹⁴⁷

144. GEORGE S. PATTON JR., *WAR AS I KNEW IT* 23 (1947), *quoted in* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 23 (1975).

145. BROWNMILLER, *supra* note 144, at 23 (discussing PATTON, *supra* note 144).

146. *Id.* at 23–24.

147. *Id.* at 31.

For many centuries, rape was seen as one of the spoils of war. In appealing for recruits during the First Crusade, the Byzantine emperor Alexius is supposed to have extolled the beauty of Greek women as an incentive to go to war.¹⁴⁸ “Booty and beauty,” as it later came to be called,¹⁴⁹ was long associated with success in battle—due as much to the opportunities presented by the victorious army’s marching through the defeated people’s territory as it was to the intimate relation between rape and the macho-military project of conquest.¹⁵⁰

This conception of the link between rape and conquest has had a corollary, in that military leaders have used—or at least tolerated—prostitution as a means of mollifying or maintaining troop morale, or alleviating boredom.¹⁵¹ The prevalence of brothels near a battle camp has often been linked to the phenomenon of the camp follower,¹⁵² but the prostitute, the “comfort woman,”¹⁵³ and the rape camp may be more properly seen as affirming different modalities of the same power relations.¹⁵⁴

Historically, rape has also served a tactical function in war, notably as an expression of the totality of victory.¹⁵⁵ For the men of the conquered nation, the rape of “their women” represented the ultimate humiliation, “a sexual *coup de grâce*”:¹⁵⁶ “[R]ape by a conqueror *is* compelling evidence of the conquered’s status of masculine impotence. Defense of women has long been a hallmark of masculine pride, as possession of women has been a hallmark of masculine success.”¹⁵⁷

The First World War marked a point of significant change in this use of rape as an instrument of war.¹⁵⁸ The German invasions of Belgium in August 1914 and of France the following September were accompanied by a campaign

148. *See id.* at 28.

149. *See id.* at 28–29. Brownmiller attributes the phrase to General Andrew Jackson, who coined it in New Orleans during the War of 1812, referring to the English. *See id.*; *see also* ROBIN REILLY, *THE BRITISH AT THE GATES: THE NEW ORLEANS CAMPAIGN IN THE WAR OF 1812*, at 265–66 (1974) (discussing origin of phrase in Battle of New Orleans and historical disputes over phrase’s source).

150. *See* BROWNMILLER, *supra* note 144, at 35; *see also* Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 *HUM. RTS. Q.* 649, 659–62 (1995).

151. *See* Tompkins, *supra* note 70, at 864. A current example relates to the planned joint military exercise between Australia and the United States that was to take place in Queensland, Australia during Easter 1997 (unfortunately titled “Tandem Thrust”).

152. *See* BROWNMILLER, *supra* note 144, at 28.

153. *See generally* CHARLES TUTTLE, *THE COMFORT WOMEN: SEX SLAVES OF JAPAN’S IMPERIAL FORCES* (1995); Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 *HARV. INT’L L.J.* 528 (1995).

154. Compare this account of a U.S. military sociologist at the end of the Second World War: “[T]he values associated with the ideal of virility play a determining role in holding the soldier’s image of himself and in creating his inner tensions and channels for their release.” Henry Elkin, *Aggressive and Erotic Tendencies in Army Life*, 51 *AM. J. SOC.* 408, 410 (1946). That does not mean that every soldier rapes. But it does mean that the construction of the soldier—or to express it differently, the subjective identity that armies make available, by fusing certain cultural ideas of masculinity with a soldier’s essence—is more conducive to certain ways of behavior than others.

155. *See* Tompkins, *supra* note 70, at 859–61.

156. *See* BROWNMILLER, *supra* note 144, at 31. In such circumstances, it is not uncommon for a husband or father to be forced to watch the rape. *See id.* at 33; *see also infra* note 173.

157. *Id.* at 31.

158. *See id.* at 34–43; Niarchos, *supra* note 150, at 663.

of terror that has been attributed by some commentators to the influence of Clausewitz, the nineteenth-century military theorist.¹⁵⁹ By the end of 1914, however, the strategies of warfare had changed radically; “modern” warfare saw stationary trenches, barbed wire, machine guns, and gas replace the traditional concept of the marching army.¹⁶⁰ At approximately the same time, the incidence of rape dramatically declined.¹⁶¹ As well as the diminished opportunities for rape presented by such warfare, this period also saw the emergence of another new technique in battle: the scientific use of international propaganda.¹⁶² Brownmiller documents the use of raped women in France and Belgium as propaganda to spur on Allied troops and to strengthen domestic support for the unconditional surrender of a foe at once cold, cruel, and syphilitic.¹⁶³ (This has continued to present times: Witness the Western media’s description of “the rape of Kuwait” in the buildup to the Gulf War.)

The Second World War saw another transformation in the utility of rape as the logical extension of the masculine project of conquest. The identification of Aryan superiority with male supremacy and the feminization of the Jews was central to the Nazi ideology.¹⁶⁴ Rape was an obvious manifestation of this ideology, with the total humiliation and destruction of “inferior peoples” being achieved in part through the manner in which men have traditionally “conquered” women.¹⁶⁵

The gendering of the relations between Aryans and their “Other,” however, was at odds with the Nazi views on genetic purity. The contradictions to which this gave rise when read against the Nuremberg race laws and the Nazi claims to racial superiority are manifest in this passage from the memoirs of Sala Pawlowicz, a survivor of Bergen-Belsen:

I was in a small office and the German had a long heavy whip in his hand. “You don’t know how to obey . . . I’ll show you. But I can’t have you, scum, because you’re Jewish, and filthy. What a shame!” He swung the whip across my breasts. “Here’s what you can have for

159. See BROWNMILLER, *supra* note 144, at 34.

160. See HOBBSAWM, *supra* note 21, at 49–51 (discussing increasing brutality of modern warfare).

161. See BROWNMILLER, *supra* note 144, at 36.

162. See *id.* at 43–45. Similarly, Harold Lasswell discusses the propaganda value of rape from a Freudian perspective:

These stories yield a crop of indignation against the fiendish perpetrators . . . and satisfy certain powerful, hidden impulses. A young woman, ravished by the enemy, yields a secret satisfaction to a host of vicarious ravishers on the other side of the border. Hence, perhaps, the popularity and ubiquity of such stories.

HAROLD LASSWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR 82 (1927) (emphasis added).

163. See BROWNMILLER, *supra* note 144, at 38–43 (critically discussing NEWELL DWIGHT HILLIS, GERMAN ATROCITIES: THEIR NATURE AND PHILOSOPHY (1918)).

164. See EVA FIGES, PATRIARCHAL ATTITUDES 121–24 (1970); KATE MILLETT, SEXUAL POLITICS 159–68 (1970).

165. See BROWNMILLER, *supra* note 144, at 63. One of the brief passages in the Nuremberg Trials that considers crimes against women includes the testimony of a survivor of Auschwitz and Revensbrück, Marie Claude Vaillant-Couturier. She describes a brothel that was set up for the SS, which the French prosecutor interpreted to be part of a broader “system of demoralization and corruption.” 6 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 213–14 (quoting M. Charles Dubost, Deputy Chief Prosecutor of French Republic); see also BROWNMILLER, *supra* note 144, at 64–78 (discussing unexamined instances of rape by Allies during Second World War).

being a dirty Jew—instead of me—this!” He lashed the whip again and again and I fainted.¹⁶⁶

It was the echoes of Nazism in the Serbian¹⁶⁷ policies of “ethnic cleansing” in the former Yugoslavia that finally shocked the world into action.¹⁶⁸ Catharine MacKinnon has linked Serbian fascism’s notions of racial purity to its ideological debt to Nazism, with the “cleansing” of ethnicity through rape as the logical extension of the Nazi conception of culture as genetic.¹⁶⁹

In the context of the former Yugoslavia, then, rape has served a number of discrete but interrelated functions. It is at once an instrument of the military objective to drive populations from their homes¹⁷⁰ and the subject of widespread political propaganda.¹⁷¹ It is used as an instrument of fear as well as a means of impregnating women (seen to be bearing children of the conqueror’s ethnicity).¹⁷² In this way, rape functions as both an intimate violation of a woman and a grotesque public display of domination: The rape of the woman’s

166. SALA PAWLOWICZ & KEVIN KLOSE, *I WILL SURVIVE* 41 (1962).

167. Despite the equivocation of much of the UN literature (anxious to avoid the appearance of partisanship), it is broadly accepted that systematic rape in the former Yugoslavia was used first and on the widest scale by the Serb forces in Bosnia in 1992—in particular by the irregular Bosnian Serb forces known as the Chetniks (in Serbo-Croatian *četnik*, from *četa*, “band, troop, (military) division”). Bosnian Croats then adopted the pattern in the spring of 1993, as they attempted to create an ethnically pure Croatian sector. The forces of the predominantly Muslim government of Bosnia are also accused of atrocities, but not as an instrument of government policy. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, ¶ 251, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report of the Commission of Experts*] (discussing ethnic character of Bosnian and Serbian rapes); ALLEN, *supra* note 4, at 42–43 (acknowledging that rape and other atrocities were committed by all sides, but suggesting Serbs alone prescribed genocidal rape as official policy); AMNESTY INT’L, *BOSNIA-HERZEGOVINA: RAPES AND SEXUAL ABUSE BY THE ARMED FORCES 1* (1993) (stating that “all sides . . . have been guilty of [sexual misconduct]”); Roy Gutman, *Foreword* to *MASS RAPE*, *supra* note 99, at ix, xi–xii (presenting experiences of Bosnian rape victims). On the rape of Serbian women, see Alexandra Stiglmyer, *The Rapes in Bosnia-Herzegovina*, in *MASS RAPE*, *supra* note 99, at 82, 137–44.

168. See *supra* notes 98–101 and accompanying text. On the significance of media reports of rape in particular, see C. Carr, *Battle Scars: Feminism and Nationalism Clash in the Balkans*, *VILLAGE VOICE*, July 13, 1993, at 25; Slavenka Drakulic, *Mass Rape in Bosnia, Women Hide Behind a Wall of Silence*, *NATION*, Mar. 1, 1993, at 253; Roy Gutman, *Mass Rape—Muslims Recall Serb Attacks*, *NEWSDAY*, Aug. 23, 1992, at 5; Paul Lewis, *Rape Was a Weapon of Serbs, UN Says*, *N.Y. TIMES*, Oct. 20, 1993, at A1; William Pfaff, *Invitation to War*, *FOREIGN AFF.*, Summer 1993, at 97; Tom Post et al., *A Pattern of Rape*, *NEWSWEEK*, Jan. 4, 1993, at 32.

169. See Catharine MacKinnon, *Rape, Genocide and Women’s Human Rights*, in *MASS RAPE*, *supra* note 99, at 183, 192.

170. See *Final Report of the Commission of Experts*, *supra* note 167, ¶ 250(a).

171. See, e.g., United Nations, Security Council, European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia—Report to the European Community Foreign Ministers, ¶ 20, U.N. Doc S/25240/Annex I (1993) (“[R]ape cannot be seen as accidental to the main purpose of aggression but as a serving strategic purpose in itself.”). The sexualization of politics is most clearly seen in the links that are made between atrocities and patriotism. A woman who survived the Buče rape/death camp in Serbian-occupied Croatia described the making of her rape into nationalist pornography: “In front of the camera, one beats you and the other—excuse me—fucks you, he puts his truncheon in you, and he films all that We even had to sing Serbian songs . . . in front of the camera.” Catharine MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, in *MASS RAPE*, *supra* note 99, at 73, 75. A Muslim soldier who observed a Serbian group committing a gang rape quoted the senior Serbian officer of the group as saying: “She has to know that we are Chetniks. She has to know that this is our land. She has to know that we’re commanding, that this is our Greater Serbia, that it’ll be like this for everyone who doesn’t listen.” *Id.* at 79.

172. See ALLEN, *supra* note 4, at xiii; Stiglmyer, *supra* note 167, at 131–37; Tompkins, *supra* note 70, at 868.

body symbolically represents the rape of the community itself.¹⁷³ It is this conscious and open use of pornography as war propaganda, in making pornography of atrocities, that leads MacKinnon to observe that “this is perhaps the first truly modern war.”¹⁷⁴

Although such an account in some way aids our attempt to comprehend the scale of the atrocities—importantly, in terms that are linked to *military* objectives¹⁷⁵—it still does not explain the *brutality* of many of the rapes that have taken place. The Croatian journalist Ines Sabalic, for example, has described atrocities of a quasi-ritualistic character, such as mutilation of the raped female body by cutting off the breasts and slitting open the stomach.¹⁷⁶ It has been suggested that these orgies of rape must be seen as outbursts of a culturally rooted contempt for women, lived out in times of crisis.¹⁷⁷ The legitimization of violence in times of war and the correlative magnification of male sexuality in battle thus provide what Brownmiller describes as the “perfect psychologic backdrop [for men] to give vent to their contempt for women.”¹⁷⁸

173. See Ruth Seifert, *War and Rape: A Preliminary Analysis*, in *MASS RAPE*, *supra* note 99, at 54, 64. This is seen most clearly in the number of rapes that other members of the woman's family or community are compelled to watch. See MacKinnon, *supra* note 171, at 80; Stiglmeier, *supra* note 167, at 82; Tompkins, *supra* note 70, at 867; see also *supra* note 156.

174. MacKinnon, *supra* note 169, at 192; see ALLEN, *supra* note 4, at 34–35 (describing widespread creation and distribution of pornography during war). MacKinnon documents a number of occasions in which actual rapes of Muslim and Croatian women by Serbian soldiers were broadcast on the evening news in Banja Luka (a Serbian-occupied city in western Bosnia-Herzegovina). In each case, the ethnic labels were switched by means of switched clothing or (clumsily) dubbed sound. See MacKinnon, *supra* note 171, at 75–76. The use of the televised media by the régimes in Belgrade and Zagreb played a crucial role in fanning the flames of the Serbo-Croatian conflict that came to swallow postwar Yugoslavia. Marco Altherr, then head of the International Red Cross delegation in Yugoslavia, said he had never seen such effective propaganda: “If you talk to them, the people on both sides are absolutely convinced that the other side is intent on killing them. And it's all the result of propaganda.” Paul Parin, *Open Wounds: Ethnopsychanalytic Reflections on the Wars in the Former Yugoslavia*, in *MASS RAPE*, *supra* note 99, at 35, 41.

175. “Whether a woman is raped by soldiers in her home or is held in a house with other women and raped over and over again, she is raped with a political purpose.” 2 HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA* 21 (1993) (emphasis added).

176. See Seifert, *supra* note 173, at 65 (discussing Ines Sabalic, *Nirgends erwähnt—doch liberall geschehen: Ein Bericht aus Zagreb*, PUBLIKATION DER GLEICHSTELLUNGSGESTELLE DER LANDESHAUPTSTADT (1992)). Other accounts incorporate the use of religious iconography in the rape scene. See, e.g., MacKinnon, *supra* note 171, at 80. Brownmiller has described the infamous My Lai massacre: “She was spread-eagled, as if on display. She had an 11th Brigade patch between her legs—as if it were some type of display, some badge of honor.” BROWNMILLER, *supra* note 144, at 109 (quoting helicopter door gunner Ronald Ridenhour); see also Niarchos, *supra* note 150, at 665 (depicting rape victim nailed to board).

177. See Seifert, *supra* note 173, at 65. “Sadeta,” a survivor from the Trnopolje camp, tried to explain the actions of her Serbian rapists in this way: “Maybe that's their way of hurting Muslim women and Croatian women, and the whole female race.” Stiglmeier, *supra* note 167, at 96; see also Susan Brownmiller, *Making Female Bodies the Battlefield*, *NEWSWEEK*, Jan. 4, 1993, at 37, reprinted in *MASS RAPE*, *supra* note 99, at 180. Brownmiller has argued that in the identity politics that have divided the former Yugoslavia, “Balkan women, whatever their ethnic and religious background . . . have been thrust against their will into another identity. They are victims of rape in war.” *Id.*

178. BROWNMILLER, *supra* note 144, at 27; see Tompkins, *supra* note 70, at 869–73 (linking wartime rape to fundamental societal hatred of women). Compare the following account of an incident that took place during America's operations in Vietnam:

They were supposed to go after what they called a Viet Cong whore. They went into the village and instead of capturing her, they *raped* her — every man *raped* her. As a matter of fact, one man said to me later that it was the first time he had ever *made love* to a woman with his boots

This has given rise to the lexicological problem of naming events often characterized as “genocidal rape,” with neologisms such as “femicidal” rape¹⁷⁹ and “gynocide”¹⁸⁰ being suggested.¹⁸¹

The multiple origins, functions, and modes of the violence against women are impossible to comprehend without this gendered context. In the next section, I consider the legal responses that the international community has adopted in response to this eroticization of violence, this violence as erotica.

B. Rape as a War Crime

Women shall be especially protected against any attack *on their honour*, in particular against rape, enforced prostitution, or any form of indecent assault.

—Fourth Geneva Convention¹⁸²

Until the Middle Ages, women in wartime had no more rights than any other property that might be seized by the victor.¹⁸³ This was largely consistent with the legal status of women at the time; their rape was considered an injury to the men from whom they were taken, rather than to themselves as human beings.¹⁸⁴ The first legal protection accorded to women emerged during the Hundred Years War (1337–1453), during which rapists became subject to “capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419).”¹⁸⁵ By 1646, the “father” of international law, Hugo Grotius, observed that the punishment of rape in war was “the law not of

on. . . . [A]t any rate, they *raped* the girl, and then, the last man to *make love* to her shot her in the head.

VIETNAM VETERANS AGAINST THE WAR, *THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES* 29 (1972) (testimony of Sergeant Michael McClusker) (emphasis added). Tamara Tompkins suggests that this failure to distinguish between rape and making love reflects “total indifference and incomprehension of the true nature of this sexual encounter.” See Tompkins, *supra* note 70, at 873.

179. See ALLEN, *supra* note 4, at xiii (quoting Asja Armada, member of Croatian feminist group Kareta).

180. See Niarchos, *supra* note 150, at 679.

181. See *infra* note 242 and accompanying text (discussing dangers of recognizing rape only by scale of atrocity).

Another unsettling aspect of these atrocities is the number of reports of women raped by former acquaintances. Stiglmyer quotes “Hatiza,” a survivor from the Trnopolje camp: “And those are our brothers, our true brothers,” she says sarcastically. “I was in the camp, I was raped, and I still can’t understand that our friends are doing it, people who until yesterday were our friends. I’m thinking legal conviction would be too good for such a bloodthirsty people.” Stiglmyer, *supra* note 167, at 92–93. In a number of accounts, the women who were raped state that men whom they knew were slightly less aggressive than those who completely depersonalized them. See *id.* at 120, 141; see also Niarchos, *supra* note 150, at 658 & nn.51–52; Tompkins, *supra* note 70, at 866–67. Precisely what drives men to rape their former *neighbors*, ostensibly on the basis of their ethnicity, is beyond my comprehension and the scope of this paper.

182. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

183. See Niarchos, *supra* note 150, at 659–60.

184. See BROWNMILLER, *supra* note 144, at 15.

185. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 425 (1993); see MERON, *supra* note 7, at 92; Niarchos, *supra* note 150, at 661.

all nations, but of the better ones."¹⁸⁶

The United States' Lieber Code of 1863 addressed rape in two distinct ways: on the one hand, special protection was accorded to women by reference to the "sacredness of domestic relations";¹⁸⁷ on the other, rape was recognized as a crime of violence.¹⁸⁸ It was the former view that prevailed, with the 1874 Declaration of Brussels¹⁸⁹ and the 1907 Hague Regulations commanding respect for "[f]amily honour and rights."¹⁹⁰ Such provisions may be construed to cover rape—though they have seldom been so interpreted in practice.¹⁹¹

"Rape" did not appear in the Nuremberg Charter or Judgment, apparently being subsumed into the general category of "ill treatment of the civilian population."¹⁹² During the prosecution, however, there was some discussion of rapes committed by German troops.¹⁹³ An example of the treatment these events received warrants some examination:

I quote, "The Maquis had evacuated the town several days earlier . . . 54 women or young girls from 13 to 50 years of age were raped by the maddened soldiers."

The Tribunal will forgive me if I avoid citing the atrocious details which follow
A medical certificate from Doctor Nicolaides, who examined the women who were raped in

186. Niarchos, *supra* note 150, at 661. *But cf.* 1 THOMAS WALKER, A HISTORY OF THE LAW OF NATIONS 306 (Cambridge Univ. Press 1899) (arguing that municipal customs should not be mistaken for Natural Law).

187. Lieber Code, *supra* note 16, art. 37 ("The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; . . . the persons of the inhabitants, especially those of women; and the *sacredness of domestic relations*. Offenses to the contrary shall be rigorously punished.") (emphasis added).

188. *See id.* art. 44. Article 44 states:

All *wanton violence* committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all *rape*, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

Id. (emphasis added).

189. *See* Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 38, *reprinted in* LAW OF WAR, *supra* note 16, at 194, 200 [hereinafter Declaration of Brussels] (never entered into force).

190. *See* Second Hague, IV, *supra* note 18, art. 46.

191. *See* Meron, *supra* note 185, at 425. The commission formed to investigate war crimes in the First World War included rape and forced prostitution as crimes. *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, *reprinted in* 14 AM. J. INT'L L. 95, 114 (1920). As has been discussed above, the trials that eventually followed the war were far from satisfactory. *See supra* notes 27–33 and accompanying text.

192. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 475; *cf.* GLUECK, *supra* note 40, at 5 (referring to "wholesale deeds of theft, murder, rapine and enslavement" committed by German forces). Rape was included as a crime against humanity in Control Council Law No. 10, the law adopted by the occupying powers as a charter for German domestic trials of war crimes. *See* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xvii (1946). This precedent was not followed in the Fourth Geneva Convention, however, which listed rape as a war crime but not as constituting a grave breach subject to universal jurisdiction. *See infra* text accompanying notes 196–201. On the use of rape in Europe during the Second World War, *see supra* text accompanying notes 164–66.

Rape was prosecuted as a crime by the Tokyo Tribunal. *See* 1 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 385 (B.V.A. Röling & C.F. Ruter eds., 1977); 2 *id.* at 971–72; *see also* BROWNMILLER, *supra* note 144, at 57–63; Niarchos, *supra* note 150, at 666.

193. *See* 6 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 404–07; 7 *id.* at 456–57.

this region.

I will pass on.¹⁹⁴

In this way, Brownmiller argues, the French prosecutor used the “standard censoring mechanism that men employ when dealing with the rape of women.”¹⁹⁵

Under the 1949 Geneva Conventions, which now constitute the core rules of international humanitarian law applicable in international armed conflicts,¹⁹⁶ rape is not listed as a grave breach.¹⁹⁷ The most immediate implication of this is that rape is not subject to universal jurisdiction.¹⁹⁸ The International Commission of the Red Cross and the U.S. State Department have recently declared that rape is a grave breach under article 147 (relating to “torture or inhumane treatment”).¹⁹⁹ However, it is hardly satisfactory that this proposition should rest on interpretation alone.

Article 27 of the Fourth Geneva Convention, which mandates that women be protected from “any attack *on their honour*,”²⁰⁰ explicitly addresses rape. The commentary explains that “women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an *absolute right to respect for their honour and their modesty, in short, for their dignity as women*.”²⁰¹ The possibility of systematic rape being characterized as an attack

194. 6 *id.* at 405 (statement of M. Dubost, French Prosecutor).

195. BROWNMILLER, *supra* note 144, at 53.

196. See *Report of the Secretary General*, *supra* note 89, ¶ 37.

197. See Fourth Geneva Convention, *supra* note 182, art. 147. But see Françoise Krill, *The Protection of Women in International Humanitarian Law*, 49 INT'L REV. RED CROSS 337, 341 (1985) (showing that rape was given additional protection, though not termed grave breach). The Conventions list particularly serious violations as “grave breaches” or war crimes. See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 182, art. 147. See generally Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995) (describing grave breaches in general and showing relevance to war in former Yugoslavia).

198. States parties are obliged to bring persons accused of having committed grave breaches to trial, regardless of where the alleged acts took place and the nationality of the accused or the victim. See First Geneva Convention, *supra* note 197, art. 49; Second Geneva Convention, *supra* note 197, art. 50; Third Geneva Convention, *supra* note 197, art. 129; Fourth Geneva Convention, *supra* note 182, art. 146. There is an obligation to suppress simple breaches, but the means of prosecution are left to the parties' discretion. See Sharon Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 335 (1995).

199. See International Committee of the Red Cross, Aide-Mémoire (Dec. 3, 1992), *quoted in* Meron, *supra* note 185, at 426–27; *Final Report of the Commission of Experts*, *supra* note 167, ¶ 105.

200. Fourth Geneva Convention, *supra* note 182, art. 27 (emphasis added).

201. COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 205 (Jean S. Pictet et al. eds., 1958), *quoted in* Niarchos, *supra* note 150, at 674. The Protocols to the Geneva Conventions similarly deal with rape as a crime against “dignity.” This is most apparent in Protocol II, which proscribes certain acts against non-combatants in non-international armed conflicts, including (e) “[O]utrages upon *personal dignity*, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” Protocol Additional to the Geneva

on “modesty” is, of course, obscene.²⁰² Such references to injuries to honor and modesty (and to a lesser extent to dignity) mask the violent nature of the crime.²⁰³ At the same time, such a conception of rape is contingent upon hierarchized gender relations that naturalize the experiences of women as victims.

The legal response to rape in war has thus been dominated by two overlapping trends: the effacement of the feminine subject, and her selective appropriation into the discourse of war crimes as the bearer of essentialized feminine virtues (protecting men’s interests in “their” women). Given the gendered context of rape in war discussed in the previous section, discussing these issues in the purportedly asexual language of legal objectivity has often served to expunge women’s experiences completely from the public record.²⁰⁴ Although some feminists have argued that this is largely a product of the predominance of men in the institutions of both war and law,²⁰⁵ I argue that this only partially explains the problem. Bound up with the “sea of male faces”²⁰⁶ are power relations which, although gendered, go beyond the *sex* of those in power.²⁰⁷

In this first sense, the Tribunal for the former Yugoslavia marks an ambiguous step forward. It includes two female judges, but they are only two

Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* June 8, 1977, art. 4(2)(e), 1125 U.N.T.S. 609 [hereinafter Protocol II] (entered into force 1978) (emphasis added). This provision has been adopted in the most recent draft of the ILC’s Code of Crimes which is to be tabled at the 1996 session of the General Assembly. *See* Report of the International Law Commission on its Forty-Eighth Session (forthcoming 1996) [hereinafter ILC Report 1996]. It is listed in article 20, “War Crimes,” but is restricted to armed conflict not of an international character. *Id.* art. 20(f)(v). Article 20(d), which is not so limited, also criminalizes “outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment.” Arguably, this constitutes an extension of international humanitarian law, applying the Protocol II standards to non-international armed conflict. Protocol I, which applies specifically to international armed conflicts, demands that “[w]omen be protected in particular against *rape*, forced prostitution and any other form of indecent assault.” Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (entered into force 1978) (emphasis added).

202. *See* Copelon, *supra* note 100, at 249 (arguing that conceptualizing rape as attack against honor is problematic); *see also* Niarchos, *supra* note 150, at 674. Such a characterization also perpetuates the notion that raped women are “soiled” or disgraced—a problem that augments the difficulties of postwar reconstruction. *See* BROWNMILLER, *supra* note 144, at 54 (describing postwar inquiry into Rape of Nanking).

203. *See* Copelon, *supra* note 100, at 249.

204. This appears to be happening to the experiences of many Rwandan women—perhaps doubly excluded through the intersection of gender and race. *See* Copelon, *supra* note 100, at 245 n.11 (citing newspaper articles on rape in Rwanda).

205. *See, e.g.,* Charlesworth et al., *supra* note 128, at 621–25. *But see* Fernando R. Tesón, *Feminism and International Law: A Reply*, 33 VA. J. INT’L L. 647, 655 (1993) (arguing that breadth and heterogeneity of international law renders “great bulk of international legal rules” gender *neutral*). Tesón thereby misses the point that it is largely this “neutrality” which serves to maintain (gender) power imbalances.

206. Niarchos, *supra* note 150, at 680.

207. *Cf.* Madame Justice Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990) (exploring limitations on ability of women judges fundamentally to change law).

of eleven.²⁰⁸ The Tribunal's Statute explicitly acknowledges the criminality of rape, but none of the original nominees for Chief Prosecutor was a woman, nor was expertise in the issue of violence against women a criterion of selection.²⁰⁹ This has now changed somewhat with the recent appointment of Canadian Justice Louise Arbour after Justice Richard Goldstone resigned.²¹⁰ At the time of this writing, there was no indication as to how this change would affect the conduct of the prosecution.

At an allied but deeper level, however, rape as it is appropriated by the Tribunal is *sterilized* in two ways. First, rape as a crime is necessarily translated into the masculine discourse of law and into the masculine discourse of *order through law*. Second, the inclusion of some rapes as an act in the "public" (politico-legal) sphere implicitly excludes other rapes that remain "private" (and thus invalid). This double-move of inclusion and exclusion effects a transformation on the experiences of women in the former Yugoslavia, imposing a definition that depends not on experience but on the legally validating circumstances in which that experience obtains a *context*. Significantly, that context is an exercise in border demarcation, delimited by specific conceptions of *order* (as international peace and security) and *power* (as the "public" exercise of instrumental force).

1. Rape, Law, and Order

Rape is explicitly included in article 5(g) of the Statute of the Tribunal as a "Crime Against Humanity,"²¹¹ and it is under this article that over twenty

208. See ELECTION OF JUDGES OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, at 1-2, U.N. Doc. A/47/1006 (1993). The General Assembly considered 22 candidates for the 11 positions. The only two women to apply (one from Costa Rica, the other from the United States) were both selected.

209. See Rhonda Copelon, *Surfacing Gender: Reconceptualising Crimes Against Women in Time of War*, in MASS RAPE, *supra* note 99, at 218 n.43. Partly in response, women's organizations have run parallel trials over which they have a greater degree of control. Notably, two suits have been filed against the Bosnian Serb leader Radovan Karadzic under the U.S. Alien Tort Statute. See *Kadic v. Karadic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 U.S. 2524 (1996); see also Michele Brandt, Comment, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413 (1995) (criticizing *Karadzic* for failure to apply international norms); Yolanda Wu, *Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L.J. 101, 103 (1993) (arguing that acceptance of plaintiffs' arguments in Alien Tort Claims Act suits would "add weight to the claim that rape is a human rights violation"); cf. G.A. Res. 49/205, U.N. GAOR, 49th Sess., 94th plen. mtg., at 9, U.N. Doc. A/Res/49/205 (1994) (urging Chief Prosecutor "to consider the appointment to his office of experts in the prosecution of crimes of sexual violence"); G.A. Res. 48/153, U.N. GAOR, 48th Sess., at 8, U.N. Doc. A/Res/48/153 (1994) (recommending such appointments).

210. See S.C. Res. 1047, U.N. SCOR, 51st Sess., 3637th mtg., U.N. Doc. S/Res/1047 (1996) (appointing Arbour as prosecutor). The appointment took effect on October 1, 1996.

211. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, art. 5(g), U.N. Doc S/25704/Annex (1993) [hereinafter *Statute of the Tribunal*].

men have been charged.²¹² Rape is nevertheless potentially relevant to all four articles that grant subject matter jurisdiction to the Tribunal.²¹³ Of primary interest here, however, is the characterization of rape as a crime that has revisited the tensions exhibited in the Lieber Code.²¹⁴

The historical treatment of rape as a crime against women's "honor" (and hence against men's investment in female subjectivity) continues to inform the law that the Tribunal is empowered to adjudicate.²¹⁵ Recognizing the inadequacy of such a limited approach, UN Special Rapporteur Tadeusz Mazowiecki has emphasized that rape is primarily a crime of *violence*: "Rape is an abuse of power and control in which the rapist seeks to humiliate, shame, embarrass, degrade and terrify the victim. The primary objective is to exercise power and control over another person."²¹⁶ As well as affirming the essentially violent nature of rape, this definition also rejects the view that rape is merely an extension of "natural" sexual relations between women and men,²¹⁷ or something "extracurricular" to the waging of war.²¹⁸

Although this reconceptualization of rape as violence is a positive step, the status of rape as a crime independent of other violations remains unclear. The idea that rape is essentially a "private" act—only constituting a "valid" international crime when linked to another more "serious" offense or when explicitly tied to "public" policy—has also been imported into the jurisprudence of the Tribunal. Sir Ninian Stephen, one of the Tribunal's eleven judges, described the jurisdiction of the Tribunal as follows: "We don't have jurisdiction in respect of rape, for example, but if it occurs as a crime against humanity—as part of ethnic cleansing, for instance—then clearly it is within our jurisdiction."²¹⁹

Article 5 of the Statute of the Tribunal grants jurisdiction to prosecute persons responsible for the crime of rape as a crime against humanity, subject to two limitations: the crime must be committed "in armed conflict, whether international or internal in character," and it must be "directed against any civilian population."²²⁰ The first requirement appears to be at odds with the

212. See Prosecutor of the Tribunal v. Dusan Tadic & Goran Borovnica, I.T.-94-1, Indictment 3, para. 4.4 (1995), reprinted in 34 I.L.M. 1028, 1030 (1995); The Prosecutor of the Tribunal v. Zeljko Meakic and Others, I.T.-95-4, Indictment 2, paras. 22.4, 22.7, 22.10, 22.13, 22.16, 25.4, 26.4, 30.4 (1995), reprinted in 34 I.L.M. 1013, 1020-26 (1995). In addition, eight Serbs have been charged with raping and torturing Muslim women in the southeastern Bosnian town of Foca between the Spring of 1992 and early 1993. See *War Crimes Tribunal Charges Eight Serbs with Rape*, REUTERS, June 27, 1996, available in LEXIS, News Library, Reuters World Service File.

213. See, e.g., Niarchos, *supra* note 150, at 681-82.

214. See *supra* notes 187-88 and accompanying text.

215. See, e.g., *Final Report of the Commission of Experts*, *supra* note 167, ¶ 105.

216. *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992*, U.N. ESCOR 4th Comm., 49th Sess., Annex II, para. 49, U.N. Doc. E/CN.4/1993/50 (1993) [hereinafter *Mazowiecki Report*].

217. *But see* Allen, *supra* note 4, at 120 (criticizing Mazowiecki's definition of rape for failing "to avoid naturalized notions of male supremacy.").

218. See MacKinnon, *supra* note 171, at 80.

219. Abigail Hansen, *Breaking the Cycle of Violence*, 31 AUSTRALIAN LAW. 1, 1 (1996).

220. *Statute of the Tribunal*, *supra* note 211, art. 5, 32 I.L.M. at 1193-94.

definition in the Secretary General's report, which did not link crimes against humanity to armed conflict.²²¹ Academics have argued that it should be understood as a jurisdictional limitation on the Tribunal, not as a codification of crimes against humanity.²²² This would be consistent with the Secretary General's position that the life span of the International Tribunal "would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia."²²³ This also appears to accord with the position outlined by U.S. Ambassador to the United Nations, Madeleine K. Albright, who stated that article 5 "applies to all acts listed in that article, when committed . . . during a period of armed conflict in the territory of the former Yugoslavia."²²⁴

The second requirement is of more concern here, as it requires the crime to be committed "as part of an overall policy of persecution based on ethnic or religious grounds against a civilian population."²²⁵ The need for an identifiable (state) policy in particular is at odds with the experiences of women raped in previous wars.²²⁶ In addition, the requirement that such a policy be directed against a population on the basis of ethnicity or religion fails to account for much of the feminist scholarship on rape in war that suggests this is really a crime directed *against women*.²²⁷

The widespread and reliable reports of systematic rape in the former Yugoslavia have been interpreted as demonstrating a systematicness that is often

221. The Report states:

47. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

48. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

Report of the Secretary General, *supra* note 89, ¶¶ 47-48, 32 I.L.M. at 1173; *see also* Healey, *supra* note 198, at 355.

222. *See, e.g.*, Healey, *supra* note 198, at 355; O'Brien, *supra* note 82, at 650-51; *cf.* BASSIOUNI, *supra* note 6, at 191 (arguing that crimes against humanity need not be linked to actual combat).

223. *Report of the Secretary General*, *supra* note 89, ¶ 28, 32 I.L.M. at 1169.

224. Healey, *supra* note 198, at 356. This position is further liberalized in the International Law Commission's Draft Code of Crimes, which defines systematic or mass violations of human rights regardless of the circumstances in which they are perpetrated. *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 21, U.N. Doc. A/46/10 (1991); *see* McCormack & Simpson, *supra* note 59, at 15; *cf.* *Preparatory Committee on International Criminal Court Concludes First Session*, *supra* note 58, at 4 (emphasizing that crimes adjudicated by proposed court be clearly enumerated criminal violations of customary international law). In the most recent draft of the Code of Crimes (to be tabled at the General Assembly in November 1996), article 18 establishes two general conditions that must be satisfied for a prohibited act to qualify as a crime against humanity: the act must be "committed in a systematic manner or on a large scale," and it must be "instigated or directed by a Government or by any organization or group." ILC Report 1996, *supra* note 201, at 93. Paragraph (j) lists "rape, enforced prostitution and other forms of sexual abuse" as crimes. *Id.* at 94. Rape was included as a crime specifically in response to events in the former Yugoslavia and to General Assembly resolutions condemning rape as a crime against humanity under certain circumstances. *Id.* at 102 (citing G.A. Res. 50/192, U.N. GAOR, 50th Sess., 99th plen. mtg., U.N. Doc. A/Res/50/192 (1996)).

225. *Final Report of the Commission of Experts*, *supra* note 167, ¶ 107; *cf.* *Report of the Secretary General*, *supra* note 89, ¶ 48, 32 I.L.M. at 1173; BASSIOUNI, *supra* note 6, at 248.

226. *See supra* text accompanying notes 147-74.

227. *See supra* notes 177-81 and accompanying text.

connected to the policy of ethnic cleansing.²²⁸ But it remains unclear precisely to what extent the rapes in Bosnia-Herzegovina were in response to orders from Serbia.²²⁹ Rapists have claimed to be acting under orders, with some women also stating that the rapes were directed as a policy.²³⁰ Even if such reports are accepted, it is not known how high up these orders may reach.²³¹ At the very least, Serbian leaders appear to have done nothing to punish or stop the rapes—inaction which, when combined with the propaganda about the “fundamentalist Muslims” and “fascist Croats” who must be driven out and annihilated, amounts to complicity in or encouragement of the actions of the Chetniks.²³²

In contrast to previous characterizations of rape in times of war, MacKinnon has written that this is not rape out of control, but rape *under control*.²³³ This is, of course, precisely what brought the question of rape into the international arena, and yet there is a substantial danger that this “public” face of rape will delineate the extent to which it will be acknowledged as a “valid” international crime. By defining certain rapes as public acts, this act of inclusion implicitly operates to exclude other rapes (those not referable to state policy). It is clearly necessary to restrict in some way the crimes justiciable before an international tribunal. But by drawing this line down the middle of rape—by reference not to women’s experiences but to the translatability of those experiences into the male-dominated public sphere of state policy—these rules of justiciability do not merely exclude certain experiences, but also mold others into suitable “stories” for male consumption. Similar problems emerge in conceiving of systematic rape as a form of genocide.²³⁴

Attempts to characterize rape as torture also have failed, despite evidence

228. See *Final Report of the Commission of Experts*, *supra* note 167, ¶¶ 244–50.

229. The Commission of Experts suggests that although some reported cases are individual or group conduct, “many more seem to be a part of an overall pattern.” *Final Report of the Commission of Experts*, *supra* note 167, ¶ 252. Rapes that take place while the woman is in detention in particular “do not appear to be random, and they indicate at least a policy of encouraging rape supported by the deliberate failure of camp commanders and local authorities to exercise command and control over the personnel under their authority.” *Id.*

230. See Gutman, *supra* note 167; Stiglmyer, *supra* note 167, at 160–61; Roy Gutman, *Rape Camps: Evidence Serb Leaders in Bosnia OK'd Attacks*, *NEWSDAY*, Apr. 19, 1993, at 5.

231. According to the Commission of Experts:

These patterns strongly suggest that a systematic policy existed in certain areas, but it remains to be proven whether such an overall policy existed which was to apply to all non-Serbs. It is clear that some level of organization and group activity was required to carry out many of the alleged rapes.

Final Report of the Commission of Experts, *supra* note 167, ¶ 253.

232. See Stiglmyer, *supra* note 167, at 161. For an explanation of the term “Chetnik,” see *supra* note 167.

233. See MacKinnon, *supra* note 169, at 190.

234. See G.A. Res. 49/205, *supra* note 209, pmb., para. 8; see also Elizabeth Kohn, *Rape as a Weapon of War: Women’s Human Rights During the Dissolution of Yugoslavia*, 24 *GOLDEN GATE U. L. REV.* 199, 206–08 (1994); cf. *supra* notes 179–81 and accompanying text. See generally John Webb, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the former Yugoslavia*, 23 *GA. J. INT’L & COMP. L.* 377 (1993) (describing and discussing Genocide Treaty on Yugoslavia).

that it is commonly used to this end.²³⁵ Interestingly, the early indictments characterized only one offense as torture: the gruesome (but much publicized) Tadic case, in which it is alleged that two prisoners were forced to restrain and bite off the testicle of another prisoner who subsequently bled to death.²³⁶ What makes this sexual mutilation torture, when the repeated rape of women held in a detention center is not?²³⁷ As Rhonda Copelon suggests, it is hard not to attribute it to the sex of the decisionmakers and their ability to empathize only with the male experience of sexual abuse.²³⁸ This distinction is repeated in relation to beatings (including kicking in the testicles) which are characterized as causing great suffering or serious injury to body or health,²³⁹ while repeated rape is viewed only as wilfully causing great suffering.²⁴⁰

Arguably, the most appropriate formulation of the crime of rape is as a grave breach of the Geneva Conventions—a crime regardless of its scale or link to an overarching policy.²⁴¹ Where rape is committed on a mass scale, or is the subject of orchestrated policy, this added dimension may be recognized by designating and prosecuting it as a crime against humanity.²⁴² Where it is used as a tool of genocide, or as a form of torture, it is appropriate to characterize it as such.

The danger of what has happened to rape in the context of the former Yugoslavia is that by emphasising the scale of the atrocity—the explicit and systematic use of rape as a tool of ethnic cleansing—the particularity of the crime becomes lost in the masculine discourse of public order. Rape is thus constituted as a public act that avoids the problems of gender specificity attendant to its conceptualization as a crime against a woman's "honor." But in so doing, precisely the opposite problem emerges: Women's experiences, though no longer ignored, become subsumed in the discourse of *order through law*. And in such a world view, gender is rendered invisible once more.

235. See Katherine Lusby, *Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story*, 25 U. TOL. L. REV. 911, 938–39 (1995); see also Charlesworth et al., *supra* note 128, at 627–29.

236. See Prosecutor of the Tribunal v. Dusan Tadic & Goran Borovnica, I.T.-94-1, Indictment 3, para. 2.6; see also Robert Block & Peter Ellingsen, *Genocide*, THE AGE (Melbourne), June 10, 1995 (Saturday Extra), at 1.

237. See, e.g., *Final Report of the Commission of Experts*, *supra* note 167, ¶ 229.

238. See Copelon, *supra* note 100, at 256. Another important factor is that the damage of rape is largely unseen, with physical damage often internal, and the psychological damage occurring in silence.

239. See Prosecutor of the Tribunal v. Zeljko Meakic, I.T.-95-4, Indictment 4, paras. 20.2, 24.2, 29.2.

240. See *id.* Note that wilfully causing great suffering is a "grave breach" under the Fourth Geneva Convention, *supra* note 182, art. 147.

241. See *supra* notes 197–200 and accompanying text. As I have stated above, however, this demands some liberal interpretation of the text. See *supra* note 200 and accompanying text. In particular, such an interpretation seems to go against the interpretation principle of *inclusio unius est exclusio alterius* [the inclusion of one means the exclusion of the other], given that rape does appear in article 27 of the Fourth Geneva Convention, *supra* note 182, and not in article 147 (which lists grave breaches). See *supra* notes 198–201 and accompanying text.

242. See Dorothy Thomas & Regan Ralph, *Rape in War: Challenging the Tradition of Impunity*, SAIS REVIEW, Winter–Spring 1994, at 81, 84, excerpted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1070 (Henry Steiner & Philip Alston eds., 1996).

2. *The Invisibility of Gender*

Early concerns that the rapes in the former Yugoslavia would go unnoticed have now eased, but they have been replaced by fears that the exaggeration of the distinctive features of genocidal rape will obscure the atrocity of “common” rape.²⁴³ The elision of rape and genocide, for example, introduces the danger that women’s experiences will themselves be elided into the discourse of genocide.

Arguably, this is merely referable to the fact that the discourse of human rights has *never* included women’s rights, either as a corollary or as an aspect of the rights that women are accorded in their other capacities (as Jewish, Argentinian, Honduran, etc.).²⁴⁴ This effacement of women’s rights happens in two distinct ways. When what happens to a woman also happens to a man, a woman’s suffering “has the dignity, and her death the honor, of a crime against humanity” because she is violated in a way comparable and comprehensible to a man. But when a woman suffers as a woman—when what was done to her “smells of sex . . . humanity is not violated.”²⁴⁵

As Catherine MacKinnon further explains, “what is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women.”²⁴⁶ In this light, Beverly Allen provides an alternative formulation of the sexual violence in the former Yugoslavia by focusing on the importance of forced impregnation as an instrument of genocide. Seeking to avoid the identification of the victim as “naturally” female, and the attendant problems of using this reductive category to define rape as a crime that *happens to women*, she argues that genocidal rape may be seen as a crime of *biological warfare*.²⁴⁷ Here she draws a distinction between the rape of women based on sex and based on reproductive capacity.²⁴⁸ This emphasizes the universalizing specificity of the crime in human biological systems.²⁴⁹ Such a conception stresses the seriousness of the crime, the violent crime of rape being distinguished from traditional contexts that limit it to something that “often, and therefore ‘naturally,’ happens to women.”²⁵⁰ The problem with such an approach is that it is precisely this distinction from

243. See Copelon, *supra* note 100, at 259; Thomas & Ralph, *supra* note 242, at 1070.

244. See MacKinnon, *supra* note 169, at 183.

245. *Id.* at 184.

246. *Id.*

247. See ALLEN, *supra* note 4, at 121–32.

248. See *id.* at 121–22.

249. See *id.* at 138. Allen also has noted:

Thus the victim is identified not in a culturally variable way as only as “woman,” nor in a biologically deterministic way as only “female.” By identifying the individual victim instead as a person capable of gestating a pregnancy, the notion of genocidal rape as biological warfare implicitly universalizes the victim, so that any human being with any biological specificity, which of course includes all of us, is potentially victimized.

Id.

250. *Id.* at 139.

“traditional contexts” that risks elision of the experiences of those women not raped as part of forced pregnancy drives.

What is required, then, is a perspective that acknowledges the specific horror of Bosnia without appropriating women’s experiences. Here the essential duality of the crime of rape must be recognized as the *intersection* of ethnic violence and gender violence.²⁵¹ Crucially, the public face of rape must not obscure its inherent misogyny.²⁵²

There are positive signs that gender concerns are being taken into account in the Tribunal. Special Rapporteur Mazowiecki has stressed the two-sided nature of rape in the former Yugoslavia as both an attack on the individual woman and a method of “ethnic cleansing” intended to “humiliate, shame, degrade, and terrify the entire ethnic group.”²⁵³ The Tribunal’s rules of procedure have been designed in the hope of being sensitive to the trauma experienced by raped women who are forced to confront the accused.²⁵⁴ But in what is ultimately seen as the most important forum of the trial—the appropriate indictment (and conviction) of war criminals—it is not clear that those women’s stories will reach the public arena intact.²⁵⁵

Obviously, a conclusion on the Tribunal’s treatment of rape would be premature. In the next and final section, I restrict myself to a reconciliation of the parallel themes pursued in this Article and a possible *reconstruction* of war crimes that may prove more useful in promoting and protecting women’s (human) rights than existing structures.

C. Rape as War

Xenophobia and misogyny merge here; ethnic hatred is sexualized; bigotry becomes orgasm.

—Catharine MacKinnon²⁵⁶

The “problem” that rape in war presents to the international legal order, then, does not lie merely in the unwillingness of men to recognize the suffering of women. Instead, many of the problems that rape as a war crime presents are referable to the structure and functions of international criminal law more

251. See Copelon, *supra* note 100, at 261.

252. See Tompkins, *supra* note 70, at 873–74.

253. See Mazowiecki Report, *supra* note 216, ¶ 85.

254. See *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, IT/32/Rev.3 (1995); see generally 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 (1994); Alex Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendants’ Rights*, 46 HASTINGS L.J. 909 (1995); Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT’L L. 235 (1996); cf. Howard Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT’L L. & COM. 1, 18 & n.87 (1995).

255. An obscene twist in this context is found in the persistent claims that UN troops are guilty of raping those they are there to protect. See MacKinnon, *supra* note 169, at 192; *UN Treachery*, MS., Jan./Feb. 1994, at 16; see also ENLOE, *THE MORNING AFTER*, *supra* note 127, at 188 (discussing rape of female U.S. soldiers by male U.S. soldiers during Persian Gulf War).

256. MacKinnon, *supra* note 171, at 75.

generally. As I argued in Part II, this structure is tied to particular notions of order, and the protection of a certain form of “public” morality. In many ways, the experiences of women raped in war have fallen through the cracks in this account of the crimes that take place during hostilities. Despite the presence of rape in a variety of forms, women’s experiences are commonly silenced or marginalized as irrelevant to the public discourse of war (as organized disorder) and the consequent restructuring of order through law. In other ways, their stories are appropriated to support a military project (the vileness of the enemy troops, or the defense of “our” women) and affirm the masculinity needed to construct a “good” soldier.

In this sense, the Tribunal for the former Yugoslavia marks a watershed in that it has given unprecedented prominence to the crime of rape—both in the clear recognition of its status as a crime against humanity,²⁵⁷ and in the indictment of men charged exclusively with crimes against women.²⁵⁸ Nevertheless, as I have argued, this is at the very least an ambiguous watershed in terms of what it might mean for the advancement of women’s (human) rights in the future. The former Yugoslavia has been remarkable, not merely for the horrific way in which rape has been explicitly used as a “public” policy,²⁵⁹ but also for the media coverage of the “private” suffering that so stirred international opinion.²⁶⁰

To recognize the violence of rape as an act at once private and public, “domestic” and international, demands an understanding of the artificiality of the lines that demarcate these boundaries. At the same time, however, it demands that one acknowledge the sexualization of war: Rape is not merely an aberration in times of war, but an extension of the power lust on which war depends. If we try to ignore gender—the social constructions of “femininity” and “masculinity” and the relations between them—it becomes impossible to explain how our conceptions of order have become so tied to militarism.²⁶¹

As I argued in Part III, the primary difficulty here lies in the failure to conceive of such crimes as crimes *against women*. In attempting to comprehend in legal form crimes that define the artificial boundary between public order and private experience, it is necessary to call that boundary itself into question. Absent a reconceptualization of masculinity and femininity in war, and of the ways in which such constructions affirm and legitimate “normal domestic” relations, efforts to open up the discourse of international criminal law to women’s experiences in war will be piecemeal and threatened by tokenism.

257. See *supra* notes 211–27 and accompanying text.

258. See *War Crimes Tribunal Charges Eight Serbs with Rape*, *supra* note 212.

259. See *supra* notes 228–34 and accompanying text.

260. See *supra* notes 98–101 and accompanying text. On the importance of the role of the media, see *supra* note 168.

261. See ENLOE, *THE MORNING AFTER*, *supra* note 127, at 228–61; see also ENLOE, *supra* note 129. For a discussion of the ways in which the laws of war have served to legitimate violence more generally, see Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49 (1994); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L L.J. 387 (1994).

What, then, does justice demand in the context of the former Yugoslavia? How can one “do justice” to experiences that have shocked the world?

One approach, which would not demand the dismantling of these structures, would be to conceive of a new form of crime that adopts, even as it transgresses, these boundaries. In contradistinction to the current treatment of rape, such an approach would have to focus on the importance of the gendered motivations behind the crime, while avoiding the appropriation of those motivations for other masculinist ends in the macho-military project of conquest. Unlike the crime of biological warfare that Allen has imagined, this approach should not value the experiences of individual women only by reference to their part in the totality.²⁶² In MacKinnon’s argot, it is necessary to avoid the Scylla of specificity and the Charybdis of generality.²⁶³

With this caveat in mind, some feminists have suggested the reconceptualization of the mass rapes in the former Yugoslavia as persecution based on *gender*, and the establishment of an independent category of crimes against humanity to reflect this.²⁶⁴ In the same way that the Holocaust led to the crystallization of the concept of crimes against humanity (and linked it to religious and ethnic genocide), the international outrage at the suffering of women in the former Yugoslavia may present the necessary conditions for a similar transformation of international criminal law.

The conservatism of the Tribunal to date suggests that such a radical step is unlikely.²⁶⁵ Although an extension of the categories of persecution is intellectually plausible, the notion of criminalizing gender-based persecution is entirely at odds with the function war crimes have played in the past. The order that war crimes have historically reinforced is one that *defines* a community—the state, the nation—or affirms the subjectivity of an individual (implicitly ungendered—that is, masculine).²⁶⁶ Gender-based persecution

262. See *supra* notes 247–50.

263. See *supra* text accompanying note 246.

264. See Copelon, *supra* note 100, at 261.

265. The Secretary General’s report pursuant to Security Council Resolution 808 stated that the application of the principle *nullum crimen sine lege* required the International Tribunal to “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problems of adherence by some but not all states to specific conventions does not arise.” *Report of the Secretary General*, *supra* note 89, ¶ 34. This is consistent with paragraph 29, which points out that the Security Council is not purporting to “legislate,” but merely to apply existing international humanitarian law. It is precisely this basis of “legitimacy” that I am calling into question in this paper. See also *supra* text accompanying note 219 (remarks of Sir Ninian Stephen); cf. *supra* note 224 (discussion of ILC’s most recent Draft Code of Crimes).

266. See *supra* Section II.C. Similarly, the concept of persecution in refugee law is generally restricted to traditionally “political” bases (which do not include gender). The categories recognized under the United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 137, 152 (entered into force 1954) and the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, 268 (entered into force 1967) are outlined in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/IP/4 (1979). They include persecution based on race, religion, nationality, membership in a particular social group, or political opinion. See generally Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173 (1993); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625 (1993); Emily Love, *Equality in Political Asylum*

(correctly) implies a destabilization of that order, calling into question the modalities of power that legitimate the violence of the state both at peace and at war.

Despite this immediate practical difficulty, as a theoretical move the idea of gender-based persecution illustrates the extent to which gendered conceptions of order become the norm. From this perspective, perhaps the most important aspect of the current trials is the major role that women's organizations have played in documenting the atrocities. These organizations have built networks that use this information not to institutionalize women as victims, or as instruments of propaganda to spur men on to more carnage, but to challenge the peculiar ideas of masculinity that are utilized in war²⁶⁷ and that define peace through its relation to a state of war.

IV. CONCLUSION

When evil-doing comes like falling rain, nobody calls out, "stop!"
 When crimes begin to pile up they become invisible.
 When sufferings become unendurable the cries are no longer heard.
 The cries, too, fall like rain in summer.

—Bertolt Brecht²⁶⁸

The prosecution of war crimes—the invocation of law as validating order, and the equation of law *as* order—marks a crucial point of contestation in the contemporary international legal system. In this Article, I have sought to examine this relationship between law and order both by reference to the historical structure and function of war crimes and in the conjunctural moment presented by events in the former Yugoslavia.

In Part II, I argued that this notion of order was premised not on the absence of violence, but on a particular relationship *with* violence. More than operating in defense of such an order, the law that is invoked is in fact constitutive of that order and the subjects that operate with(in) it. In Part III, I applied this historico-theoretical analysis to the ambiguous war crime of rape. The coincidence of rape and war and the various ways in which states have historically "dealt with" it demonstrates the extent to which this law as order is gendered. At the same time, events in the former Yugoslavia also may have suggested a way out of the legitimation cycle that until now has either ignored or appropriated women's experiences. The notion of reclaiming women's experiences through the legal construct of gender-based persecution—if not as a legal then as a *political* category—suggests a possible reconceptualization of gender-based harm.

There is, of course, a long way to go. No tribunal can truly "do justice"

Law: For a Legislative Recognition of Gender-Based Persecution, 17 HARV. WOMEN'S L.J. 133 (1994); David Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988); Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929 (1994).

267. See Cynthia Enloe, *Afterword to MASS RAPE*, *supra* note 99, at 219, 220.

268. BERTOLT BRECHT, *POEMS, 1913–1956*, at 69 (John Willett & Ralph Manheim eds., 1976).

to the experiences of the rape camp. But insofar as war-crimes trials constitute the morality that they seek to defend, there remains an obligation for such public expositions of outrage to remain true to the experiences that form their subject matter.

The redefinition of order, the implosion of incomplete categories of experience, the preparedness to listen responsibly for silence even as “evil-doing comes like falling rain”—this is the demand that is made of us by the experiences of Yugoslavia.

