THE INTERPLAY OF ETHNICITY, GENDER AND SEXUAL VIOLENCE DURING WARTIME AND IN COERCIVE INTERROGATION

WHAT ROLE FOR HUMAN DIGNITY?

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Onder wetenschappelijke begeleiding van Professor Rosa Brooks

1. INTRODUCTION

She walked slowly behind him and began rubbing her breasts against his back. "Do you like these big American tits, Fareek?" she said. "I can see that you are starting to get hard. How do you think Allah feels about that?"

Then she and I left the room. We walked down the hall to talk to Adel, another linguist who was getting ready for a different interrogation. Brooke asked this Muslim for advice. She had a high-priority uncooperative detainee, she explained, and she wanted to find a way to break him from his reliance on God, his source of strength. He suggested that she tell the Saudi that she was having her period and then touch him. That could make him feel too dirty and ashamed to go before God later, he said, adding that she should have the MPs turn off his water so he couldn't wash later. She grabbed a red marker and disappeared into the ladies' room.

She started unbuttoning her BDU pants. "Fareek, did you know that I'm having my period?" she said. She placed her hands in her pants as she started to circle behind the detainee. "How do you feel about me touching you now?" Fareek's spine shot straight as a steel rod. As I translated, he looked at me as if my death was his most profound desire. Brooke came back around his other side, and he could see that she was beginning to withdraw her hand from her pants. As it became visible, the Saudi saw what looked like red blood on her hand. "Who told you to learn to fly, Fareek?" she demanded. He glared at her with vengeance, refusing to give in. "You fuck," she hissed, wiping what he believed was menstrual blood on his face.
"Aaaaaaaaaaaaaaaahhhhhhhhhhhh!" Fareek was screaming at the top of his lungs, rattling the flimsy trailer, body shaking, beginning to sob. He kept

yanking his arms apart, as if he could somehow wrest himself out of his handcuffs.
"How do you like this?" she asked, holding open the palm of her hand to show him her blood. Fareek spit at both of us and shouted again, this time a more pleading, fearful cry. His voiced quivered as he screamed, and he lunged forward out of his chair, breaking loose from one of his ankle shackles. He began to scream, wail, and shout, "La la la." No no no.

In this scene, Sergeant Eric Saar, a military interrogation translator at Guantanamo Bay, gives us his eyewitness account of events that took place in June 2003.[1] In trying to break a 'tough' Muslim detainee's resistance, a woman interrogator exploited Muslim faith by using sexual tactics.[2] This is only one of many military techniques used to break a detainee's resistance by causing indignation, offending and degrading their faith, culture and ethnicity.[3]

This eyewitness account will be the starting point from which this paper will examine various aspects this story touches on. One can identify different interesting and contemporary relevant aspects which run through this story: in broad terms, it contains references to sexual violence, raises questions about the potentially inhuman and degrading treatment of this particular Muslim detainee and highlights the tensions that might come into play when such notions as gender, sex, religion, ethnicity and dignity come to collide.

This paper will first look to international humanitarian jurisprudence that has developed legal standards on sexual violence during wartime. And although this jurisprudence is developed against the historical backdrop of sexual violence against women, most of the jurisprudential evolution on how sexual violence is defined is *mutadis mutandis* applicable to males. It will describe how the different War Tribunals of Rwanda, Yugoslavia and Sierra Leone have defined and refined those legal standards and how they have been embodied in the Statute of the International Criminal Court. Next, since this story takes place in the framework of the current debate about torture and cruel, inhuman and degrading treatment, this paper will describe more in detail the contours of that debate. However, the overarching focus of this paper will lie on the concept of *dignity* and its counterpart *humiliation.* Chapter IV will therefore examine how notions like ethnicity, gender and religion relate to the concept of dignity, with the story of the female interrogator as reference point. That chapter will approach issues from a different angle and under a more critical light. In conclusion, this paper will raise some important questions and

[1] Erik Saar & Viveca Novak, *A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo* 224-226, (The Penguin Press) (2005).
[2] *See* The Seattle Times, "Guantánamo Bay: Female interrogators' tactics aired" (28 January 2005), *available at* http://seattletimes.nwsource.com/html/nationworld/2002162977_gitmo28.html (last visited May 11, 2006).
[3] *See* The Seattle Times, "Guantánamo Bay: Female interrogators' tactics aired" (28 January 2005), *supra* note 1.

highlight some of the contradictions and peculiarities that are frequently overlooked in the area's this paper has described.

2. SEXUAL VIOLENCE DURING WARTIME – EVOLUTION OF INTERNATIONAL JURISPRUDENCE[4]

2.1. GENERAL

Rape and sexual violence have always been a part of warfare. Crusaders in the 12th century raped women in the name of religion.[5] The conquest of the Americas in the 15th century involved mass rape of indigenous women by the so-called *conquistadores*.[6] English soldiers in the 18th century engaged in the systematic raping of Scottish women during the subjugation of Scotland.[7] When the Germans invaded Belgium during the First World War, rape was used as a weapon to hold the country in the grip of terror.[8] Rape was deployed as a weapon of retaliation by the Soviet Army in the Second World War.[9] In our 'modern' times, rape and sexual violence against women are still being reported in almost every situation of armed conflict: Iraqi invaders subjected Kuwaiti women to sexual violence;[10] women in Peru, Liberia, East Timor and India - to name a few – have been victims of various forms of sexual abuse during internal conflicts.[11]

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[4] When talking about 'sexual violence' or 'sexual crimes', the present author mainly means crimes, which involve infringements on bodily sexuality as well as sexual dignity: rape, mutilation, sexual humiliation and others.

[5] Amnesty International, *Human Rights are Women's Rights* 18 (Amnesty International USA) (1995).

[6] *Ibid.,* at 18.

[7] *Ibid.,* at 18.

[8] *See* United Nations, *Preliminary report of the Special Rapporteur on the situation of systematic rape,*
sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez, "Contemporary Forms of Slavery", para. 7, E/CN.4/1992/26 (1992), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/223e11112b08bb78802566d500553642?Opendocument , (last visited May 11, 2006).

[9] Amnesty International, *Human Rights are Women's Rights, supra* note 5, at 18.

[10] United Nations, *Report on the situation of human rights in Kuwait under Iraqi occupation submitted by the Special Rapporteur, Mr. Walter Kälin,* E/CN.4/1992/26 (1992), *reprinted at* Walter Kälin (ed.), "Human Rights in Times of Occupation: The Case of Kuwait", Bern (1994).

[11] Christine Chinkin, *Rape and Sexual Abuse of Women in International Law* 2-3, *available at* http://www.ejil.org/journal/Vol5/No3/art2.pdf, (last visited May 11, 2006) *and published* as 'Peace and Force in International Law', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (*Studies in Transnational Legal Policy*, No. 25, American Society of International Law (1993) 203.

Despite this sad history, rape and sexual violence have only been prosecuted in the last fifty years. As Human Rights Watch notes in its post-genocide report on Rwanda: "It was long mischaracterized and dismissed by military and political leaders as a private crime or the unfortunate behavior of a renegade soldier."[12] Neither of the charters of the International Tribunals of Nuremberg or Tokyo contained reference to a rule enabling the prosecution of the widespread sexual violence that occurred during the Second World War.[13] The Nuremberg Tribunal, although it received evidence of abundant sexual violence and rape, never prosecuted someone on any sexual violence charges and, although the International Military Tribunal for the Far East ("Tokyo Tribunal") did refer to rape when it charged Japanese officials, it only did so in conjunction with other crimes; it was not considered a serious enough charge to stand alone in an indictment.[14] This is a particularly disturbing conclusion when one takes into account that the Tokyo Tribunal received evidence[15] of the systematic rape carried out in the Chinese province of *Nanjing* by Japanese Soldiers from 1937-38, which is by some called the second largest rape campaign in humankind's history.[16] Only in 1946, during prosecutions led by the Control Council for Germany, was rape specifically enumerated as a Crime against Humanity, although it was never prosecuted as such.[17]

2.2. SEXUAL VIOLENCE IN INTERNATIONAL LEGAL DOCUMENTS AND INTERNATIONAL JURISPRUDENCE

With the rise of military doctrine in the 19th century, came the first thorough codification of humanitarian law.[18] General Order No. 100 of 24 April 1863,

[12] Human Rights Watch/Africa, "Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath", at 27, *available at* http://www.hrw.org/reports/1996/Rwanda.htm (last visited May 11, 2006).
[13] United Nations, *Women 2000 Report: "Sexual Violence and Armed Conflict: United Nations Response*", published to promote the goals of the Beijing Declaration and the Platform for Action, *available at* http://www.un.org/womenwatch/daw/public/w2apr98.htm#9 (last visited May 11, 2006).
[14] Stephanie K. Wood, *A Women scorned for the "least condemned" war crime: precedent and problems with prosecuting rape as a serious war crime in the international criminal tribunal for Rwanda*, 13 Colum. J. Gender & L. 274, 282 (2004).
[15] *See* United Nations, *Women 2000 Report: "Sexual Violence and Armed Conflict: United Nations Response*", *supra* note 13.
[16] *See* Iris Chang & William C. Kirby, *The Rape of Nanking: The Forgotten Holocaust of World War II*, (Penguin Books) (1998). (arguing that the number one is the systematic rape by Pakistani soldiers of female civilians in trying to suppress Bengalese nationalism). *See also* BBC News: "Scarred by History: The Rape of Nanjing", *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/223038.stm. (last visited May 11, 2006).
[17] *See* Human Rights Watch: "Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath", *supra* note 12, at 33.
[18] *See* Patricia Viseur-Sellers, *The Cultural Value of Sexual Violence*, 93 Am. Soc'y Int'l L. Proc. 312, 316 (1999).

better known as the "Lieber" Code - named after its drafter[19] -, marked a significant historical compilation of the laws and customs of war.[20] It was commissioned by President Lincoln and contained a broad set of rules governing the conduct of Union soldiers during the American Civil War.[21] Although Lieber's Code was not the first codification of principles of laws of war and humanity, it has exhibited tremendous influence on the laws of war as it was the basis for the following Hague Conventions and has influenced the drafting of the Geneva conventions.[22] Section 2 of the Lieber Code promulgates promising 'special measures for the protection of women' but article 37 states in a rather general fashion that 'the persons of the inhabitants, especially those of women' shall be protected while article 44 only contains a blanket prohibition of rape.[23] The Hague Convention IV on the Laws of War on Land of 1907 does not even mention sexual violence or rape – article 46 merely notes that "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."[24] This has been interpreted, given the influence of the Lieber Code, as to disallow all forms of rape and sexual violence.[25]

The fourth Geneva Convention of 1949, drafted in response to the cruelties witnessed during the Second World War, contains an arguably weak referral to sexual violence during warfare. It reads: "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".[26] The two Additional Protocols of 1977 contain stronger prohibitions although they are not included under the 'Grave Breaches'. Article 76 of the First Additional Protocol states that women are the object of special respect and are protected in particular against rape, forced prostitution and any other form of indecent assault.[27] Article 4, (2) (e) of The Second Additional Protocol prohibits 'outrages upon personal dignity', in particular humiliating and degrading treatment, rape, enforced

[19] Instructions for the Government of Armies of the United States in the Field (Lieber Code) by Order of the Secretary of War, 24 April 1863, *available at* http://www.icrc.org/IHL.nsf/FULL/110?OpenDocument (last visited May 11, 2006).
[20] Theodor Meron, *Francis Lieber's Code and Principles of Humanity*", 36 Colum. J. Transat'l L. 269, 278 (1998).
[21] *Ibid.,* at 270.
[22] Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, *supra* note 20*,* at 279 (Although there already existed medieval and Renaissance ordinances containing principles of war and humanity - most of them on the European Continent- , Lieber was unaware of those and drafted the General Order No. 100 without use of any technical legal precedents).
[23] *See* Lieber Code, Article 37 and Article 44.
[24] Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, (Hague IV), The Hague, 18 Oct. 1907, *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6 (last visited May 11, 2006).
[25] *See* Patricia Viseur-Sellers, "The Cultural Value of Sexual Violence", *supra* note 18, at 318.
[26] Art 27 of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, *available at* http://www.unhchr.ch/html/menu3/b/92.htm (last visited May 11, 2006).
[27] Article 76, (2) Additional Protocol I to the Geneva Convention, *available at* http://www.unhchr.ch/html/menu3/b/93.htm (last visited May 11, 2006).

prostitution and any form of indecent assault.[28] These two provisions give women greater protection as they apply to all women within the conflicted territory, regardless of whether their states are parties to the convention.[29] These provisions have been criticized, however, because in framing rape as an 'indignity' or an 'attack on women's honor', it diminishes the severity of this human rights violation in the eyes of the international community.[30]

It was not until the landmark conviction of *Paul Akayesu*,[31] a former mayor of a Rwandan commune who was found guilty on nine counts of Genocide, Crimes against Humanity and War Crimes, that the international community clearly manifested that it would no longer shut its eyes for sexual abuse of women during warfare.[32] This verdict was important for two reasons: it marked the first time an international tribunal punished sexual violence during wartime and the first time that rape was found to be an act of genocide.[33]

2.2.1. Rwanda

The Rwanda Genocide is one of the most atrocious massacres mankind has ever witnessed. An estimated of 800.000 civilians were massacred in the three-month period of April through June 1994.[34] The horrifying ease with which systematic slaughter was carried out was unseen. For instance, on April 21, *Interahamwe* militias entered an orphanage school ground in the town of Butare, separated the Tutsi and the Hutu children and began massacring the Tutsi children with machetes and clubs.[35] During this terror reign, thousands – statistics reveal 250.000 or more[36] - of women and girls were individually raped, gang-raped, held in sexual slavery and sexually mutilated.[37] Government propaganda portrayed Tutsi females as calculated seductress-spies

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[28] Article 4, (2) (e) of the Additional Protocol II, *available at* http://www.unhchr.ch/html/menu3/b/94.htm (last visited May 11, 2006).

[29] Julie Mertus, *War's Offensive on Women: The Humanitarian Challenge in Bosnia, Kosovo, and Afghanistan* 81 (Kumarian Press) (2000).

[30] *See* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law,* 5 Hastings Women's L. J. 243, 249 (1994).

[31] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), *available at* http://ictr.og/default.htm (last visited May 11, 2006)

[32] See Stephanie K. Wood, *supra* note 14, at 3.

[33] Human Rights Watch, "Women's Human Rights", *in* World Report 1999, *available at* http://www.hrw.org/worldreport99/women/women4.html (last visited May 11, 2006).

[34] *See* United Nations, *Report of the Secretary-General on the Situation in Rwanda*, S/1994/640, 31 May 1994 (noting that an estimated of *800.000* people were brutally slaughtered); *See also* BBC News, "Rwanda: How the Genocide Happened", *available at* http://news.bbc.co.uk/1/hi/world/africa/1288230.stm (last visited May 11, 2006).

[35] Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, March 1999, *available at* http://www.hrw.org/reports/1999/rwanda/Geno11-4-04.htm#P306_98854 (Header 'Collective Slaughter: Town of Butare'*)* (last visited May 11, 2006).

[36] *See* Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath*, *supra* note 12, at 24. ("According to the statistics, one hundred cases of rape give rise to one pregnancy. If this principle is applied to the lowest figure [the numbers of pregnancies caused by rape are estimated to be between 2,000-5,000], it gives at least 250,000 cases of rape …).

[37] Human Rights Watch, *Shattered Lives, supra* note 12, at 1.

who took pleasure in ridiculing and undermining Hutu masculinity.[38] As many as five thousand Rwandan women were impregnated by rape[39] and recent reports show that the systematic rape that occurred during the genocide is still demanding its death toll due to a growing HIV/AIDS pandemic.[40]

The Statute of International Criminal Tribunal of Rwanda, an *ad hoc* tribunal established by the United Nations to prosecute the perpetrators of the genocide,[41] enumerates rape as a Crime against Humanity and as a Grave Breach of Common Article 3 of the Geneva Convention ("outrages upon dignity"), thereby recognizing that gender-based violence is as a grave war crime as murder, extermination and slavery.[42]

In the *Akayesu* case, the Tribunal elaborated on the definition of rape, as there was no commonly accepted definition available.[43] First, the Akayesu Trial Camber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[44] Second, it decided that rape includes "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual", exemplified by a victim's testimony of *Interahamwe* men thrusting a piece of wood into the sexual organs of a woman as she lay dying.[45] It went on to define the broader concept of sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive" and emphasized that sexual violence is "not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[46] It is interesting to note that the Tribunal stated that physical force is not what makes a situation coercive in nature, but that "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion" and that "coercion may be inherent in certain circumstances (…)."[47] It described the incident of a student who was ordered to undress and forced to do gymnastics naked in the public courtyard in front of a crowd as constituting sexual violence.[48] It is important to observe that the Tribunal stressed that

[38] *Ibid.,* at 18.
[39] Julie Mertus, *War's offensive on Women, supra* note 29, at 3.
[40] Amnesty International, Rwanda*: "Marked for Death", rape survivors living with HIV/AIDS in Rwanda*, *available at* http://web.amnesty.org/library/index/engafr470072004 (last visited May 11, 2006).
[41] United Nations Resolution 955 (1994), *available at* http://www.un.org/ictr/english/Resolutions/955e.htm (last visited May 11, 2006).
[42] Statute of the International Criminal Tribunal for Rwanda, Article 3 and 4, *available at* http://www.un.org/ictr/statute.html (last visited May 11, 2006).
[43] Prosecutor v. Akayesu, *supra* note 31, at para. 686.
[44] *Ibid.*, at para. 688.
[45] Prosecutor v. Akayesu, at para. 686.
[46] *Ibid.,* at para. 688.
[47] *Ibid.*
[48] Prosecutor v. Akayesu, *supra* note 31, at para. 688.

coercion may be inherent when military personnel, like militia, are present.[49] One could argue that the same coercive inference applies to interrogated detainees.

Finally, the *Akayesu* Judgment emphasized that rape will also constitute genocide when it is committed with the specific intent to destroy, in whole or in part, a particular group. The Tribunal stressed that rape may in some case be the *worst* form of genocide as it leaves the person behind with physical and mental harm, or in the words of the Tribunal: "these rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities."[50] Gerald *Grahima,* Rwanda's prosecutor general, is reported to have said that rape was the worst experience of most victims of the genocide and that some people actually paid to die or to be shot, rather than to be sexually tortured or raped.[51] This paper will elaborate more on the discussion surrounding 'genocidal rape' in Chapter IV, since it exhibits special features of the intersection between culture, ethnicity and sexual violence.[52]

Another important event in the aftermath of Rwanda is the indictment of *Pauline Nyiramasuhuko*, who allegedly used her official capacity – as the Minister for Women's Affairs, no less – to incite Hutus to rape thousands of female Tutsis during the genocide.[53] She is the first woman to be charged with rape as a Crime against Humanity by an international tribunal.[54] She is alleged to have ordered many Hutu men to rape Tutsi women before killing them and having endorsed or encouraged gruesome and nearly unthinkable atrocities of sexual violence.[55] One such sickeningly case included a 45-year-old Rwandan woman who was raped by her 12-year-old-son - with a hatchet held to his throat – in front of her husband while their five other younger children were forced to hold open her thighs.[56] *Nyiramasuhuko*'s case is still awaiting final judgment.

Noteworthy also, mostly because of its further use by the Special Court of Sierra Leone Prosecution, is the Trial Chamber's explanation in the *Kayishema*

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[49] See Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 319 (2003).

[50] Prosecutor v. *Akayesu, supra* note 31, at para. 731.

[51] *See* Peter Landesman, "The Minister of Rape: How Could a Woman Incite Rwanda's Sex-Crime Genocide?", N.Y. Times Mag., Sept. 15, 2002, at 125 (*available on microfiche at the U.Va. Law Library).*

[52] *See* in particular the debate between Copelon and MacKinnon on pages 56-57.

[53]Pauline Nyiramasuhuko , ICTR-97-21-AR72**,** Indictment (January 3, 2001), *available at* http://ictr.org/default.htm

[54] UN Press Release: *Les Premiers jugements en matière de crime de genocide seront rendus les 2 et 4 Septembre*, August 31, 1998, *available at* http://www.un.org/News/fr-press/docs/1998/19980831.afr93.html (last visited May 11, 2006). The original French text reads: "Pauline Nyiramasuhuko est la première femme à avoir jamais été mise en accusation pour génocide; elle était ministre".

[55] Sherrie Russel-Brown, *Rape as an act of Genocide*, 21 Berkeley J. Int'l L. 350, 353 (2003).

[56] *See* Peter Landesman, *supra* note 51, at 116.

case of the notion of 'other inhuman acts' under the charge of Crimes against Humanity. In this case the Trial Chamber stated that in order to be found guilty of Crimes against Humanity 'for other inhuman acts' one must commit an "act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act." [57] The Trial Chamber stressed that the crime of 'other inhuman acts' is not a lesser-included offence of the other enumerated crimes.[58] However, as to the facts of the case, the Trial Chamber held that the Prosecutor had not provided sufficient proof of the *specific* acts that could uphold the charge of 'other inhuman acts'. Evidence at trial had only occasionally mentioned that the two accused had attacked, mutilated and injured the population in the *Kibuye* Prefecture. The Trial Chamber rejected the notion that the 'other inhuman acts' should be used as a catch-all provision without proving specific acts that could constitute 'other inhuman acts'.[59]

2.2.2. Serbia, Croatia and Bosnia-Herzegovina

During the 1992-1993 Serbian ethnic cleansing campaign against Bosnia and Herzegovina, rape and sexual abuse of 'enemy' women was widely deployed as a planned tactic to sow terror.[60] The sexual violence against women by the Serbian forces received an unprecedented amount of publicity in the mainstream press and caused worldwide shock and disgust.[61] In this genocide-campaign, thousands of Muslim and Croatian women and girls were transported to Serbian-run "rape-camps", where they were gang-raped, sexually enslaved and forcibly made pregnant.[62] In that campaign, forced pregnancy was a well thought through strategy of eliminating Muslim ethnicity from the inside out, by forcing women to carry and bear children belonging to the enemy's own group.[63] It was also used as destroying the women's standing in the Muslim society, casting a social stigma over her, and thus making her unable to conceive a child from Muslim men.[64] Todd Salzman has called this practice "the usurpation of the female body as a weapon of war".[65] Professor MacKinnon has uttered: "this is rape as a policy of ethnic uniformity and ethnic conquest, of annexation and expansion, of acquisition by one nation of other nations. This is rape as ethnic expansion through forced reproduction."[66]

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[57] Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, (21 May, 1999), paras 583-586. *available at* http://itcr.org/default, *Completed Cases*.
[58] *Ibid.*
[59] *Ibid.,* at 584 (noting that the Prosecution did not particularize the nature of the acts that they relied upon for the charge of other inhumane acts.)
[60] *See* Julie Mertus, *supra* note 29, at 21.
[61] Amnesty International, *Human rights are Women's rights, supra* note 5, at 19.
[62] Catherine MacKinnon, *Rape, Genocide and Women's Human Rights*, 17. Harv. Women's L. J. 5, 7 (1994).
[63] *Ibid.,* at 13.
[64] Jonathan Short, *Sexual Violence as Genocide: The developing Law of International Criminal Tribunals and the International Criminal Court*, 8 Mich. J. Race & L. 503, 511 (2002-2003).
[65] Todd Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia,* Hum. Rts. Q. 348, 366 (1998).
[66] Catherine Mackinnon, *supra* note 62, at 13.

As in the Rwandan example, the government manipulated info and issued propaganda inciting racial hatred. Serbian Major *Milutinovic* was preparing a document where he portrayed Muslim men as praying on the 'pure' Serbian woman, "impregnating them with orthodox Islamic seeds, forcing her to bear a stranger and then to take even him away from her."[67] Even more, women were raped in Serbian-led camps by Serbian men who dressed up as (Catholic) Croatian soldiers, filming the rapes and forcing the women to confess on film that Croatians raped them.[68]

Article 5 of the statute of the International Tribunal for Yugoslavia explicitly lists rape as a Crime against Humanity.[69] Although rape is not explicitly enumerated under Article 2 (Grave Breaches of the Laws of War), rape may also amount to such a Grave Breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements under Article 3 and 4 of the Statute are met.[70] The list in Article 2 is indeed non exhaustive.[71]

Several cases before the Yugoslavia Tribunal have clarified some of the underlying notions of rape and sexual violence.

First, the *Celebici* Judgement – named after the prison where the atrocities occurred - contains notable implications regarding sexual violence against male detainees and rape as a means of torture. In this case four Bosnians where charged with various forms of sexual violence, perpetrated against Bosnian Serb residents whom they had confined in the Celebici prison camp. Three of them were charged with superior responsibility for the grave breach of inhuman treatment and for cruel treatment as a violation of the laws and customs of war for acts committed by their subordinates, which included subjecting two male detainees to perform fellatio on each other and by having a burning fuse cord placed around their genitals.[72]

The Trial Chamber next considered the elements that rape and sexual violence must exhibit to constitute torture and ultimately adopted the requirements that are contained in the Convention Against Torture.[73] If any form of sexual

[67] Todd A. Salzman, *supra* note 65, at 353 (quoting from reporter Roy Gutman, "A Witness to Genocide").

[68] Catherine Mackinnon, *supra* note 62, at 7.

[69] Article 5 of the ICTY Statute, *available at* http://www.un.org/icty/legaldoc-e/index.htm (hereinafter 'Yugoslavia Tribunal')

[70] Prosecutor v. Furundzjia, Judgment, IT-95-17/1, 10 December 1998, *available at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf , para. 172 (last visited May 11, 2006).

[71] *See* Article 2 of the ICTY Statute: "…but not limited to".

[72] Prosecutor v. Delalic, Judgement IT-96-21-T, 16 November 1998, *available at* http://www.un.org/icty/celebici/trialc2/judgement/index.htm , para. 24 and 26 (last visited May 11, 2006).

[73] See Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an

violence satisfies these elements it may constitute torture.[74] The Trial Chamber found that the multiple rapes committed by one of the accused Croats on a Serbian women as he questioned her about her husband caused "severe pain and suffering" and were committed against her for the purpose of obtaining information as to the whereabouts of her husband, to punish her for not providing that information, to punish her for the acts of her husband, and to coerce and intimidate her into cooperating.[75]

Finally, the Trial Chamber elaborated on the notion of 'inhuman treatment' – using an overview of human rights instruments and international jurisprudence –, defining it as an intentional act or omission which causes serious mental or physical suffering, injury or constitutes a serious attack on human dignity.[76] It concluded that inhuman treatment is an umbrella that covers all other grave breaches listed in the Geneva Conventions and that it is contrary to the 'fundamental principle of humanity'.[77]

In the *Furundzjia* case, the Yugoslavia Tribunal reviewed the definition of rape used by the Rwanda Tribunal and ultimately chose for a narrower definition, in which it labeled the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[78]

The Tribunal went further to include 'humiliation' in the list of prohibited purposes enumerated in the Torture Convention's definition of torture, a reasoning which, in the Court's view, flows from the general spirit of humanitarian law: safeguarding human dignity.[79]

The *Kunarac* Judgement embodied the first case in the Yugoslavia Tribunal's history that prosecuted rape as a Crime against Humanity and the first ever conviction for sexual enslavement.[80] Three members of the Serbian military force – *Kunarac*, who was a commander of a special unit of the Bosnian Serb Army, and *Kovac and Vukovic* who were members of the Serbian military unit in Foca - where charged with various forms of sexual violence committed in the Foca municipality. Serb military forces invaded the town of Foca in early

act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[74] Prosecutor v. Delalic, *supra* note 72, at para. 496.

[75] Prosecutor v. Delalic, *supra* note 72, at para. 941.

[76] *Ibid.,* para. 544.

[77] *Ibid.* .

[78] Ibid., para. 185.

[79] Prosecutor v. Furundzjia, *supra* note 70, at para. 162 (it stated that "among the possible purposes of torture one must also include that of humiliating the victims.")

[80] Kelly Askin, *supra* note 49, at 22.

1992, separated the Muslim and Croatian men from the women and children and transported the two groups to separate detention facilities. There, the Serbian forces systematically and publicly raped and gang-raped women and children – some nearly 12 years of age – and moved the women and children around other camps to please their captor's 'needs'.[81]

In criticizing paragraph (ii) of the *Furundzjia* classification of the objective elements that constitute rape,[82] the Trial Chamber emphasized that 'sexual autonomy' should be interpreted much broader and is considered to be violated "wherever the person subjected to the acts has not freely agreed to it or otherwise not a voluntary participant".[83]

The Trial Chamber went on to analyze in greater depth the notion of 'outrages on personal dignity'. In charging the accused *Kovac* with "outrages upon personal dignity" for instances where he made young girls dance naked on the table for his and other soldier's entertainment, the Trial Chamber confirmed the definition of 'outrages upon personal dignity' – laid down in the *Aleksovksi* Judgment of 1999 [84] – as an act that is "animated by contempt for the human dignity of another person" and "must cause serious humiliation or degradation", but it rejected the notion that the humiliation or degradation need to be of 'lasting effect'.[85] In the *Aleksovski* Judgment, the court had elaborated on the notion of 'outrages upon personal dignity' under Article 3 of the Statute (violations of the Laws of War), as based on Common Article 3 of the Four Geneva Conventions, which is regarded as having evolved into customary

[81] See Human Rights Watch Report, "A Closed, Dark Place: Past and Present Human Rights Abuses in Foca" (July 1998), *available at* http://www.hrw.org/reports98/foca/ (last visited May 11, 2006); *See also* Amnesty International USA, "Rape as a Tool of War", *available at* http://www.amnestyusa.org/stopviolence/factsheets/rapeinwartime.html (last visited May 11, 2006).

[82] *See* Prosecutor v. Kunarac, Judgement, IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001, at para. 438, *available at* http://www.un.org/icty/kunarac/trialc2/judgement/index.htm ("In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzjia definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim") (last visited May 11, 2006).

[83] *See* Prosecutor v. Kunarac, *supra* note 82, at para. 457.

[84] Prosecutor v. Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999, at para. 56, *available at http://www.un.org/icty/aleksovski/trialc/judgement/index.htm* ("An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule")

[85] Prosecutor v. Kunarac, *supra* note 82, at para. 501, *available at* http://www.un.org/icty/kunarac/trialc2/judgement/index.htm ("However, the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause "lasting suffering" to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting". In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity).

international law.[86] The *Aleksovski* court, on its turn assessing the *Celebici* Judgment's explanation of 'inhuman treatment' as forming an umbrella containing all the other Grave Breaches of the Geneva Conventions, had stated that an 'outrage upon personal dignity' is a *species* of inhuman treatment that is "deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*", [87] and concluded that the prohibition against outrages upon personal dignity safeguards the most important value of "respect for the human personality."[88]

Thus, *Kovac* makes clear that a War Tribunal can hold an accused responsible for the War Crime of 'outrages upon personal dignity', which can be considered a great step forward in recognizing and protecting an individual's dignity in humanitarian law.[89] Note, finally, that this definition does not contain any reference to acts of any sexual nature.

2.2.3. Sierra Leone

I will expand more in detail on how the civil war unfolded because it involved a myriad of actors on all sides of the conflict, all of whom have engaged in sexual violence.[90]

Civil war raged in Sierra Leone from 1991 until July 2002.[91] The conflict in Sierra Leone started in March 1991 when rebel fighters of the Revolutionary United Front (RUF) launched a war from the east of the country near the

[86] Prosecutor v. Aleksovski, *supra* note 84, para. 48-56 (noting the International Court of Justice *Nicaragua* Judgement)
[87] *Ibid.,* at para. 54.
[88] *Ibid.*
[89] *See* Kelly Askin, *supra* note 49, at 26; *See also* Prosecutor v. Kunarac, *supra* note 82, at para. 514 (Since *Kovac,* the view of the Trial Chamber is that the offence of 'outrages upon personal dignity' requires (i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect).
[90] See Human Rights Watch, "Sexual Violence within the Sierra Leone Conflict", Feb. 21, 2001, *available at* http://www.hrw.org/backgrounder/africa/sl-bck0226.htm ("The violence has affected thousands of girls and women of all ages. While members of the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC; the renegade members of the Sierra Leonean Army who led the 1997 coup, now sometimes also known as the West Side Boys) have been the most common perpetrators, members of the civil defense forces - the biggest and most powerful of which is the Kamajors - and the loyal Sierra Leonean Army have also been implicated."); Relating to sexual abuse by the ECOMOG and UNAMSIL, *see* Human Rights Watch Sierra Leone Report, "We'll Kill You if You Cry", Chapter V: "Sexual Violence against women and girls during the civil war", January 2003, *available at* http://hrw.org/reports/2003/sierraleone/sierleon0103-06.htm#P580_109415 (last visited May 11, 2006).
[91] See BBC News. "Timeline: Sierra Leone, A Chronology of Key Events", available at http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1065898.stm (last visited May 11, 2006).

border with Liberia to overthrow the government.[92] The RUF was formed in 1984 as a reaction against government corruption and mismanagement and claimed to be a political movement with the aim of salvaging the country and overthrowing the All People's Congress ("APC"), the ruling government party.[93] Its invasion of Sierra Leone from Liberia in March 1991 triggered the civil war that was to last ten years. At first the RUF fought against Sierra's Leone's army forces - with the support of the Military Observer Group (ECOMOG) of the Economic Community of West African States (ECOWAS) -, who protected the president *Momoh* but one year later the army itself launched a military coup to overthrow President Momoh, under the lead of Captain Valentine Strasser.[94] As fighting between the different rebel groups and paramilitary militia's continued, Parliamentary and presidential elections were held in February 1996, and the army endorsed the victory of President *Kabbah.* The RUF, however, did not participate in the elections and would not recognize the results and the conflict continued.[95] However, in May 1997, President Kabbah was overthrown in a coup led by Major Johnny Paul Koroma, who formed a new government called the Armed Forces Revolutionary Council (AFRC), which eventually merged with the RUF rebel groups.[96] From exile in Guinea, President *Kabbah* continued to mobilize the international community to enforce the ECOMOG forces in Freetown, leading to his reinstatement in early 1998.[97] After being expelled from Freetown, RUF/AFRC coalition assembled and launched a three-week intensive counter-attack in which the most serious and egregious human rights violations in the ten-year during civil war were committed: systematic amputations and mutilation, the burning alive of civilians, mass rape, sexual enslavement and forced labour.[98] In November 2000, the government and RUF signed a cease-fire, which committed both parties to starting the disarmament process, the reestablishment of government authority in former rebel-held areas, and the release of all child combatants and abductees.[99] After the United Nations Security Council established UNAMSIL, a much broader force to assist the government in enforcing the peace agreement signed in early 1999, it increased it several times until it reached an impressive 17.500 counting

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[92] *See* United Nations, *Report of United Nations Mission in Sierra Leone*, "Background of the Conflict", *available at* http://www.un.org/Depts/dpko/missions/unamsil/background.html (last visited May 11, 2006).
[93] Human Rights Watch Report, *We'll Kill you if You Cry*, Chapter IV: Background: Civil War, *available at* http://hrw.org/reports/2003/sierraleone/sierleon0103-06.htm#P580_109415 (last visited May 11, 2006).
[94] *Ibid.*
[95] Report of United Nation Mission in Sierra Leone, *supra* note 92.
[96] Human Rights Watch Report, *We'll Kill You if You Cry*, *supra* note 90, *Background Civil War.*
[97] *Ibid.*
[98] *See* BBC News: "Agony Words Cannot describe", March 2, 1999, *available at* http://news.bbc.co.uk/1/hi/world/africa/288722.stm *; See also* Amnesty International Annual Report (1999): Sierra Leone, *available at* http://www.amnesty.org/ailib/aireport/ar99/afr51.htm (Sierra Leone) (last visited May 11, 2006).
[99] Human Rights Watch Sierra Leone Report, *We'll Kill You if You Cry, supra* note 90.

military force.[100] In early 2002, the human rights violations finally decreased, as the disarmament process was declared complete.[101]

Estimates of women that were subjected to various forms of sexual violence as a result of the internal war range from 50.000 à 64.000 (only internally displaced females)[102] up to 257.000 (adding non-war related non-displaced persons).[103] A report by Physicians for Human Rights, having conducted a population-based assessment of the prevalence of sexual violence, released dizzyingly numbers: participants reporting war-related sexual violence recounted the following types of abuses: rape (89%), forced nudity and stripping (37%), gang rape (33%), abduction (33%), molestation (14%), sexual slavery (15%), forced marriage (9%), and insertion of foreign objects into genital opening or anus (4%).[104]

Rebel forces in particular engaged in a widespread - as they called it - 'virgination' of young girls, seeking to stigmatize them in their own society.[105] Sierra Leonean society places a high value on virginity – 'virginated' girls are, for instance, less eligible for marriage.[106] In one case, were a 14-year-old virgin girl refused to have sex with her captor, she was repeatedly stabbed with a knife in her vagina.[107] In addition, rebel forces sickeningly exploited family relations, for instance, by having husbands watch the rape of their wives and daughters.[108] Men who refused to rape members of their own families had their limbs amputated as punishment.[109] The RUF and AFRC Rebel Forces and the CDF (the pro-government Civil Defense Forces) have abducted thousands of women and girls and held them into sexual slavery, making them fight, perform forced labor and 'marrying' them to several rebels.[110]

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[100] *See* United Nations Security Council Resolution 1270 (Oct. 22, 1999) on the establishment of UNAMSIL, S/RES/1270 (1999), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N99/315/02/PDF/N9931502.pdf?OpenElement ; See United Nations Security Council Resolution 1346 (30 March 2001), S/RES/1346 (2001) , *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N01/312/19/PDF/N0131219.pdf?OpenElement (last visited May 11, 2006).

[101] *See* Report of United Nations Mission in Sierra Leone, *supra* note 92.

[102] Human Rights Watch, *We'll Kill You if You Cry*, Chapter V, *supra* note 90.

[103] Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 Harv. Hum. Rts. J. 85, 90 (2005).

[104] Physicians for Human Rights, "War-related Sexual Violence in Sierra Leone: A Population based assessment" (2002), *available at* http://www.phrusa.org/research/sierra_leone/exec_summ.html (last visited May 11, 2006). Even when exaggerations in self-reporting and under-reporting (because of guilt, shame or other personal negative emotions) are subtracted, the numbers remain at a very high-end.

[105] *See* Amnesty International, "Sierra Leone: Rape and Other Forms of Sexual Violence against Girls and Women", *available at* http://web.amnesty.org/library/Index/engAFR510352000 (last visited May 11, 2006); ('Virgination' means the deprivation of virginity).

[106] Human Rights Watch, *We'll Kill You if You Cry*, Chapter V, *supra* note 90.

[107] *See* Amnesty International: "Sierra Leone Rape and Other Forms of Sexual Violence against Girls and Women", *supra* note 105.

[108] *See* Binaifer Nowrojee, *supra* note 103, at 89.

[109] *See* Amnesty International Annual Report 1999: Sierra Leone, *supra* note 98.

[110] *Ibid.*

The United Nations, in cooperation with the Sierra Leonean government, established the Special Court of Sierra Leone, a 'hybrid' War Tribunal consisting of both international and Sierra Leonean staff members.[111] Its statute enables the Special Court to prosecute rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence rape and sexual violence as a Crime against Humanity under Article 2, (g) if committed as a widespread or systematic attack against any civilian population.[112] Article 3, (e) of the Statute enables the Special Court to prosecute 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as a serious violation of humanitarian law as enshrined in Common Article 3 of the Geneva Conventions and the Second Additional Protocol (also referred to as 'War Crimes').[113] The choice of which article to utilize for prosecution might have an important impact on the way sexual violence jurisprudence will develop in the future.[114] At the time of writing, three alleged leaders of the CDF, three alleged leaders of the AFCR, and three alleged RUF rebel leaders are indicted before the Special Court on charges of Crimes against Humanity, War Crimes and Other Serious Violations of International Humanitarian Law. In addition to the nine accused currently on trial at the Special Court, four other persons were indicted by the Prosecutor. First, against former Liberian President Charles Taylor, who played an important role in the conflict by actively supporting the RUF in destabilizing Sierra Leone's government.[115] Former RUF leaders Foday Sankoh and Sam Bockarie, and former AFRC leader Johnny Paul Koroma were also under indictment, but the indictments against Sankoh and Bockarie were withdrawn on 8 December 2003 due to their deaths. The whereabouts of Johnny Paul Koroma are unknown but his indictment still stands.[116] Six of the indictments contain charges of rape and other acts of sexual violence and outrages upon personal dignity.[117] The Prosecutor has more creatively used the notion of 'other inhuman acts' as Crimes against Humanity in the issuing of indictments, in order to encompass other types of sexual violence that women endure in conflict, like, for instance, the 'coerced marriages'.[118] At the time of writing, no final judgment in any of the pending cases had been issued.

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[111] Agreement Between the United Nations and The Government of Sierra Leone on The Establishment of A Special Court of Sierra Leone, 16 January 2002, *available at* http://www.sc-sl.org/scsl-agreement.html

[112] *See* Article 2, (g) of the Statute of the Special Court of Sierra Leone (SCSL), available at http://www.sc-sl.org/scsl-statute.html

[113] *See* Article 3, (e) of the SCSL Statute.

[114] *See* Shana Eaton, *Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime*, 35 Geo. J. Int'l L. 873, 912 (2003-2004).

[115] *Ibid.*

[116] *See* Special Court of Sierra Leone, *Cases,* available at http://www.sc-sl.org

[117] *See* Special Court of Sierra Leone *Cases, Indictments*.

[118] *See* for instance the indictments against the RUF members, *Cases, The RUF Accused, Indictments, available at* http://www.sc-sl.org/Documents/SCSL-04-15-PT-12-6192-6202.pdf

An important aspect of Sierra Leone's sets it apart from the Rwandan and Bosnian aspect: there are no allegations or proof available that this conflict was about ethnic cleansing or that it amounted to genocide. The primary catalyst of the conflict, it is said, was the quest for control of the mineral resources and primarily the diamond sector.[119] Indeed, the Statute of the Special Court does not even mention genocide under any of the chargeable offenses.[120] Although it might be more difficult to prove rape as a war crime or a crime against humanity, than charge it against the backdrop of genocide – because one can establish a link between rape as a means to 'achieve' the goal of genocide – the Special Court of Sierra Leone will be the first War Tribunal to address rape and sexual violence out of the context of ethnic cleansing or genocide.[121]

Although much remains to be seen on how the Special Court will influence future gender-related war crimes jurisprudence, it is clear that the growing political will to address sexual violence during wartime as an intolerable crime[122] and to punish the responsible perpetrators, is a departure from the long held view that sexual violence is a 'by-product' of war.[123]

2.2.4. The International Criminal Court

The International Criminal Court was established by the 1998 Rome Statute as a permanent criminal court with complementary jurisdiction over the most serious crimes 'of international concern'.[124] In large part due to a strong lobbying effort – mainly by the Women's Caucus for Gender Justice[125] - did the final version of the Statute contain ample references to gender-crimes.[126] The reported goals of the lobbying efforts were twofold: the first was to explicitly list a range of serious sexual violence crimes to ensure they are

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(Count 8 - these counts are often charged in the alternative to crimes against humanity or war crimes) (last visited May 11, 2006).

[119] *See* Amnesty International USA Amnesty Magazine: "Blood Diamonds", *available at* http://www.amnestyusa.org/amnestynow/diamonds.html (under the header 'amputation is forever'); *See also* BBC News: "Diamonds: A Rebel's Best Friend" (15 May 2000), *available at http://news.bbc.co.uk/1/hi/world/africa/745194.stm*
http://news.bbc.co.uk/1/hi/world/africa/745194.stm (noting that the Civil War was financed by the diamond profits and that millions worth of diamonds were smuggled out of the country on a daily basis) (last visited May 11, 2006).

[120] *See* Statute SCSCL, *supra* note 112.

[121] *See* Shana Eaton, *supra* note 114, at 909.

[122] *See* Binaifer Nowrojee, *supra* note 103, at 105.

[123] *See* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 McGill L. J. 217, 220 (2000-01).

[124] *See* Article 1 of the Rome Statute of the International Criminal Court, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

[125] *See* Rhonda Copelon, *Gender Crimes as War Crimes*, *supra* note 123, at 233.

[126] *See* Valerie Oosterveld, *The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Justice?*, 18 Harv. Hum Rts. J. 55, 58 (2005).

always understood as crimes in themselves.[127] The second was to incorporate the previous developed jurisprudence that sexual violence must be seen as an integral part of other recognized egregious forms of war violence, such as torture, genocide and inhumane treatment.[128] The idea behind this latter strategy is that listing gender crimes purely as separate war crimes against women might entail the – historically proven[129] - risk that those crimes against women will be treated as of secondary importance.[130]

Article 7, 1 (g) of the Rome Statute contains a broad list of sexual violence, all punishable as a Crime Against Humanity: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[131] This umbrella-provision recognized that these sexual crimes can be perpetrated against any civilian population, both in time of peace and war, and by state as well by private actors – this is relevant because women are mostly subjected to sexual violence perpetrated by various actors from different sides of the conflict (as demonstrated by the Sierra Leone conflict).[132] There is however a threshold requirement that these crimes should be related to a *state* or *organizational* policy to commit systematic attacks.[133]

Article 8, 2 (b), (xxii) explicitly lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions, as War Crimes.[134] The 'also constituting'-language was explicitly chosen to make clear that sexual violence (in various forms) is a grave breach, equivalent to other crimes subject to universal jurisdiction.[135] It is important to observe that these forms of sexual violence, under the charges of War Crimes, are no longer listed as a species of 'outrages upon personal dignity' or together with 'other

[127] *See* Rhonda Copelon, "Gender Crimes as War Crimes", *supra* note 123, at 234.
[128] *See* Rhonda Copelon, "Gender Crimes as War Crimes", *supra* note 123, at 234.
[129] For instance, the original *Akayesu* indictment did not contain any charges of rape or sexual violence, despite the fact that it was widely documented by various human rights organizations: *See* Kelly Askin, *supra* note 49, at 14; Sexual violence against women was documented by the Special Rapporteur on Violence Against Women, Ms. Coomaraswamy, *see* Report of the Mission to Rwanda on the Issue of Violence Against Women, U.N. Doc. E/CN.4/1998/54/Add.1, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G98/103/85/PDF/G9810385.pdf?OpenElement (last visited May 1, 2006).
[130] *See* Rhonda Copelon "Gender Crimes as War Crimes", *supra* note 123, at 234. ("it makes a difference (…) to treat rape as torture rather than humiliation").
[131] Article 7, 1 (g) of the Rome Statute.
[132] *See* Rhonda Copelon, *Gender Crimes as War Crimes*, *supra* note 123, at 235
[133] Article 7, 2 (a) of the Rome Statute.
[134] Article 8, 2, (b), (xxii) of the Rome Statute.
[135] *See* Rhonda Copelon, *Gender Crimes as War Crimes*, *supra* note 123, 234 (noting in footnote 54 that "also constituting" replaced an earlier proposal of the phrase "also amounting to")

forms of indecent assault', which is substantially different from the Special Court of Sierra Leone's Statute.[136]

Finally, Article 7, 1 (h) of the Rome Statute prohibits persecution against any identifiable group or collectivity on the basis of gender. This codification of the non-discrimination principle in human rights and humanitarian law, based on 'gender', was the result of a consensus between women lobby groups favoring a cultural-embedded notion of gender and conservative lobbyists seeking to remove the 'gender' notion all together form the draft statute. [137] The consensus resulted in defining 'gender' in Article 7, 3 of the Rome Statute as 'the two sexes, male and female, within the context of society'. [138]

The ICC Prosecutor is currently investigating the situation in the Democratic Republic of the Congo, as well as the Uganda and Sudan conflicts in which systematic sexual violence has been extensively documented.[139] It remains to be seen how the prosecution will indict perpetrators of sexual abuse but the Rome Statute provides for ample opportunity to greatly advance the recognition of gender-crimes in international jurisprudence as punishable amongst the most heinous and intolerable crimes, and reflects a long-pursued societal change in the demand for greater respect and recognition for women's rights during wartime.[140]

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[136] Article 3, (e) of Statute of the Special Court of Leone (as violations of the laws and customs of war) lists rape, enforced prostitution as a species of "outrages upon personal dignity" together with 'any other form of indecent assaults'.

[137] The difference, as conceived by the different lobbying parties, is that 'sex' refers to objective notions of male and female sex, while the term 'gender' encompasses a broader and progressive notion of 'socially constructed understandings of what it means to be male or female': *see* Valerie Oosterveld, *The Definition of 'Gender' in the Rome Statute of the International Court*, *supra* note 126, at 64.

[138] *See* Rhonda Copelon, *Gender Crimes as War Crimes*, *supra* note 123, at 237.

[139] *See* International Criminal Court, *Situations and Cases, available at* http://www.icc-cpi.int/cases.html ; *See* for the D.R.C., Human Rights Watch, "D.R. Congo: Tens of Thousands Rape, few Prosecuted" March 7, 2005), *available at* http://hrw.org/english/docs/2005/03/07/congo10258.htm
See for Uganda: UNICEF Press Release (15 June 2005), "Study highlights rape in Northern Uganda's largest IDP camp", *available at* http://www.unicef.org/media/media_27378.html ; *see* for Sudan: Amnesty International: Sudan "Darfur: Rape as a weapon of war: sexual violence and its consequences" 19 July 2004), *available at* http://web.amnesty.org/library/index/engafr540762004 (all last visited May 11, 2006).

[140] *See* International Committee of The Red Cross, *Customary International Humanitarian Law, Volume I: Rules* 585 (Jean Marie Henckaerts & Louise Dowald-Beck, 2005).

3. CONSTRUCTING THE FRAMEWORK: THE UNITED STATES 'TORTURE DEBATE' ON COERCIVE INTERROGATION.

3.1. GENERAL

The public debate about torture and cruel, inhuman and degrading treatment broke loose when photographs from Abu Ghraib prison, showing Iraqi prisoners hooded, naked and forced into humiliating actions and positions, shocked nations throughout the globe as it displayed what was being allowed under American control.[141] The following heated debates amongst scholars, politicians and world leaders next focused on the interpretation of international and domestic legal standards that (should) govern the prohibition on torture and cruel, inhuman and degrading treatment relating to the United States' "War on Terror".[142] This debate soon centered on leaked legal memoranda that were prepared within the White House – soon to be dubbed the 'Torture Memo's' – and which declared, *inter alia*, that certain forms of interrogation might be considered 'cruel, inhuman and degrading' treatment but are nevertheless allowed as long as they do not amount to torture, and in case they do amount to torture, should be allowed in situations of extreme necessity.[143] With the so-called McCain amendments, seeking to insert a ban on cruel, inhuman and degrading treatment for people in U.S. custody or under U.S. control and currently attached to the 2006 Defense Department Appropriations Bill - after an intensive White House effort to quash the initiative -, the debate about what standard should govern U.S. military interrogation practices reached new heights and was widely covered in the media.[144]

Even renowned academia publicly spoke out, assessing that torture was in some cases inevitable; Harvard Professor Alan Dershowitz told CBS Television's popular *60 Minutes*: "If you've got the ticking time bomb case, the case of the terrorist who knew precisely where and when the bomb would go off, and it was the only way of saving 500 or 1, 000 lives, every democratic

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[141] *See* The New Yorker. "Torture at Abu Ghraib" by Seymour Hersch, *available at* http://www.newyorker.com/fact/content/?040510fa_fact ; *See for* the official photographs: The official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq, *The Abu Ghraib Investigations* (Steven Strasser, ed.), at 103.

[142] *See* Karen J. Greenberg, *The Rule of Law Finds Its Golem: Judicial Torture Then and Now*, *in* "The Torture Debate in America" 1, 1 (Karen J. Greenberg (ed.), New York University Press 2006).

[143] *See* W. Bradley Wendell, *Legal Ethics and the Separation of Law And Moral*", 91 Cornell L. Rev. 67, 68 (2005). (referring to the Memorandum from Jay S. Byee, Assistant Attorney General, to Alberto Gonzalez, Counsel to the President (Aug. 1, 2002), in the Torture Papers: The Road to Abu Ghraib 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[144] *See* Alfred W. McCoy, *A Question of Torture* 185-187 (Metropolitan Books, New York 2006); *See* for latest version of McCain Amendment: Physicians for Human Rights, "McCain Amendment in the final version of the FY 2006 Defense Appropriations Bill", *available at* http://www.phrusa.org/research/torture/mccain_text.html (last visited May 11, 2006).

society would, have, and will use torture."[145] Likewise, Berkeley Law School Professor John Yoo has argued that captured members of Al Qaeda and the Taliban are not protected by any prohibition on torture or cruel interrogation arising out of the Geneva Conventions because they do not fall within any category of armed conflict the Bush Administration has recognized.[146] That sentiment is not one only shared by this country's *intelligentia*; American citizens seem to favor a somewhat 'looser' prohibition on torture when it comes to interrogating terrorist suspects.[147]

3.2. INTERNATIONAL LEGAL DOCUMENTS

There are various international documents that contain a prohibition on torture and cruel, inhumane and degrading treatment. Article 7 of the International Covenant on Civil and Political Rights states that "no one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment."[148] When ratifying the Covenant, the United States has made a reservation in which it considered itself bound only to the extent that 'cruel, inhumane and degrading treatment or punishment' corresponds with the prohibitions of the Fifth, Eight, and/or Fourteenth Amendment of the US Constitution.[149] A similar reservation is attached to the International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,[150] which defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of

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[145] *Quote taken from* Alfred W. McCoy, *A Question of Torture*, *supra* note 144, at 111. This ticking time bomb'-scenario has been criticized by *Henry Shue* as an extraordinary and overtly self-serving scenario, both in the scale of destruction as the certainty of the fact that the correct information will be extracted by morally abiding citizens with the assistance of a caring doctor: S*ee* Henry Shue, *Torture*, 7 Phil. & Pub. Aff. 124, 142 (1978).

[146] *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1684 (2005). (referring to the Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Dep't of Def. 1 (Jan.9, 2002), on file with the Columbia Law Review).

[147] *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, *in* "The Torture Debate in America" 1, 35 (Karen J. Greenberg (ed.), New York University Press 2006) (noting that popular surveys like a November 2001 Christian Science Monitor survey, shows that 35% of surveyed Americans favored torturing terror suspects).

[148] *see* The International Covenant on Civil and Political Rights ("ICCPR") G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (hereinafter 'International Covenant').

[149] Reservations, Understandings and Declarations to the ICCPR made by the United States of America, *available at* http://193.194.138.190/html/menu3/b/treaty5_asp.htm (last visited May 11, 2006)

[150] *See* http://www.ohchr.org/english/countries/ratification/9.htm , *Declarations and Reservations,* United States of America, Reservation I, 1.

any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. [151]

Moreover, the U.S. has made a reservation that defines 'mental suffering' as *prolonged mental harm*.[152] By making these reservations, the United States has shielded itself from potentially more demanding international human rights standards, an issue that – in this present author's view - lies at the heart of the current torture debate. Indeed, this regime allows the U.S. to engage in any practice not prohibited by the U.S. Constitution, even if that practice is considered a violation of international legal standards by the other parties to the Covenant or the Torture Convention.[153] In light of U.S.' harsher criminal punishment system, this discrepancy might be higher than initially thought.[154]

Finally, the Geneva Conventions (containing the Laws and Customs of War) contain several provisions related to torture and inhuman treatment. Article 17 of the Third Geneva Convention provides that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever". [155] Furthermore, Prisoners of War who refuse to answer may not be threatened, insulted, or exposed to any "unpleasant or disadvantageous treatment of any kind".[156] Moreover, Common Article 3 lists prohibitions on 'cruel treatment and torture' and 'outrages upon personal dignity, humiliating and degrading treatment' as minimum standards applicable to *all* actors in an armed conflict.[157] Next, Article 75, para. 2, (b) of the Second Additional Protocol 1977 to the Geneva Conventions relating to International Armed Conflict expresses in powerful language the *minimum* standards of treatment of persons who are 'in the power of a party to the

[151] Article 1, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT"), *available at* http://www.hrweb.org/legal/cat.html (hereinafter 'Torture Convention').
[152] *Ibid.*, Reservation II, 1, (a).
[153] Trevor Ulbrick, *Tortured Logic: The (Il)legality of United States Interrogation Practices in The War on Terror*, 4. Nw. U. J. Int'l Hum. Rts. 210, 245 (2005).
[154] *See* Harvard Professor James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, Oxford University Press (2003). (concluding that America's punishment employs a 'leveling-down' approach in punishment, clinging to a status-formality idea, while Europe levels up, reminiscent of the negative class system of the *Ancièn Régime*).
[155] Article 17, para. 3 of the Third Geneva Convention relative to the Treatment of Prisoners of War (21 October 1950), *available at* http://www.unhchr.ch/html/menu3/b/91.htm (last visited May 11, 2006).
[156] *Ibid.*
[157] *Ibid.*, Article 3, (a) and (c) ; *See* Jeremly Waldron, *supra* note 146, at 6. (noting that detained members of irregular forces also benefit from this provision).

conflict' and who do not benefit from more favorable treatment under the Conventions or under this Protocol.[158] The article states that such persons:

shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.[159]

It then list *absolute* prohibitions, whether committed by civilians of by military agents, including 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.' [160] Retired Navy Commander and U.Va. Law School lecturer Dave Glazier is arguing in his forthcoming article that Article 75 is declaratory of customary international law – even recognized by the U.S. – and applicable on the War on Terror (what he redefined as 'the War on Al-Qaeda and the Taliban'), thus overruling the United States position that the Geneva Conventions do not apply as a matter of humanitarian treaty law.[161]

Finally, the International Committee of the Red Cross has also stated that the general prohibition on torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, has crystallized into customary international law applicable in both international and non-international armed conflict.[162]

3.3. RELEVANT INTERNATIONAL LEGAL JURISPRUDENCE

Turning to the prohibition on 'cruel, inhuman and degrading treatment or punishment', which might prove to be the relevant legal standard to apply to the story of the female interrogators, neither the International Covenant nor the Torture Convention contains a definition. To find out more about the exact extent of the difference between 'cruel, inhuman and degrading treatment or punishment' and torture, we might look towards international jurisprudence for clarification.

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[158] *See* Article 75, 2, (b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), *available at* http://www.unhchr.ch/html/menu3/b/93.htm

[159] *Ibid.*

[160] Article 75, 2 of the Second Additional Protocol.. ("…The following acts are and shall remain prohibited at any time and in any place")

[161] *See* David W. Glazier, *Full and Fair by What Measure?: International Law Standards Applicable to Military Commission Procedure*, Boston University International Law Journal, Forthcoming, *available at* SSRN: http://ssrn.com/abstract=896643 (summary) ; *See also* Mary Ellen O' Connell, *Affirming the Ban on Harsh Interrogation*, 66 Ohio St. L. J. 1231, 1243 (2005).

[162] *See* International Committee of The Red Cross, *Customary International Humanitarian Law, Volume I: Rules* 315 (Jean Marie Henckaerts & Louise Dowald-Beck, 2005).

First, the European Court of Human Rights has decided important cases concerning torture and cruel, inhuman and degrading treatment (sometimes labeled 'ill-treatment') in which it also considered provisions from the Torture Convention besides the European Convention on Human Rights.[163] For example, in the Case of the *Republic of Ireland v. The United Kingdom*, where certain interrogation techniques used by British forces against alleged IRA terrorist were under scrutiny, the European Court of Human Rights has distinguished torture from cruel, inhuman and degrading treatment (a distinction similarly made in the European Convention on Human Rights[164]) in terms of 'difference in the intensity of the suffering inflicted'. It held that interrogation techniques such as hooding, 'wall-standing', subjection to noise and deprivation of sleep, food and drink, - when used in combination for a long period – "caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation" and thus "undoubtedly amounted to inhuman and degrading treatment", but held that they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood." [165]

The European Court went on to define 'degrading' techniques "as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[166] In the Case of *Selmouni* v. *France*, a case in which a suspect of narcotics trafficking was severely beaten, sodomized, urinated on and otherwise humiliated by police offers, the European Court made some important observations:

The Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[167]

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[163] *See* Mary Ellen O' Connell, *Affirming the Ban on Harsh Interrogation*, *supra* note 161, at 7.

[164] See Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedom, *available at* http://www1.umn.edu/humanrts/instree/z17euroco.html ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment") (last visited May 11, 2006).

[165] Republic of Ireland v. United Kingdom, *Application no. 5310/71*, Judgment 18 January 1978, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=Republic%20%7C%20of%20%7C%20Ireland&sessionid=6931314&skin=hudoc-en , para. 167. (last visited May 11, 2006).

[166] *Ibid.*

[167] Selmouni v. France, Application No. 25803/94, Judgment 28 July 1999, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=selmouni&sessionid=6931305&skin=hudoc-en , para. 101 (last visited May 11, 2006).

The European Court thus clearly assessed that the higher requirements for cruel, inhuman and degrading treatment, as formulated in the *Ireland* decision, can be lowered. It went on to note:

Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (…) and makes no provision for exceptions and no derogation from it is permissible. [168]

As to the merits of the case, the Court was satisfied that these acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance and thus violated the European Convention's prohibition on 'inhuman and degrading treatment.'[169]

In a recent case, *Aktas* v. *Turkey*, the Court reiterated that torture and cruel, inhuman and degrading treatment differ from each other because of the intensity of suffering,[170] but added that the purposive element of the alleged acts should be considered to decide whether an act amounts to torture under the European Convention.[171] The Court noted with regard to 'ill-treatment' that it must attain a minimum level of severity before it will be considered to fall within the provision's scope. The assessment of this minimum is relative and depends on all of the circumstances of the case including the duration of its treatment, the physical or mental effects and, in some cases, the age, sex and health of the individual.[172]

Second, the Israeli Supreme Court has promulgated, in an important case brought before it by the Public Committee Against Torture in Israel, the general principle that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever."[173]

Finally, the Human Rights Committee – the monitoring body of the International Covenant – has ranged various acts, from forced undressing, genital electric shock-treatment to being forced to stand for a long period of

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[168] *Ibid.,* para. 95.
[169] *Ibid.* para. 99.
[170] Aktas v. Turkey, Application no. 24351/94, Judgment 24 April 2003*, available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Aktas&sessionid=6941351&skin=hudoc-en , para. 313 (Noting "that torture attaches a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v. the United Kingdom* judgment") (last visited May 11, 2006).
[171] Aktas v. Turkey, *supra* note 170, at para. 313.
[172] *Ibid.,* para. 312.
[173] The Supreme Court of Israel, sitting as the High Court of Justice, 5100/95 Public Committee Against Torture in Israel v. Israel (1999) IsrSC 53(4), *available at* http://hei.unige.ch/~clapham/hrdoc/docs/terrorisraeljudgment.pdf , at 7 (last visited May 11, 2006).

time as torture, but without pointing out what exactly about it makes these acts amount to torture.[174]

Although beyond the scope of this paper – in which the focus lies on international jurisprudence about standards of human dignity, and considering that the U.S. will inevitably apply lower human rights standards due to its treaty reservations – the United States domestic jurisprudence might be somewhat instructive for the understanding of 'cruel, inhuman and degrading' treatment given that the United States has linked its obligation under both the International Covenant and the Torture Convention to its Constitutional amendments. [175] It should be noted however that the eight amendment jurisprudence does primarily focus on 'excessive punishments'[176] and, to the extent it applies to interrogation techniques, does not seem to be concerned with notions of 'human dignity' but more with questions of admissibility of coerced information.[177]

3.4. DIGNITY, MORALITY AND ILL-TREATMENT

Chicago Professor Eric Posner argues that coercive interrogation should not be banned under the 'symbolic' argument that it runs contrary to human dignity because imprisonment, he argues, is a widely acknowledged form of punishment that also runs contrary to human dignity and causes deliberate infliction of pain.[178] However, imprisonment sets itself apart from interrogation in two important ways: first, imprisonment is a *de iure* response to a judicial established guilt whereas interrogation of terror suspects seems to operate in a less compelling legal framework,[179] and second, as Harvard Professor Whitman has shown, imprisonment need not necessarily be

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[174] Jason R. Odeshoo, *Truth or Dare?: Terrorism and 'Truth Serum' in the Post 9/11 World*, 57 Stan. L. Rev. 209, 242 (2004).

[175] *See* for two overviews on this issue: J. Trevor Ulbrick, *supra* note 153, at 11; S*ee also* Mary Ellen O' Connell, *supra* note 161, at 8.

[176] *See* for instance Gregg v. Georgia, 428 U.S. 1553, 175 (1976) (the issue here was whether the sentence of death for the crime of murder was excessive under the 8th amendment and the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases.); *see* Eberheart v. Georgia, 433 U.S. 917, 97 (1977) where the Supreme Court held that the death sentence for the crime of rape was excessive in light of the Eight Amendment.

[177] *See* Mary Ellen O' Connell, *supra* note 161, at 8.

[178] *See* Eric Posner & Adrian Vermeule, *Should Coercive Interrogation be Legal?,* 104 Mich. L. Rev. 671, 691 (2006).

[179] *See* Heather MacDonald, *How To Interrogate Terrorists*, *in "*The Torture Debate in America" 1, 86 (Karen J. Greenberg (ed.), New York University Press 2006) ("As interrogators tried to overcome the prisoner's resistance, their *reference point* remained Geneva and other humanitarian treaties but the interrogators pushed into the outer limits of what they thought the law allowed (…).") (emphasis added).

intrinsically entwined with degrading treatment and violations of human dignity.[180]

Apart from the various objections that can be made against 'ominous catch-all' arguments so meticulously proffered by the 'Torture Memo's"- adepts,[181] I agree with Columbia Law Professor Jeremy Waldron where he reminds us that:

The most important issue about torture remains the *moral* issue of the deliberate infliction of pain, the suffering that results the insult to *dignity* and the demoralization and depravity that is always associated with this enterprise whether legalized or not.[182]

Moreover, as *Elaine Scarry* contends, torture does not only inflict pain and indignation of various forms on the victim, but also leads to the barbaric empowerment of the torturer, nullifying the claims of the tortured victim's world, thereby making the torture supreme in everything that remains of the victim's shattered world – only subordination is left.[183]
Unfortunately, not all of us are possessive of the moral integrity of the U.K. delegate to the European Convention on Human Rights draft conference, who uttered that "it would be better for society to perish than for it to permit this relic of barbarism remain."[184]

Indeed, a sad future lies ahead if one is to include the United States, in this day and age, with such countries as Congo, Rwanda, Bosnia, Liberia and others, all notorious for their brutal torture history.[185]

[180] *See* James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe, supra* note 154, at 191-202(describing and analyzing in great detail how Europe and America differ in the 'harshness' of punishment).
[181] *See* Joshua Dratel, *The Curious Debate in "*The Torture Debate in America" 1, 112 (Karen J. Greenberg (ed.), New York University Press 2006). (for instance the 'ticking time bomb' argument, the argument that torture is necessary to face the 'new paradigm' of modern terrorism, that torture elicits the actual information wanted and does not lead to false information, etc…)
[182] *See* Jeremy Waldron, *supra* note 146, at 33.
[183] *See* Elaine Scarry, *The Body in Pain: The Making and the Unmaking of the World,* at 33 (Oxford University Press 1985).
[184] Quote of Mr. Cocks, United Kingdom delegate to the ECHR conference (1949), taken from Jeremy Waldron, *supra* note 146, at 15.
[185] *See* for an exhaustive report on torture in numerous countries: Amnesty International, *Torture worldwide: An affront to Human Dignity* (Amnesty International, New York 2000).

4. PUTTING IT TOGETHER: EXPLORING THE CONCEPT OF DIGNITY AND HUMILIATION WITH REGARD TO SEXUAL VIOLENCE AND COERCIVE INTERROGATION

I will use the story of the female interrogator using sexual suggestive tactics on religious Muslim men in a coercive environment as a framework in which I will analyze various notions that are involved: how to construct human dignity vis-à-vis notions of gender, sexual identity, culture and religion. More specifically, what are the dimensions of the idea of human dignity that are so frequently and in various contexts used - be it by War Tribunals or professed by the various actors in the U.S. Torture debate.

This Chapter will employ less legalistic and formal terminology as the present author has allowed himself more leeway in approaching this issue, raising questions and pointing out some problems.

4.1. GENERAL

When I glanced briefly at the news header alleging that Muslim male detainees at Guantanamo Bay were confronted with seductive female interrogators that employed sexually suggestive tactics to try and elicit valuable information from them, my primary reaction was utterly misplaced:[186] it was a mixed feeling of continued astonishment at the U.S.' 'creativity' in coming up with coercive interrogation tactics (recalling interrogators having used heavy metal before[187]) and a bit of lingering amusement when imagining being interrogated by an attractive women.[188]

Having come to senses and after reading the complete article, the seriousness of the issue dawned upon me and many questions sprang to my mind. Why do interrogators use such tactics? Why do they think it effective? Why are they or should they be offensive? Are they illegal? If so, under what legal standards?

The Department of Defense ("DoD") soon initiated investigations into the sexual abuse allegations, but ultimately fell short of taking effective long-term recommendations or actions and limited itself to rather simple documentation, benchmarking the alleged acts against so-called 'counter-resistance' - interrogation techniques, not contained in the otherwise governing Army Field

[186] *See* The Washington Post, "Detainees Accuse Female Interrogators", February 10, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A12431-2005Feb9.html (last visited May 11, 2006).

[187] *See* BBC News, "Sesame Street breaks Iraqi POWs", 20 May 2003, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/3042907.stm (last visited May 11, 2006).

[188] I purposely exaggerate and frame it as a male, hormone-driven reaction to heighten the relevance of the discussion I will embark on in this chapter and to heat up the debate.

Manual 34-52 but formally approved.[189] For instance, the Church III Investigation reported – inter alia – that the case of the two female interrogators who 'touched and spoke to detainees in sexually suggestive manner' constituted only 'minor assaults' in which they exceeded the bounds of approved interrogation policy on their own initiative.[190] Likewise, the Schmidt Investigation categorized an alleged 'lap dance' on a Muslim man as an allowed technique, only constituting 'mild, non-injurious physical touching' and the allegation that a female interrogator wiped red ink on a Muslim detainee's arm, telling him it was menstrual blood, was considered allowed under the FM 34-52 'futility'-technique.[191]

Although not always 'appropriate' techniques, these sexual 'counter-resistance' – techniques seem to be condoned by military officials.[192]

The following chapters will highlight different viewpoints one might have regarding the intersection of sexual, cultural, ethnic and religious identity in relation to the concept of human dignity, sketched against the backdrop of wartime gender-crimes and the discussion surrounding cruel and inhuman and degrading treatment.

4.2. SITUATING HUMAN DIGNITY

Human dignity seems an ungraspable notion, difficult to define, but understood by everyone: a typical 'we know it when we see it *(when it is offended*)'- feeling. For example, Martha Nussbaum observes that humiliation "makes the statement that the person in question is low, not on par with others *in terms of human dignity*".[193] Likewise, the *Kovac* judgment framed 'outrages upon personal dignity' as "an act which is animated by *contempt* for the human dignity of another person."[194]

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[189] *See* Lt. Gen. Mark Schmidt and Brig. Gen. John Furlow, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, *executive summary*, *available at* http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf , at 4 (hereinafter "Schmidt Report").

[190] *See* for instance: Vice Adm. Albert T. Church III Report on the development of interrogation techniques and abuses in Guantanamo, Iraq and Afghanistan, *Executive Summary*, *available at* http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf , at 14. (the two interrogators where disciplinary sanctioned), (hereinafter "Church III report").

[191] *See* Schmidt Report, *supra* note 189, at 7 and 8. 'Futility' technique means 'highlighting the futility of the detainee's situation'.

[192] *See* The Washington Post, "Detainees Accuse Female Interrogators", *supra* note 186. (A pentagon official is reported to have said that wearing skimpy clothing or engaging in provocative touching and banter would be inappropriate interrogation techniques).

[193] Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* 204 (Princeton University Press 2004) (emphasis added).

[194] Prosecutor v. Aleksovski, *supra* 84, at para. 56 (emphasis added).

"Human dignity" is listed by many international human rights treaties and is often paired up with such galactic terms as 'inherent' and 'inalienable.[195] The notion of dignity has been approached and analyzed differently over time, mostly outside any legal context: ranging from *dignitas hominis* in the Roman Times (status and honor), over dignity linked to religious or supernatural idea's during the Dark Ages, to the Humanist idea of dignity as rational autonomy.[196] In the first half of the twentieth century, *dignity* began to creep into legal basic texts, such as constitutions and treaties, in the form of *human dignity*, but was mostly left undefined.[197] Human dignity has, on the one side, been seen as providing *the basis* for why human should have human rights in general and has, on the other hand, been proffered as a right in *itself* through which it can disqualify certain actions undertaken by governments and private persons.[198] But, as McCrudden points out, there is currently no single coherent interpretation in any one jurisdiction, neither domestic nor transnational, so the *exact* meaning of *human dignity* will depend on the specific context it is used in.[199]

4.3. SEXUAL VIOLENCE: GENDER AND ETHNICITY

Turning to gender-crimes, it should be remembered that wartime rape is listed under the Geneva Convention as an offense against the honor and dignity of women. This has been broadly criticized by feminist scholars who argued that the concept of 'honor' and 'dignity' relies on how a woman is seen in society by *men,* for instance, by making their honor and dignity dependent on their virginity and chastity.[200] Interesting to note is that some scholars have argued that listing rape and sexual violence against women 'only' as humiliating and degrading treatment, confers feelings of shame and stigma on the *victimized women* and not the aggressor, demanding that such crimes should be condemned in terms of human rights violations because of the specifics of rape as violence against a woman's integrity, body, autonomy, selfhood, self-esteem and her standing in the community.[201] But does dignity not include a woman's integrity, self-esteem and standing? Why is a broader *legal* umbrella of rights thought to warrant broader protection than the use of terms as 'honor'

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[195] *See* for example the United Nations Charter Preamble and the two UN International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights.

[196] *See* Christopher McCrudden, *Human Dignity, in* University of Oxford Faculty of Law Legal Studies Research Paper Series 3-5 (April 2006).

[197] *Ibid.,* at 9 (noting that before, dignity seemed to be related more to the private 'status' of personal privileges that had specific legal remedies).

[198] *Ibid.* at 22-23.

[199] *See* Christopher McCrudden, *Human Dignity, supra* note 196, at 46.

[200] *See* Rhonda Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law", 5 Hast. Women's L. J., at 249 (1994).

[201] Argument constructed from two articles: Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law*, *supra* note 30, at 249 and Rhonda Copelon, *Gender Crimes as War Crimes, supra* note 123, at 221; *See also* Shana Eaton, *supra* note 114, at 912. (discussing that defining rape as an 'outrage upon personal dignity' casts shame on the victim rather than her aggressor).

and 'dignity'? Perhaps the context-specific history of 'dignity' (as seen through the eyes of male society) has gutted the strong condemnation that notion might have otherwise exhibited against sexual crimes on women? Should the framing of these crimes as *women's* right violations contain more force or condemnation than framing it in terms of violations of *human dignity*? It seems strange that many international human rights document declare that human dignity is the supreme and overarching idea behind the body of rights they will next enumerate, but that the notion in itself seems to have lost all of its impressive power.

There has been some debate surrounding 'genocidal rape', focusing on whether or not ethnicity should be considered in wartime rape. Professor Rhonda Copelon acknowledges ethnicity but calls to disregard it as she emphasizes that genocidal rape should be seen as 'a crime against women *qua* women'.[202] The underlying concern is that the gendered nature of the crime of rape will disappear in favor of a focus on the group, as genocide, rather than the individual.[203] She fears and opposes that a woman's sexual dignity will not be seen as only belonging to her as an individual, but as an integral part of the woman's family, group and, indeed, men's identity – that it will be seen as a violation of the honor of the male 'and his exclusive right to sexual possession of *his* woman as property.'[204] Copelon further argues that one must not treat genocidal rape as special because, in terms of the *effects* on women, it is of comparable terribleness as other forms of wartime rape.[205] But is that true? Is the impact of genocidal rape for women the same as for rape 'simply' as war looting or 'booty'? Special Rapporteur On the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, Ms. Linda Chavez believes otherwise when she observed that it is "a symbolic act performed to humiliate a community, ethnic group or nation", from which the woman is a part.[206] Likewise, Professor MacKinnon has focused on genocidal rape as a crime that involves both gender *and* ethnicity. In describing sexual violence during the Bosnia conflict, she contends:

In the West, the sexual atrocities have been discussed largely as rape *or* as genocide, not as what they are, which is rape as genocide, rape directed toward women because they are Muslim or Croatian. (…) The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a

[202] Term indebted to Sherrie L. Russel-Brown, *supra* note 55, at 2
[203] *Ibid.* at 3.
[204] *See* Rhonda Copelon, *Surfacing Gender*, *supra* note 30, at 249 and 262.
[205] *See* Rhonda Copelon, *Women and War Crimes*, 69 St, John's Rev. 61, 66 (1995).
[206] See United Nations, Preliminary report of the Special Rapporteur on the situation of systematic rape,
sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez, 16 July 1996, supra note 8, at para. 12.

culture (…) or in their sex specificity, meaning as attacks on women. But not as both at once.[207]

As seen above, the Rwanda and Yugoslavia Tribunals have also considered genocidal rape as a more specific form of wartime rape, by recognizing the subjectivity of the crime of genocidal rape.[208] The *Akayesu* Court has held that genocidal rape may even be *the worst kind* of rape as it means the "physical and psychological destruction of Tutsi women, their families and their communities."[209] It thus not only recognized the intersectionality of genocidal rape, but individualized genocidal rape as one of the worst ways to inflict harm on an individual member of that group, here, Tutsi women.[210] This might lessen Copelon's objection to genocidal rape that it shifts the focus to *men* because "raping her is a means to humiliate, indeed, to feminize the men who are powerless to protect her." [211] It should be remembered that the conflict in Sierra Leone was not linked to ethnical targeting so the Special Court will arguably not elaborate on genocidal rape. Finally, the above-mentioned discussion about the inclusion of 'gender' – as the cultural understanding of sex roles of males and females - as an element of the crime of 'persecution' in the Statute of the International Criminal Court clearly shows that the international community will take account of the intersectionality of culture, ethnicity and sex.[212]

4.4. WHY "SEXUAL CRIMES" ARE DIFFERENT

In describing rape as a weapon of war, Special Rapporteur Linda Chavez highlighted some of its characteristics:

It is an aggressive and violent act which provides satisfaction because of the humiliation and helplessness of the victim; it is used as an instrument to punish, intimidate, coerce, humiliate and degrade.[213]

One can agree that all of this is true, but, generalized out of the wartime scenario, could the same not be said for punching someone in the face? Surely one can imagine situations were that is painful, humiliating and used to intimidate? The *Akayesu* Court, when comparing rape and torture, seemed to move in a direction of analogizing them when it observed that rape, *like*

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[207] *See* Catherine MacKinnon, *Rape, Genocide and Women's Human Rights*, *supra* note 62, at 9-10.
[208] *See* in general: Sherrie L. Russel-Brown, *supra* note 55, at 2.
[209] Prosecutor v. *Akayesu, supra* note 31, at para. 731.
[210] Sherrie L. Russel-Brown, *supra* note 55, at 14.
[211] *See* Rhonda Copelon, *Surfacing Gender*, *supra* note 30, at 263.
[212] *See* Valerie Oosterveld, *supra* note126, at 64.
[213] *See* United Nations, *Preliminary report of the Special Rapporteur on the situation of systematic rape,*
sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez, 16 July 1996, *supra* note8, para. 12.

torture, is "used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person (…) and is a violation of personal dignity".[214] So what explains this gut feeling that *sexual* crimes are of a different, and more atrocious, nature? Consider the scenario of the young girl that was forced to dance naked on the table to entertain her captor, and let us compare it to, say, physical beating: Although the latter entails far more direct physical coercion and infringement of bodily integrity, I am not convinced that, if asked, people would consider it a worse act than that the former. Although forced into nudity (under threats) the girl was not beaten or even touched in that particular event. But she was humiliated, and perhaps to a greater degree than if she was 'merely' beaten. But why?

Catherine MacKinnon frames the gravity of these crimes in terms of consequences: the intimate intrusion on the body, the attack on the self, which can be shattered, the violation of trust and the destruction of spirit.[215] Rhonda Copelon would probably answer that rape and sexual violence or humiliation are different because they are "a transposition of the intimate into violence", because body parts and emotions that were thought of in terms of intimacy and pleasure are forever associated with shame, pain and humiliation.[216] But, as Katherine Franke points out, "sex gets put to work in the service of myriad power relations" and is not only expressive of erotic intimacy.[217] Perhaps sexual violence and humiliation are different because it is intrinsically discriminatory: it singles out a specific feature of the human being, the 'immutable' sex as exhibited by the human physicality,[218] goes on to exploit 'this very fact of the own humanness' in order to destroy the broader personality of which it is a part.[219] In contrast, punching someone in the face might be painful and humiliating but singles out the human physicality, a notion every human being shares. Exploiting gender (understood as sex as constructed through personal, societal and cultural understanding) singles out a very specific platform and aims at exploiting that because of its alienation: it is something personal and private to the victim and of which the perpetrator is not a part – he is the cruel intruder.[220] That would also explain, in our case of the female interrogated Muslim men, why, "although straightforward pain of physical torture seems impossible to fathom", yet "torture that is designed to

[214] Prosecutor v. *Akayesu, supra* note 31, at para. 687.
[215] *See* Catherine MacKinnon, *Sex Equality* 778 (Foundation Press, 2001).
[216] Rhonda Copelon, *Surfacing Gender*, *supra* note 30, at 253.
[217] Katherine Franke, *Putting Sex to Work*, 75 Denv. U. L. Rev. 1139, 1143 (1998) (noting that sex sometimes pays the rent, sells cars or vacations).
[218] With a wink at U.S. Constitutional Law Doctrine on 'heightened security' since the famous Footnote 4 of 'Caroline Products'.
[219] *Term indebted* to Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law, supra* note 193, at 191.
[220] Moreover, framing it in terms of gender might deal with the counter-argument that same-sex rape does not single out something alien - the notion of 'gender', however, is broader than the 'sex' and entails personal, cultural and societal experiences , constructions and understanding related to sex.

strip a men or woman of his identity, religion and core beliefs seems somehow even more insidious." [221]

In this context, it is interesting to look at the current debate about shaming penalties and try to draw a parallel with sexual crimes and dignity. In answering the question why shaming punishments offend human dignity in ways that coercive punishment (like imprisonment) does not, Chicago Professor in Law and Ethics Martha Nussbaum observes that the latter punishment does not 'constitute a humiliation or degradation of the *whole* person' and that shaming penalties are 'ways of marking a person, often for life, with a degraded *identity*".[222] Perhaps the same can be argued about sexual crimes: because they identify and target *inner* features of the person and explicitly mark those as inferior and inhuman, just to leave them, shattered and broken, as a perpetually cutting part of their identity, such crimes are inherently more humiliating than physical beatings, that are external, targeting parts not of the inner person but of the mere physicality of it. A bit of this thrust of argument can be found in testimonies of rape victims who feel like they are somehow responsible, causing them to feel guilt and "enemizing" their own body as the perpetrator against their dignity: they internalize both the cause - their own female body - and the effects of sexual violence, making it a permanent part of what they have become.[223]

4.5. MALE AND FEMALE DIGNITY

Is there or should there be a distinction between the application of 'dignity' in the treatment of men and women? Otherwise put, is there a personal, societal or cultural difference in the perception of male and female dignity in relation to sexual violence?

In its 1994 preliminary report, Ms. Coomaraswamy, Special Rapporteur on Violence Against Women, highlighted some of the intrinsic differences in cultural ideology in viewing male and female roles in society. Construction of masculinity has always been seen as requiring the ability to exert power over others, especially through the use of force.[224] Moreover, men have exerted a tendency to denigrate all parts of their personality that could be traditionally viewed as female: such emotions as need, sadness and compassion because of

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[221] *See* Joyce S. Dubensky & Rachel Lavery, *Torture: An Interreligious Debate, in* "The Torture Debate in America" 1, 162 (Karen J. Greenberg (ed.), New York University Press 2006) .
[222] Martha Nussbaum, *supra* note 193, at 230.
[223] *See* Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable,* 70 Notre Dame L. Rev. 845, 858 (domestic) and 878 (wartime) (1995).
[224] *See* United Nations, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45 (22 November 1994), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/75ccfd797b0712d08025670b005c9a7d?Opendocument , para 63-64. (last visited May 11, 2006).

its supposed link with vulnerability.[225] It is arguable that young boys are shaped into men with these psychological and behavioral notions engraved in their identity and have developed their sexual identities conforming thereto.[226] Distancing oneself of the moral judgment whether such societal view is right or wrong, the question arises whether these differences are premise to alter one's perception on male dignity. The next case is telling, and potentially relevant for the female interrogation cases. In *Johnson v. Phelan,* a black man was forced to undress himself under the monitoring of a female prison guard who also supervised him while he was showering and using the toilet.[227] Johnson filed his suit under the eighth amendment: the court rejected his claim but Chief Judge Richard Posner filed a separate opinion, which is quite interesting. The Majority fist stated that it could not conceive the eighth amendment to contain a right 'not to be seen by the opposite sex' since it is a frequent practice in daily life: mixed saunas or doctor's examinations are quite common, for example.[228] An easy argument could be made against that: these are voluntarily acts, unlike permanent surveillance by opposite sex guards (without considering whether they are or not rightful for security reasons). Turning to the normative content of the eighth amendment, Posner argues that it requires reasonable efforts to prevent frequent and 'gratuitous' exposure of nude prisoners to the opposite sex. He went on to note "the reality is that crime (here) is gendered, and the gender is male."[229] The underlying force with which Posner argues is reflected in the beginning of his separate opinion where he rejected the view on prisoners as "a type of vermin, devoid of human dignity and entitled to no respect."[230] Could a yet deeper motive be that Posner believes that this infringement on male dignity is somehow *worse* - a more degrading *species* – than the *genus* of human dignity? The argument could be made that, given the societal structuring of men as strong, forceful and invulnerable males, prison men being watched by females is more degrading than the other way around. The argument would go that females have been subordinated throughout most of history, their dignity was linked to men's perception of honor and they were denied legal protection for most of modern positivist times,[231] while male dignity entailed primacy, masculinity and dominancy as formed against the lines of what sex-role socialization required.[232] Johnson might well have felt that this is the world upside down,

[225] Martha Nussbaum, *supra* note 193, at 201.
[226] Tamara L. Tompkins, *supra* note 223, at 5.
[227] Johnson v. Phelan, 69 F. 3d 144 (1995).
[228] *Ibid.,* at 5.
[229] Concurring and dissenting opinion of Chief Judge Posner, *Ibid.,* at 12.
[230] Johnson v. Phelan, 69 F. 3d 144 (1995), concurring and dissenting opinion of Chief Judge Posner, at 8.
[231] *See* for instance Chapter B "historically unequal power relations" of the Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45 (22 November 1994), *supra* note 224, at para. 49.
[232] *See* James W. Messerschmidt, *Masculinities and Crime* 33 (Rowman & Littlefield Publishers, Inc., 1993).

being put in a double *subordinate* position: imprisonment ánd female control over the most private, intimate and formerly self-controlled parts of his life. How else can one read Copelon's statement: "when a man is raped, the humiliation is accomplished though *reducing* him to the status of women."[233]

In Fareek's case, the female agency was permanently entwined with the dignity of his ethnic and religious masculinity and she internalized herself through intimate connections to and interactions with the 'world-unmaking' structure of indignation and degradation that she had created all around him. [234] Is it not fair, when assessing the nature and severity of alleged inhuman and degrading treatment, to look at all the 'aggravating' circumstances that might have severed his indignation: female dominancy, the grave insult of his religious beliefs that define his inner worth and the ultimate lessening of both his masculinity and human dignity? [235]

5. CONCLUSION

This paper has first analyzed the positive evolution in War Tribunal jurisprudence towards an increasing recognition of women's rights in wartime. The Rwanda Tribunal has formulated the first definition of rape while the Yugoslavia Tribunal laid down the first cases where sexual violence on males was prosecuted as a War Crime and developed a doctrine of sexual violence as torture. Furthermore, it expanded the notion of "outrages upon personal dignity" which marked an important step towards recognition of the importance of human dignity in wartime. Both of the War Tribunals considered that rape could be a weapon of genocide, an observation that honored reality. The International Criminal Court contains even stronger language against sexual violence and has great potential to advance the relevance of sexual crimes in its future prosecutions. This paper has next portrayed the debate surrounding torture and cruel, inhuman and degrading treatment in the U.S. and has highlighted the legal and moral discrepancies with current governing international humanitarian standards. In the final Chapter, the interplay of the various notions of sex, gender, ethnicity with the concept of dignity have been examined and have raised interesting questions on what makes sexual crimes different in terms of human dignity, and what the role of male and female gender, power relations and ethnicity have played within that discussion.

Some final remarks still remain, however. First, it is strange to note that international War Tribunals have developed and expanded, through their

[233] *See* Rhonda Copelon, *Surfacing Gender*, *supra* note 30, at 246 in footnote 12 (emphasis added).
[234] *See* Elaine Scarry, *supra* note 183, at 29.
[235] *See* on the interplay of religious, cultural and ethical responses to sexual victimization: Todd. A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, *supra* note 65, at 366.

indictments and judgments, the roles that notions of 'outrages on personal dignity', inhuman and degrading treatment and sexual humiliation play, but that most feminist authors have at the same time found that the concept of 'dignity offenses' embodies nothing more than a void and powerless standard of condemnation of sexual violence and even acknowledges male dominancy. And yet, as this paper has highlighted – mainly when describing why sexual crimes are different – many arguments relating to the devastating consequences of sexual violence seem to embrace that very notion of dignity. Second, it should be emphasized that some feminist writers inject a dominant Western view in the debate on genocidal rape. When Copelon argues that genocidal rape should not be seen as a species of women's rape, she might very well disregard the actual importance that such women attach to their standing in the community or group, because they see it as an integral part of their identity. It is one thing striving to change the overlapping of a woman's personal and communal identity, but another to flatly reject such overlapping when evidence to the contrary exists. As shown by the Rwanda and Yugoslavia experience, women *do* care about their ethnical alienation or destruction resulting from sexual violence and it is important to recognize this. Lastly, it is quite surprising to the present author than none of the scholars he encountered have ever mentioned the value of male cultural education regarding sexual violence. If it is true that reminiscent idea's of male dominancy, societal sex-role construction and denigration of femininity play a great role in the persistence of sexual violence, than perhaps the key to combating male agency in sexual violence might be found in anti-stereotype education, imprinting different gender-patterns through the development of a young boy's sexual identity.

As to Eric Saar's testimony, one could most certainly argue, on legal grounds reaching back to such precedents as *Kunarac, Aleksovski and Kovac*, that the deployment of cultural, religious and sexual offensive interrogation techniques constitutes inhuman and degrading treatment. It can even be argued that it amounts to torture, if one embraces the European Court's 'severity of suffering'- standard: *Fareek's* reaction to the smearing of menstrual blood seemed akin to a death cry. She had touched him were no fist could reach, she had shattered his inner constituency, all of his very being and indeed, his dignity. But, maybe not only his dignity – perhaps also that of the perpetrator. Erik Saar's account of his emotions following the shameful interrogation, are telling:

I felt as if I had lost something. We lost something. We lost the high road. We cashed in our principles in the hope of obtaining a piece of information.
There was no honor in what we had just done. We were grasping, and in doing so we had spit on Islam. What we did was the antithesis of what the United States is supposed to be about.

I cried. I sat there for half an hour. Sleep kept being chased away by shame.[236]

[236] *See* Erik Saar & Viveca Novak, *supra* note 1, at 229-230.