

# **Understanding and Proving International Sex Crimes**

**Morten Bergsmo, Alf Butenschøn Skre and  
Elisabeth J. Wood (editors)**

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## Rape During War is Not Inevitable: Variation in Wartime Sexual Violence

Elisabeth J. Wood\*

Wartime sexual violence varies dramatically across wars and sometimes, across armed groups fighting in the same war. During the conflict in Bosnia-Herzegovina, the sexual abuse of Bosnian Muslim women by Bosnian Serb forces was so systematic and widespread that it qualified as a crime against humanity under international law. In Rwanda, the widespread rape of Tutsi women comprised a form of genocide, according to the International Criminal Tribunal for Rwanda. In such settings, sexual violence frequently takes place in public, in front of family and community members. Other notable cases include the Janjaweed militias in Darfur, the Soviet and Japanese armies in World War Two, and the various armed groups in the eastern Democratic Republic of the Congo ('DRC').<sup>1</sup>

Yet, in some conflicts, sexual violence by some armed groups is remarkably limited despite their engaging in other violence.<sup>2</sup> Some armed groups, such as the Salvadoran insurgency, appear to have successfully prohibited their combatants from engaging in sexual violence against civilians. Even in some cases of ethnic conflict, such as the Israeli-Palestinian conflict, sexual violence is limited.

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\* **Elisabeth Jean Wood** is Professor of Political Science at Yale University and Professor at the Santa Fe Institute.

<sup>1</sup> This chapter draws on the work of a new generation of social scientists working on wartime sexual violence (cited herein), as well as my own. I am grateful for comments from Dara Kay Cohen, Amelia Hoover Green, Michele Leiby, and Elizabeth Starr; for research support from the Harry Frank Guggenheim Foundation, the United States Institute of Peace, the MacMillan Center for International and Area Studies of Yale University; and the Santa Fe Institute; and for research assistance from Molly Daniell, Tess Lerner-Byars, Molly O'Grady, Elizabeth Starr, and Kai Thaler.

<sup>2</sup> Elisabeth Jean Wood, "Variation in Sexual Violence During War", in *Politics and Society*, 2006, vol. 34, no. 3, pp. 307–341; Elisabeth Jean Wood, "Armed Groups and Sexual Violence: When Is Wartime Rape Rare?", in *Politics and Society*, 2009, vol. 31, no. 1, pp. 131–161.

When sexual violence does occur, the pattern varies in targeting, form, purpose, as well as frequency. Some armed groups target women and girls who belong to ‘enemy’ groups during ethnic or political cleansing. Some groups target only females, while others target males as well. The form of sexual violence also varies. Although sexualized torture and gang rape are particularly common, sexual violence sometimes takes on other forms, such as forced prostitution or sexual slavery. In some settings, patterns of wartime sexual violence appear to be a magnification of peacetime cultural practices; in others, they are wartime innovations. In some conflicts, the pattern of sexual violence is symmetric, with all parties to the war engaging in sexual violence to roughly the same extent. In other conflicts, it is very asymmetric, as one armed group does not respond in kind to sexual violence by the other party. Despite the challenges of gathering data on this sensitive topic, the variation does not appear to be a product of inadequately reported violence: there are well-documented cases where sexual violence is rare (including those mentioned above) as well as frequent.

Sexual violence varies in frequency, targeting, and form among civil wars as well as interstate wars, among ethnic wars as well as non-ethnic, among secessionist conflicts, among state armies, and among non-state actors.<sup>3</sup> Until recently, with some exceptions, both the policy and academic literature focused on cases with patterns of widespread rape of girls and women, as in Bosnia, Rwanda, Sierra Leone, and the DRC. Common explanations for wartime rape reflect that emphasis: rape is an effective strategy of war, particularly of ethnic cleansing; rape is one form of atrocity and occurs alongside other atrocities; war provides the opportunity for widespread rape and many male soldiers will take advantage of it. Yet many armed groups, including both state militaries and non-state armed groups, do not engage in widespread rape despite frequent interaction with civilians. Indeed, some armed groups, including the Sri Lankan insurgency, engage in ethnic cleansing, which is often seen as the classic setting for widespread rape, without engaging in sexual violence.

Focusing on a few patterns instead of the full spectrum of variation, including the absence of wartime rape, misses the opportunity to leverage

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<sup>3</sup> Wood, 2006, see *supra* note 2; Elisabeth Jean Wood, “Sexual Violence during War: Toward an Understanding of Variation”, in Kalyvas *et al.* (eds.), *Order, Conflict, and Violence*, Cambridge University Press, Cambridge, 2008; and Wood, 2009, see *supra* note 2.

variation for a better understanding of wartime sexual violence. The observed variation raises several questions: Under what conditions do armed groups not engage in sexual violence? Under what conditions do they engage in rape as a strategy of war? Sexual torture? Sexual slavery? When is widespread rape better understood as a practice, namely, a form of violence that is not ordered but tolerated by commanders (defined more precisely below), rather than a strategy?

The observed variation in wartime sexual violence, particularly the relative absence of wartime sexual violence by many armed groups, also has important policy implications. In particular, rape is not, as is sometimes claimed, inevitable in war. The absence of sexual violence by some armed groups reinforces the argument that commanders of armed groups that do engage in it should be held accountable.

Social scientists are increasingly documenting and analyzing the variation in the patterns of wartime sexual violence, particularly temporal variation of the form, frequency, targeting and purpose of such violence. I first introduce key concepts, including distinctions among different dimensions of violence. I then briefly summarize recent research documenting patterns of wartime sexual violence. After showing that many approaches in the published literature do not account for the observed variation – indeed, many predict *more* sexual violence than the tragic levels observed – I advance a theoretical framework that focuses on the internal dynamics of armed groups. I then analyze the conditions under which armed groups do not engage in rape, those under which they engage in strategic rape, and those under which rape emerges as a practice – namely, a pattern that is not ordered, but is tolerated, by commanders, and that occurs where there are no strategic benefits as well as where there are. Throughout the chapter, I draw on recent findings from social science literature, some of which is not yet published. I conclude with some tentative policy implications of this analysis.

### **11.1. Concepts and Definitions**

By ‘absence of sexual violence’, I mean that sexual violence by a group is very rare, but not necessarily completely absent. Throughout, ‘armed groups’ refers to both state and non-state groups.

In accordance with recent international law, by ‘rape’, I mean the penetration of the anus or vagina of the victim with any object or body

part, or the penetration of any body part of the victim or perpetrator's body with a sexual organ, either by force, or by the threat of force or coercion, or by the taking advantage of a coercive environment, or against a person incapable of giving genuine consent.<sup>4</sup> Thus rape can occur against men as well as women. 'Sexual violence' is a broader category that includes rape, non-penetrating sexual assault, sexual mutilation, sexual slavery, enforced prostitution, enforced sterilization, and forced pregnancy.<sup>5</sup> The term 'sexual violence' is frequently used as if aggregating this variety of form is a sound basis for analysis, but the underlying causal processes may be very different. For example, those factors that make strategic rape more probable on the part of an armed group are very likely distinct from those that make sexual mutilation or forced sterilization more probable. In what follows, I focus my usage of the term on rape and sexual torture, but employ the aggregate meaning of the term where appropriate or when the literature does so.

Essential to understanding any pattern of violence against civilians by an armed group, including any particular form of sexual violence, are three dimensions of violence.

The first dimension is the *frequency* of that form of violence by a particular armed group: does it occur very frequently, moderately often, occasionally, or very rarely? This of course begs the question: relevant to what? In the literature, the reference of the comparison is often not made explicit. The comparison is often to other units or armed groups in the same conflict, and sometimes to other conflicts. Throughout, I focus on patterns on the part of armed groups, comparing the frequency of particular forms of sexual violence on the part of one group to those of other groups in the same and other conflicts. The appropriate measure of frequency varies depending on the focus: the number of events (rapes, for

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<sup>4</sup> See International Criminal Court ('ICC'), Elements of Crimes, ICC Doc. No. ICC-ASP/1/3(part II-B), 9 September 2002, Articles 7(1)(g)-1 and 8(2)(b)(xxii)-1, available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>, last accessed on 1 December 2011.

<sup>5</sup> *Ibid.* Note that sexual humiliation, including forced nudity, is not explicitly listed with rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilization as a distinct crime, but might count as a crime against humanity of sexual violence if it was an act of sexual violence as defined above that was "of a gravity comparable to the other offences" and/or as a war crime of outrages upon personal dignity if the act met the other requirements of the crimes: see *supra* note 4, Articles 7(1)(g)-6 and 8(2)(b)(xxi), respectively.

example), the number of events per member of the referent population (incidence), or the fraction of the referent population that suffered at least one such event (prevalence).<sup>6</sup> Note, however, that ‘referent population’ begs precision: is it the population of some geographical area, a targeted ethnic group, or the national population? Moreover, available data is often partial, imprecise and not comparable across conflicts, so the comparisons I make are usually qualitative, except where I draw on newly available sources.

*Targeting*, the second dimension, concerns whom the group targets with violence. ‘Selective targeting’ is that against an individual because of her behavior, often the provision of support for a rival group or some other refusal to comply.<sup>7</sup> In contrast, ‘indiscriminate violence’ is violence that is not targeted: indeed, in its proper form, it is random. In between is ‘collective targeting’, the targeting by an armed group of social groups because of who they are – that is, their identity as members of that group. Examples include ethnic groups, political parties, particular villages thought to support the rival.

The third dimension builds on the distinction between ‘strategic sexual violence’ and ‘opportunistic sexual violence’. I define ‘opportunistic sexual violence’ as violence carried out for private reasons, not group objectives, and ‘strategic sexual violence’ as a pattern, or instances, of sexual violence purposefully adopted by commanders in pursuit of group objectives.<sup>8</sup>

It is of course difficult to demonstrate empirically the purposeful adoption of violence: groups where violence such as rape or sexual torture is explicitly ordered are probably rare, but do exist.<sup>9</sup> Following Michele Leiby, I include as strategic any violence whose empirical pattern indicates that the armed group controls its use: namely, the violence occurs

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<sup>6</sup> There is an additional, sometimes relevant, notion of frequency, which is the frequency of events compared to the number of members of the armed group: 100 incidents of rape, for example, indicate a different level of sexual violence by armed group members if they number 1,000,000 than if they number only 100.

<sup>7</sup> Stathis Kalyvas, *The Logic of Violence in Civil Wars*, Cambridge University Press, Cambridge, 2006.

<sup>8</sup> Note that if a single commander purposefully adopts rape in pursuit of group objectives, then rape committed by those under his command is strategic. The definition does not presume uniformity across the armed group.

<sup>9</sup> See the subsequent content of this chapter.

when it is strategically beneficial (meaning beneficial in terms of group objectives) and does not occur when it is not.<sup>10</sup> Also included are cases where rape of civilians is tolerated by group leaders because it is understood by combatants and/or commanders as a form of compensation.

The distinction between ‘strategic’ and ‘opportunistic’ sexual violence is important for both scholarly understanding and prosecution. However, the distinction as used in the literature is often confusing.<sup>11</sup> ‘Strategic’ sometimes appears to be used as a synonym for ‘massive’, which conflates the frequency, with the purpose, of violence. Moreover, the existence of a strategy is sometimes inferred, rather than demonstrated, as when widespread rape is followed by social disruption, and the consequence – social disruption – is presumed to be the purpose without further evidence. (Note that while inferring the existence of a strategy from its consequences is problematic, inferring the existence of a strategy from evidence that violence occurs only under control of commanders is not.) Similar concerns arise when a pattern of violence is claimed to be a ‘weapon’, ‘tactic’, or a ‘tool’ of war without further evidence that it was in fact strategic as defined here.

To address these problems, I introduce a third category between ‘opportunistic’ and ‘strategic’. Violence which is not ordered but is tolerated by commanders, and occurs when it is not strategic as well as when it is, I term a ‘practice’. Typically, a practice originates on the part of field units as an innovation or an imitation of units of other groups, and then diffuses across units. In the case of sexual violence as a practice, the vio-

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<sup>10</sup> See Michele Leiby, *State-Perpetrated Wartime Sexual Violence in Latin America*, doctoral dissertation, University of New Mexico, 2011a; and Michele Leiby, “Wartime Sexual Violence as a Weapon of Irregular Warfare: An Analysis of Sub-National Variation in Peru”, paper presented to the annual meeting of the American Political Science Association, Seattle, 30 August – 4 September 2011b. Such cases are similar to what Osiel terms “atrocities by connivance”. See Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, Transaction Publishers, New Brunswick, NJ, 1999. Note that in earlier work, I defined ‘strategic’ more broadly, including practice as well, but I have come to think it clearer to develop the separate category of practice. See Elisabeth Wood, “Sexual Violence during War: Variation and Accountability”, in Alette Smeulers and Elies van Sliedregt (eds.), *Collective Crimes and International Criminal Justice: an Interdisciplinary Approach*, Intersentia, Antwerp, 2010.

<sup>11</sup> See the chapter by Agirre in this volume.



lence is tolerated when it is not strategically beneficial as well as when it is. Thus my definition of ‘strategic’ is narrower than that of most scholars.

The dimensions as defined are distinct. A practice could be more or less frequent, and targeted more or less narrowly (that is, collectively, or even indiscriminately or selectively). Targeting could be narrow, but with either a high or low frequency, and could be opportunistic, strategic, or the result of a practice.

A final concept also essential in describing variation in sexual violence is that of repertoire. By ‘repertoire of violence’, I mean the subset of battle deaths, assassination, forced displacement, torture, the various forms of sexual violence, and so on, regularly observed on the part of an armed group.<sup>12</sup> The concept captures important differences in the context of acts: for example, some groups rape and then kill the victim; some rape and then displace the victim; and others do neither. Repertoires can be wide or narrow, and vary sharply across armed groups: for example, in some conflicts, one armed group engages in significant sexual violence but other groups do not. Similarly, the ‘repertoire of sexual violence’ is the subset of forms of sexual violence in which the group regularly engages, and can be wide or narrow, and varies across groups.

The pattern of sexual violence on the part of an armed group may vary significantly over the course of a conflict. The observed patterns are diverse, including a change in form from rape to sexual slavery, from being a strategy to a practice, from opportunistic events to a practice, as well as becoming more or less frequent, or more or less narrowly targeted. For example, a group may begin to engage in the rape of civilians in response to another group’s doing so: it may ‘mirror’ the other group, either as a strategic decision by commanders, or by individual units wielding violence similar to that which they observe. Or should civilians resist a group’s rule, an armed group may turn to rape as a form of punishment, on command or as a result of combatant frustration. Similarly, repertoires of sexual violence also vary over time, sometimes becoming wider (the group engages in more forms of sexual violence, perhaps mirroring another group), but in some cases becoming more narrow.

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<sup>12</sup> James Ron, “Savage Restraint: Israel, Palestine and the Dialectics of Legal Repression”, in *Social Problems*, 2000, vol. 47, no. 4, pp. 445–472; and Amelia Hoover Green, *Repertoires of Violence Against Non-combatants: The Role of Armed Group Institutions and Ideologies*, doctoral dissertation, Yale University, 2011.

Note that these distinctions made for the purpose of social science analysis should not be understood as implying distinct legal consequences. In particular, commanders and leaders are responsible for sexual violence as a practice and opportunistic sexual violence, as well as strategic sexual violence, if the usual criteria for command and/or superior responsibility under international law are met.

### 11.2. Variation in Patterns of Sexual Violence

Recent research on patterns of wartime sexual violence spans the methods of social science, including qualitative, quantitative and historical research. Space constraints prevent an adequate summary of all relevant work, so I focus here on work that is explicitly cross-national either in empirics or in the scope of the theory advanced.

Much of the literature initially focused on sexual violence in Bosnia-Herzegovina and Rwanda, as human rights advocates and legal scholars sought to hold perpetrators of widespread sexual violence responsible under international law. Those works noted variation in targeting, but paid little attention to variation in frequency and made little attempt to distinguish sexual violence as a practice from strategic sexual violence. When other cases were considered, researchers often referred to Susan Brownmiller's sweeping analysis of global and historical patterns in her seminal 1975 book, *Against Our Will*. While Brownmiller acknowledges some variation (for example, the North Vietnamese and Viet Cong appeared to have engaged in little rape of civilians), the overarching argument was that rape during war was ubiquitous, but not inevitable.<sup>13</sup> While the focus on Bosnia and Rwanda contributed to the development of sexual violence as a crime under international law, the question of variation was neglected and the rhetoric of the time emphasized the supposed ubiquity of wartime rape.

That is no longer the case as scholars increasingly focus on variation.<sup>14</sup> The initial work that explicitly documented and analyzed variation across armed groups and conflicts largely drew on careful qualitative

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<sup>13</sup> Susan Brownmiller, *Against Our Will*, Bantam, New York, 1975.

<sup>14</sup> Some journalists have picked up on the theme of variation and its implications for policy. See "War's overlooked victims: rape is horrifyingly widespread in conflicts all around the world", *The Economist*, 13 January 2011; and Jina Moore, "Confronting Rape as a War Crime", in *CQ Global Researcher*, 2010, vol. 4, no. 5, pp. 105–130.

comparison of a few cases, but did not fully leverage the entire spectrum of variation, particularly the existence of groups that did not engage in sexual violence.<sup>15</sup> To address this gap, I chose my initial set of cases to represent the entire spectrum of frequency (including armed groups that engaged in little sexual violence) and showed that the frequency of sexual violence varied across inter-state as well as civil conflicts; ethnic as well as ideological conflicts; and state militaries as well as insurgent groups.<sup>16</sup>

Before proceeding to discuss more recent work, it is important to address a doubt sometimes raised about my claim that sexual violence on the part of some groups is very rare. Given the inadequacy of available data, the observed absence might reflect our ignorance of its actual occurrence rather than its rarity. Indeed, there are many reasons why rape and other forms of sexual violence are under-reported in wartime, including the reluctance of victims to report the crime, the failure of forensic authorities to record sexual violence, and the limited resources available to organizations reporting human rights abuses.<sup>17</sup> The reported variation may reflect different intensities of domestic and international monitoring of conflicts rather than different frequencies; violence in some regions appears to garner more international attention than in others. Nor is it reasonable to assume that it is under-reported to the same degree across conflicts, parties and regions, as there is often regional, class and partisan bias in both reporting and data collection. Reporting rates may also vary across forms of sexual violence: rape, particularly the rape of males, is likely less reported than other forms in most settings. Even when sexual violence is documented, available data may only identify the perpetrators as “armed men”.<sup>18</sup> Moreover, the description of sexual violence as “widespread and systematic” may reflect an organization’s attempt to draw resources to

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<sup>15</sup> Cynthia Enloe, *Maneuvers: The international politics of militarizing women's lives*, University of California Press, 2000; Lisa Sharlach, “Sexual Violence as Political Terror”, dissertation, University of California, Davis, 2001; and Mia Bloom, “War and the Politics of Rape: Ethnic versus Non-Ethnic Conflicts”, unpublished manuscript, 1999.

<sup>16</sup> Wood, 2006, see *supra* note 2; and Wood, 2008, see *supra* note 3.

<sup>17</sup> Wood, 2006, see *supra* note 2.

<sup>18</sup> For discussion of the challenges of documenting wartime sexual violence, see Francoise Roth, Tamy Guberek and Amelia Hoover Green, Corporación Punto de Vista and Benetech Human Rights Data Analysis Group, “Using Quantitative Data to Assess Conflict-Related Sexual Violence in Colombia: Challenges and Opportunities”, 2011, available online at <http://www.hrdag.org>, last accessed at 1 December 2011.

document sexual violence, whatever its actual level, rather than the pattern of incidents *per se*. And in settings where political violence is ongoing, organizations may feel it prudent to state that all sides engage in sexual violence, whether or not this is shown in their data.

Nonetheless, the variation in the incidence and form of sexual violence is sufficiently large that it clearly exceeds measurement error in the better-documented cases: the existence of very well-documented, low-incidence cases strongly suggests that the claim that some armed groups engage in little sexual violence is not an artifact of ignorance.<sup>19</sup> For example, it is unlikely that the apparent absence of sexual violence in the Israeli-Palestinian conflict is due to under-reporting, given the scrutiny of violence there by domestic human rights groups and international actors. In short, it is unlikely that the level of rape of women and girls was so much less in Bosnia-Herzegovina or that it was so much more in Israel-Palestine, as to confound the observation of significant variation.

Fortunately, more accurate data on wartime sexual violence is becoming available for some conflicts. Michele Leiby, for example, analyzes a random sample of testimonies of victims and witnesses compiled by the Truth and Reconciliation Commission in Peru, coding not only various types of sexual violence but, remarkably, all human rights violations.<sup>20</sup> Among her important findings is that the incidence of sexual torture of male detainees by state forces was much higher than the truth commission had recognized. For the case of El Salvador's civil war, Amelia Hoover Green reconstructed the databases of human rights organizations and the Truth Commission for El Salvador in order to analyze repertoires of violence on the part of distinct state forces and insurgent factions. She shows that El Salvador was an extremely asymmetric conflict: state forces engaged both in rape during military operations early in the war, and in sexual torture of both males and female prisoners throughout the war in moderate to high levels, while the insurgent forces engaged in little sexual violence of any kind.<sup>21</sup>

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<sup>19</sup> Wood 2006, see *supra* note 3; and Wood, 2008, see *supra* note 3.

<sup>20</sup> See her chapter in this volume as well as Leiby, 2011a, see *supra* note 10; and Leiby, 2011b, see *supra* note 10.

<sup>21</sup> More precisely, she documents a few early incidents of rape as well as other abuse of civilians, in response to which the group transformed its training and socialization institutions such that little sexual violence occurred later. See Hoover Green, 2011, see *supra* note 12.

Moreover, in the last decade or so, researchers have included questions about sexual violence in surveys based on representative samples, in order to estimate the incidence and/or prevalence of certain forms of sexual violence among particular populations (initially, of the refugee camp populations in Liberia, for example; and more recently, of the DRC national population using the national version of the Demographic Household Survey).<sup>22</sup> However, the patterns identified in such surveys are often too aggregate to address many questions of interest at the necessary level of detail, such as when and where rape diffused from one group to another, and whether some units of an armed group engage in sexual slavery more than others.<sup>23</sup> It is rare that perpetrators are identified in other than vague terms such as “armed men”, “soldiers”, or “rebel”. Indeed, the DRC survey asked only whether or not the perpetrator was a sexual partner.

The present state-of-the-art documentation of patterns of rape across civil wars is the work of Dara Kay Cohen (and collaborators: see below).<sup>24</sup> For every conflict between 1980 and 2009, she collected data from the US State Department Human Rights Country Reports, an annual publication that provides detailed data on human rights violation for every country. To address the problem of poor and incomparable data, she coded the relative magnitude of reported rape to construct an index in which no reports was coded as “0”, isolated reports as “1”, numerous reports as “2” and widespread reports as “3”.

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<sup>22</sup> Lynn L. Amowitz, Chen Reis, Kristina Hare Lyons, Beth Vann, Binta Mansaray, Adyinka M. Akinsulure-Smith, Louise Taylor, and Vincent Iacopino, “Prevalence of War-related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone”, in *Journal of the American Medical Association*, 2002, vol. 287, no. 4, pp. 513–21; and Amber Peterman, Tia Palermo and Caryn Bredekamp, “Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo”, in *American Journal of Public Health*, 2001, vol. 101, no. 6, pp. 1060–1067.

<sup>23</sup> For an assessment of quantitative analysis based on representative sample surveys, see Hoover Green, 2011, see *supra* note 12; and Roth *et al.*, *Using Quantitative Data*, see *supra* note 16. For discussion of the use of statistical evidence in the prosecution of wartime sexual violence, see Hoover Green’s chapter in this volume.

<sup>24</sup> Dara Kay Cohen, “Explaining Sexual Violence during Civil War”, doctoral dissertation, Stanford University, 2010; and Dara Kay Cohen, “Causes of Rape during Civil War: Cross-National Evidence (1980–2009)”, unpublished paper, 2011a.

Among her most important findings are as follows. Sub-Saharan Africa had a smaller proportion of civil wars with the highest level of rape (10 of 28) than did Eastern Europe (four of nine), thereby belying the imagery of many journalistic reports. Of the conflicts with some non-zero level of rape, in 62 percent of those conflicts, both state and insurgent forces engaged in it; in 31 percent, only state forces did so; and in seven percent, only insurgent groups did.<sup>25</sup> Thus state forces are more often the perpetrators of rape.

Researchers at the Peace Research Institute of Oslo, in collaboration with Cohen, are extending Cohen's approach and data to build a database based on a much broader range of sources, including reports by Amnesty International, Human Rights Watch, and the International Crisis Group, as well as State Department reports. To date, the research group has published the findings from the pilot project, namely, an analysis of conflicts (and the first five years after the conflict where relevant) in 20 African countries.<sup>26</sup> Of the 177 conflicts analyzed, there were no reports of sexual violence in 59 percent of the conflicts, while the highest level of sexual violence ("3") was reported in 11 percent of the conflicts and the next highest, in 16 percent. While the percentage of armed groups that engage in the highest level of sexual violence has not changed, the percentage of those that engage in the 'isolated' and 'numerous' categories ("1" and "2") declined from 2000 to 2009. The study confirms Cohen's earlier finding that it is state forces, not rebel groups, that engage in sexual violence more frequently: the forces of 50 percent of the states analyzed engage in sexual violence at some period, while only 42 percent of rebel groups and 35 percent of militias had done so. According to the pilot study, the targeting of state, rebel and militia forces alike appears to be indiscriminate. Finally, high levels of sexual violence often occur during periods with few killings.

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<sup>25</sup> Cohen 2011a, see *supra* note 24. This last finding confirmed the earlier work of Jennifer Green, "Uncovering Collective Rape: A Comparative Study of Political Sexual Violence", *International Journal of Sociology*, 2004, vol. 34, no. 1, pp. 97–116. After systematically coding New York Times articles from 1991–2003 for reported episodes of mass rape, Green found that mass rape was carried out by state, not insurgent forces, in approximately two thirds of the cases she identified. However, the New York Times is not as detailed a source as the State Department reports for several reasons: see Cohen, 2010, see *supra* note 24.

<sup>26</sup> Ragnhild Nordås, "Sexual Violence in Armed Conflicts", Center for the Study of Civil War, Oslo, 2011.

### 11.3. Incomplete Explanations

What might account for the observed variation in wartime sexual violence? In earlier work, I discussed the various explanations, at times implicit, in the literature published to date, and showed that they are at best incomplete.<sup>27</sup> Increased opportunity during war, combined with a presumption (present in some of the literature) that many men will rape if given the opportunity, does not explain variation: many non-state actors who do not engage in sexual violence have ample opportunity to do so as they live close to civilian populations, as was the case of the Salvadoran and Sri Lankan rebel groups. Nor does opportunity explain cases where targeting is narrow: usually the armed groups engaging in such violence have access to civilians that they do not target as well as those they do. In both Bosnia-Herzegovina and Rwanda, perpetrators had roughly equal access to civilians of various ethnicities, yet targeted particular ones.

Nor do increased individual incentives to engage in sexual violence explain the observed pattern. Sexual violence is sometimes said to occur in retaliation for sexual violence previously suffered, or rumored to have been suffered, by co-ethnics. But in many conflicts, at least one armed group does not respond in kind to sexual violence: recall that Cohen found that about 39 percent of conflicts exhibited asymmetry, with one group engaging in sexual violence and the other not. The ‘substitution’ argument (that wartime rape ‘substitutes’ for sex with prostitutes, camp followers, female combatants or willing civilians) also does not explain the observed variation. It does not account for the targeting of particular groups of women, the often extreme violence that frequently accompanies wartime rape, or the occurrence of sexual torture. Moreover, if it were adequate as the sole explanation of variation, rape by forces with ample access to prostitutes would not occur, but that is belied by the rape of girls and women by members of the American military in Vietnam<sup>28</sup> and the rape of civilians by the combatants of the Revolutionary United Front of Sierra Leone despite their access to girls and women held as sex slaves. Furthermore, some armed groups with significant numbers of female combatants do engage in high levels of sexual violence; the Revolutionary United Front of Sierra Leone is an example. Additionally, female combat-

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<sup>27</sup> Wood, 2008, see *supra* note 3, and Wood, 2009, see *supra* note 2.

<sup>28</sup> Gina Weaver, *Ideologies of Forgetting: Rape in the Vietnam War*, State University of New York Press, Albany, 2010.



ants themselves actively participate in rape in some conflicts: according to Dara Cohen, female combatants participated in 25 percent of the Revolutionary United Front's gang rapes, which comprise about 75 percent of the total.<sup>29</sup>

The militarized masculinity approach argues that societies in war develop, or draw on, institutions and norms that inculcate a highly militarized masculinity based on sharp distinctions between genders: to become men, boys must become warriors. The result is that combatants represent domination of the enemy in highly gendered terms and use specifically sexual violence against enemy populations. The argument thus accounts for the targeting of enemy women and men, and with specifically *sexual* violence.<sup>30</sup> However, the argument does not explain the absence of sexual violence on the part of some very effective insurgent and state armies.

In contrast to the above arguments based on gratification, increased incentives, or a general product of military training, the instrumental argument for sexual violence holds that when it is widespread, it occurs because armed groups engage in it as a strategy. In addition to the oft cited Bosnian Serb militias and Hutu forces in Rwanda, in Guatemala, where state forces engaged in widespread rape during sweeps through indigenous villages, the Truth Commission found direct evidence of commander promotion of rape of civilians in the form of ridicule of combatants who initially declined to participate.<sup>31</sup> Some of the literature in this vein also holds that wartime rape is much more frequent in recent years than in the past. However, high levels of rape by armed groups are not a new phenomenon as some have argued; some militaries in World War Two engaged in rape, sexual slavery and forced prostitution with great frequency.<sup>32</sup>

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<sup>29</sup> Reported in Dara Kay Cohen, "Female Combatants and Violence in Armed Groups: Women and Wartime Rape in Sierra Leone", unpublished paper, 2011b, which analyzes data in Jana Asher, ed., and Human Rights Data Analysis Group of Benetech, "Sierra Leone War Crimes Documentation Survey Database v. 2", unpublished dataset, 2004.

<sup>30</sup> Madeline Morris, "By Force of Arms", in *Duke Law Journal*, 1996, vol. 45, no. 4, pp. 651–781; and Joshua Goldstein, *War and Gender. How Gender Shapes the War System and Vice Versa*, Cambridge University Press, New York, 2001.

<sup>31</sup> Cited in Michele Leiby, "Wartime Sexual Violence in Guatemala and Peru", in *International Studies Quarterly*, 2009, vol. 53, no. 2, pp. 445–468.

<sup>32</sup> Wood, 2006, see *supra* note 2.



Such strategic violence appears to take four broad forms. The first is sexual torture against persons detained by an armed group when it occurs as an immediate strategic benefit. The second is sexual slavery, another form of custodial sexual violence. The third is widespread sexual violence as a form of terror or punishment targeted at a particular group, which frequently takes the form of gang (and often public) rape, most notoriously as part of some campaigns of ‘ethnic cleansing’ to force the movement of entire populations from particular regions claimed as the homeland, and as part of some genocides. The fourth is the decision, perhaps implicit, by commanders to reward troops for service with rape. (Of course the common response of military and political leaders to accusations of strategic sexual violence by their forces is to claim that the troops were not under their control, an issue I return to in the conclusion.)

However, this argument predicts *more* sexual violence than is observed: if sexual violence is an effective strategy of war, why is it the case that not all armed groups engage in it? The conditions for such instrumental engagement in sexual violence are not well identified in the literature. Some authors suggest that patriarchal culture provides the relevant condition: where armed groups understand sexual violence as a violation of the enemy family and community’s honor, they are likely to engage in sexual violence as a weapon of war.<sup>33</sup> However, such beliefs are present in many societies where massive sexual violence on the scale predicted by this argument has not occurred, as in Sri Lanka and Israel-Palestine. Moreover, such broad notions of cultural proclivity do not account for cases where one party to the war promotes sexual violence while the other does not. While devaluation of women is a necessary condition for the occurrence of sexual abuse of women, this general notion of patriarchy is too broad to account for the observed variation: it is not a sufficient condition. Rather than focus on broad notions of culture, many recent scholarly works focus on the culture and institutions of the armed organization.

Thus many of the explanations in the published literature at best explain only part of the observed variation. Indeed, they generally predict more wartime sexual violence than the tragic levels observed. They fail to explain the fact that many armed groups do not engage in even moderate levels of sexual violence.

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<sup>33</sup> Enloe, 2000, see *supra* note 15.

#### **11.4. A Theoretical Framework for Explaining Variation in Wartime Sexual Violence**

Because such arguments do not explain the observed variation, researchers have turned their focus to the dynamics internal to armed groups. In what follows, I develop a theoretical framework that emphasizes combatant norms, leaders' strategic choices about forms of violence, the dynamics within small units once deployed in war, and armed group institutions.

##### **11.4.1. Individual Combatants**

Armed groups draw their members from particular cultural settings, usually a particular patriarchy. Incoming recruits carry with them cultural norms and beliefs concerning the appropriateness of different kinds of violence, including sexual violence, against particular populations. Armed groups may draw from particular sub-groups, for example, a specific ethnic group, precisely for these reasons. Some groups, for example, some paramilitary groups, actively attempt to recruit from criminal populations. In contrast, state militaries often attempt to draw or conscript recruits from a wide range of sub-cultures in order to build national unity. The relevant pool of recruits may also reflect the organization's resource base: those without economic resources may be more likely to attract 'activist' recruits willing to make long term commitments to ideological goals, while those with economic resources may attract 'opportunistic' recruits, an argument that neglects the impact of subsequent socialization of the recruit by the group.<sup>34</sup> Whether or not recruits enter an armed organization with relatively homogeneous norms and beliefs thus depends on the recruiting practices of the organization. Those norms and beliefs are often profoundly altered as recruits are inducted into the group through both formal and informal practices, as discussed below.

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<sup>34</sup> Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007. However, in his emphasis on contrasting pools of recruits, Weinstein underestimates the power of socialization practices and disciplinary institutions to meld recruits, typically male teenagers, into group members irrespective of their initial motives for joining. Distinct patterns of violence may reflect group strategy concerning training, discipline, and incentives and group ideology rather than distinct pools of recruits. See below, and also Wood, 2009, see *supra* note 2; Hoover Green, 2011, see *supra* note 12; and Francisco Gutiérrez Sanín, "Telling the Difference: Guerrillas and Paramilitaries in the Colombian War, in *Politics and Society*, 2008, vol. 36, no. 1, pp. 3–34.

#### 11.4.2. Leadership Strategy

Military leaders seek to control the repertoire, targeting, and frequency of violence wielded by their combatants, not least because of the fear that weapons wielded by soldiers may be turned against officers. Likely considerations include not only issues of military tactics and strategy, but also implications for the ongoing supply of recruits, intelligence, other necessary ‘inputs’ to the war effort, and for the legitimacy of the war effort in the eyes of desired supporters (domestic and international alike). Even when an armed group appears to embrace terrorizing civilians, there are decisions to be made about targeting and timing. In particular, military leaders may make explicit decisions to prohibit or to promote sexual violence of different forms, against particular groups. If it occurs at a significant level, leaders who have not yet made an explicit decision may be pressed to do so and may decide to tolerate its occurrence without an explicit decision to prohibit or promote. Commanders may also promote high levels of violence towards civilians without a formal decision to do so, using euphemisms understood as signaling to combatants that they will not be punished. Leaders may further delegate certain forms of violence to groups they claim not to command, for example, militias or death squads. In order to control violence to at least the minimum necessary degree, group leaders or their delegates develop institutions for the socialization and training of recruits and for the discipline of members.<sup>35</sup> To highly varying degrees, those institutions may also attempt to distill group ideology (discussed below).

#### 11.4.3. Institutions for Socialization of Recruits

To build an effective armed group, recruits have to be melded into effective combatants through training and socialization. The military socialization literature argues that combatants hold fast under fire not because of grand concepts such as patriotism or group ideology, but because of their commitments to their ‘primary group’ of fellow combatants.<sup>36</sup> Training and socialization to the small group take place both formally through group institutions such as boot camp and informally through initiation rituals and hazing. In state militaries, the powerful experiences of endless

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<sup>35</sup> Hoover Green, 2011, see *supra* note 12.

<sup>36</sup> Edward Shils and Morris Janowitz, “Cohesion and Disintegration in the Wehrmacht in World War II”, in *Public Opinion Quarterly*, 1948, vol. 12, no. 2, pp. 280–315.

drilling, dehumanization through abuse at the hands of the drill sergeant, and degradation and then ‘rebirth’ as group members through initiation rituals typically meld recruits into combatants whose loyalties are often felt to be stronger than those to family.<sup>37</sup> Brutalization of recruits is intended to enhance aggression, which the discipline of drill is intended to control.<sup>38</sup> To the extent that the organization relies on child recruits, training and socialization are particularly likely to re-socialize combatants. These processes occur to a lesser or greater degree; nonetheless, the result is a setting where conformity effects are likely to be extremely strong.

#### 11.4.4. Wartime Dynamics

Combatant norms and practices, both general cultural ones and also those instilled during initial socialization, may evolve dramatically during active engagement. Both the suffering and wielding of violence may bring profound changes to combatants’ understanding of the appropriateness of repertoires, targeting, and frequency of violence. The increasing desensitization of combatants to violence and the dehumanizing of victims, the anxiety and uncertainty of combat and the threat of violence, and the displacement of responsibility not only onto the group but onto the enemy who ‘deserves what they got’ (blame attribution) are powerful wartime processes that may reshape group repertoires towards the wider use of violence: wider both in the sense of wider targeting and a broader repertoire which may include many forms sexual violence.<sup>39</sup> Collective responsibility for atrocities can itself become a source of group cohesion and a

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<sup>37</sup> Donna Winslow, “Rites of Passage and Group Bonding in the Canadian Airborne”, in *Armed Forces and Society*, 1999, vol. 25, no. 3, pp. 429–57; and Hank Nuwer, “Military Hazing”, in *The Hazing Reader*, Indiana University Press, Bloomington, 2004, pp. 141–46.

<sup>38</sup> Dave Grossman, *On Killing. The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, Little Brown and Company, 1996; and Osiel, 1999, see *supra* note 10.

<sup>39</sup> Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, HarperCollins, New York, 1992; Alexander Hinton, *Why did they kill? Cambodia in the Shadow of Genocide*, University of California, 2005; and Daniel Chirot and Clark McCauley, *Why Not Kill Them All? The Logic and Prevention of Mass Political Murder*, Princeton University Press, Princeton, 2006; and Hoover Green, 2011, see *supra* note 12. For an argument about how an initial pattern of limited sexual violence may escalate to more brutal forms and wider targeting, see Jamie Leatherman, *Sexual Violence and Armed Conflict*, Polity Press, Cambridge, 2011.

bulwark against betrayal.<sup>40</sup> Indeed, small group dynamics can undermine military discipline when small group loyalties and conformity dynamics within the group lead to withholding of information from commanding officers, disobedience, or even to the ‘fragging’ of officers, as seen in the case of the US Army in Vietnam.<sup>41</sup>

#### 11.4.5. Armed Group Institutions: Discipline and Indoctrination

The strength of the armed group’s institution for discipline and ongoing indoctrination determines whether the leadership’s choices about the frequency, targeting and repertoire of violence dominate patterns driven by the wartime social psychological dynamics just discussed. Within an armed organization – particularly in the changing and often covert circumstances of irregular warfare – there are a series of relationships down the chain of command in which the superior officer attempts to influence the behavior of those below (who often have different preferences for the level, targeting and form of violence), but without direct access to what those below are, in fact, doing.<sup>42</sup> The challenge applies to insurgent groups as well: leaders attempt to control the violence of their combatants and whether they succeed in doing so depends on the strength of the group’s institutions.<sup>43</sup> Armed groups that adopt an irregular warfare strategy face this challenge in particularly sharp form: units may operate inde-

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<sup>40</sup> Osiel, 1999, see *supra* note 10; and Goldstein, 2001, see *supra* note 30.

<sup>41</sup> Robert MacCoun, “Unit Cohesion and Military Performance”, in *Sexual Orientation and U.S. military personnel policy: Policy options and assessment*, National Defense Research Institute, RAND, Santa Monica, 1993; and Joanna Bourke, *An Intimate History of Killing. Face-to-Face Killing in Twentieth Century Warfare*, Granta Books, London, 1999.

<sup>42</sup> Scott Gates, “Recruitment and Allegiance: the Microfoundations of Rebellion”, in *Journal of Conflict Resolution*, 2002, vol. 46, no. 1, pp. 111–130; Neil Mitchell, *Agents of Atrocity: Leaders, Followers, and the Violation of Human Rights in Civil War*, Palgrave MacMillan, New York, 2004; Christopher Butler, Tali Gluch, and Neil Mitchell, “Security Forces and Sexual Violence: A Cross-National Analysis of a Principal-Agent Argument”, in *Journal of Peace Research*, 2007, vol. 44, no. 6, pp. 669–687; Hoover Green, 2011, see *supra* note 12; and Leiby, 2011, see *supra* note 10.

<sup>43</sup> Humphreys *et al.* found that unit cohesion and discipline, rather than the level of contestation, social structure such as community or ethnic ties, or the existence of a local economic surplus, best explained patterns of civilian abuse across armed groups in Sierra Leone: see Macartan Humphreys and Jeremy Weinstein, “Handling and Manhandling Civilians in Civil War”, in *American Political Science Review*, 2006, vol. 100, no. 3, pp. 429–47.

pendently for significant periods of time with little direct contact with superiors, with the result that superiors know little about the practices on the ground and have little opportunity to punish infractions.

Amelia Hoover Green argues that there are, in principle, two ways in which armed groups resolve this ‘commander’s dilemma’, as she terms the tension between needing both to produce and to control violence.<sup>44</sup> The first is through strong disciplinary institutions: combatants obey orders because they are punished if they do not. Given the challenges of organizing and controlling violence toward group goals, armed groups tend to be hierarchical, in varying degrees.<sup>45</sup> The ability of the hierarchy to enforce decisions depends on the flow of information concerning those patterns up the chain of command and the willingness of superiors to hold those below them accountable.

Military sociologists stress the importance of discipline, but often argue that disciplinary institutions are insufficient. Strong identification with group units above and with the armed group as a whole (‘secondary group cohesion’) is one way to resolve such tensions and ensure a strong hierarchy.<sup>46</sup> When military superiors are seen as legitimate authorities, the likelihood of obedience even in the wielding of extreme violence is enhanced.<sup>47</sup> Such cohesion and legitimacy enhances the probability that information about infractions of group rules and norms is passed up the chain of command, so that the need for a disciplinary response is recognized. Maintaining discipline through the vagaries of combat often requires the development of strong internal intelligence institutions to ensure the flow of such information. For example, the Liberation Tigers of Tamil Eelam insurgency in Sri Lanka deployed a parallel chain of command dedicated to internal intelligence.<sup>48</sup>

According to Hoover Green, the second way in which organizations may, in principle, resolve the ‘commander’s dilemma’ is through institu-

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<sup>44</sup> Hoover Green, 2011, see *supra* note 12.

<sup>45</sup> Samuel Huntington, *The Soldier and the State. The Theory and Politics of Civil-military Relations*, Belknap Press of Harvard University Press, Boston, 1957; and Guy Siebold, “Core issues and theory in military sociology”, in *Journal of Political and Military Sociology*, 2001, vol. 29, pp. 140–59.

<sup>46</sup> Siebold, 2001, see *supra* note 45.

<sup>47</sup> Stanley Milgram, *Obedience to Authority; An Experimental View*, Harper, New York, 1974; and Grossman, 1996, see *supra* note 38.

<sup>48</sup> Wood, 2009, see *supra* note 2.

tions which inculcate recruits so strongly that they internalize group ideology and norms, an argument that calls for indoctrination stronger than that of the ‘secondary cohesion’ just described. Through ongoing, intensive political education, the group instills an understanding of the purpose of the conflict, and an understanding that some forms of violence undermine that purpose. In the ideal case, combatants thus come to internalize the leadership’s choices about violence and implement it with little need for discipline. In practice, armed groups inculcate group ideology to highly varying degrees. Some armed groups, often leftist groups that understand the conflict is likely to continue over many years and perhaps decades, go to impressive lengths to inculcate group ideology and identification long after the initial training period. Note that this discussion raises the question of what accounts for the particular institutions developed by the armed group, a discussion that would take us too far afield.

#### **11.5. When is Wartime Rape a Strategy or Practice of War? When is it Rare?**

This theoretical framework is of course relevant for the analysis of all forms of violence, not just the various forms of sexual violence. In what follows, I focus on the implications that are especially relevant for analysis of patterns of rape, particularly for the absence of rape on the part of the group, rape as a strategy of war, and rape as a practice of war. Throughout I draw on relevant unpublished works (with permission of the authors), as well as other sources.

Before doing so however, what happens when the orders of superiors and the intentions of combatants about sexual violence collide? If indoctrination of combatants is complete, in principle, no conflict will arise. When conflicts do arise, if disciplinary and internal intelligence institutions are sufficiently strong, the choice of the leadership will prevail, whether it is promotion, prohibition, or tolerance of rape of civilians. For example, if leaders judge sexual violence to be counterproductive to their interests and if the group’s institutions are sufficiently strong, little sexual violence will be observed. In the contrasting case, an organization with strong institutions could judge sexual violence as in its interest and effectively enforce such violence by its combatants. If organizational strength is insufficient, individual and unit norms will dominate, with the organization unable to deter or occasion behavior it would rather prevent or promote, respectively. Thus under some probably rare conditions, the



prevalence of sexual violence may be low without relying on hierarchical discipline, namely, when sufficiently many combatants have themselves internalized norms against sexual violence (see below). More frequent is the other case of an organization's prohibiting sexual violence, but without the hierarchy or will to effectively do so.

The strength of armed group institutions – the ability of the hierarchy to enforce decisions taken by the leadership through disciplinary and/or through ongoing indoctrination – is thus central to the theoretical framework and its implications. For the framework to be useful in analyzing patterns of sexual violence, the degree of organizational strength must be observable apart from those patterns. Observable indicators include the ability to effectively tax the civilian population and to channel the resulting resources throughout the organization with low levels of corruption; the organization's routine punishment of combatants who break rules and norms other than those governing rape, a sufficient but not a necessary condition for strong institutions, as indoctrination may be so strong that combatants never break the rules; and the organization's capacity to carry out widespread and/or complex offensive or defensive maneuvers that require extensive coordination of multiple units.

#### **11.5.1. Explaining the Absence of Sexual Violence**

What considerations would lead commanders and leaders to attempt to effectively prohibit sexual violence by combatants? An armed group's leadership may prohibit sexual violence for strategic, normative, or practical reasons.<sup>49</sup> Many armed groups fear the consequences of uncontrolled violence by their combatants: such forces may be unready to counter a surprise attack, they may prove difficult to bring back under control, and they may even turn their sights on their commanders;<sup>50</sup> the unintended consequences may be severe, such as the entry of an ally of the enemy into the fray. That aside, if an organization aspires to govern the civilian population, leaders will probably attempt to restrain combatants' engagement in sexual violence against those civilians (though perhaps endorsing

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<sup>49</sup> Wood, 2009, see *supra* note 2.

<sup>50</sup> Gutiérrez Sanín, 2008, see *supra* note 34. The Salvadoran insurgency attempted to shape individual longings for revenge toward a more general aspiration for justice because revenge-seeking by individuals would undermine insurgent discipline and obedience. See Elisabeth Jean Wood, *Insurgent Collective Action and Civil War in El Salvador*, Cambridge University Press, New York, 2003.



it against other civilian groups) for fear of undermining support for the group. Similarly, if an armed group is dependent on civilians for supplies or high quality intelligence, the latter of which is difficult to coerce,<sup>51</sup> leaders will probably attempt to restrain sexual violence against those civilians.

Reasons for prohibiting sexual violence may reflect normative concerns as well as practical constraints. Leaders of a revolutionary group seeking to carry out a social revolution may see their group as the disciplined bearer of a new, more just social order for all citizens, and therefore prohibit sexual violence because such violence violates the norms of the new society or because its prohibition legitimizes its ideology both to members and to its likely constituents. Despite systematic celebration of martyrdom in pursuit of victory, the Salvadoran insurgency did not endorse suicide missions and effectively prohibited sexual violence.<sup>52</sup> Nationalist and anti-colonial insurgencies may prohibit sexual violence and seek female cadres as part of its ideological commitment to becoming a modern state army.<sup>53</sup> Leninist groups may suppress sexual violence as part of a general emphasis on discipline and self-sacrifice, and of its commitment, in varying degrees, to gender equality. Leaders may regulate sexual relations on the part of its combatants as part of a general norm of self-sacrifice and effectively prohibit sexual violence as well. For example, the Sri Lankan insurgency engaged in little sexual violence toward civilians, even when it engaged in the ethnic cleansing of Muslims from the northern part of the country in 1990 and also killed thousands of civilians in the course of assassinations by suicide bombing and collective reprisals.<sup>54</sup> Relatedly, in conflicts where one party engages in massive violence against civilians, the other party may not do so as an explicit strategy to demonstrate moral superiority. A norm against sexual violence may take a distinct form: sexual violence across ethnic boundaries may be understood by leaders as polluting the instigator, rather than harming and humiliating the targeted individual and community. Finally, leaders may prohibit sexual violence out of deference to international law for various

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<sup>51</sup> Wood, 2003, see *supra* note 50.

<sup>52</sup> *Ibid.*; and Hoover Green, 2011, see *supra* note 12.

<sup>53</sup> Armed groups that rely on female combatants may have additional reasons to restrain sexual violence on the part of their troops. See Wood, 2009, see *supra* note 2.

<sup>54</sup> Wood, 2009, see *supra* note 2.

reasons, perhaps because they aspire to some sort of international recognition or because they fear financial backers may curtail funding.

Whether or not the decision to prohibit sexual violence is effectively implemented depends on the strength of the group's institutions. If disciplinary and internal intelligence institutions are sufficiently strong, combatants will not engage in it if prohibited. However, given the strength of the social psychological processes during war that tend to widen repertoires, and the challenges of continued access by superiors to detailed information about the behavior of combatants, Hoover Green argues that these institutions are necessary, but that alone they are not sufficient to ensure an absence of sexual violence.<sup>55</sup> Rather, an armed group must also develop strong institutions for ongoing political education of combatants, so that they develop and maintain internalized norms against rape. (Disciplinary institutions remain necessary as alignment of norms of all combatants with those of the leadership is not likely to occur). In her analysis of contrasting repertoires of violence on the part of the various insurgent factions and state military organizations during El Salvador's civil war, Hoover Green demonstrates that armed groups that employ both strong disciplinary systems and consistent political education institutions use narrower repertoires of violence and, in particular, engage in little sexual violence.

If commanders prohibit sexual violence or promote it, but institutions are too weak to enforce that policy, whether or not combatants engage in sexual violence depends on individual and small unit norms. If individual combatants and their units endorse and enforce norms against sexual violence, little sexual violence by those combatants will occur. Such norms may take the form of internalized cultural norms whereby in the case of some ethnic conflicts, combatants themselves understand that sexual relations with civilians associated with the enemy is polluting to the perpetrator or, for other reasons, is normatively prohibited. However, as Hoover Green argues, the conditions for such shunning of sexual violence by combatants are demanding.<sup>56</sup> The wartime processes of brutalization, desensitization, and dehumanization discussed above must not have eroded such normative constraints. And given the powerful influ-

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<sup>55</sup> Hoover Green, 2011, see *supra* note 12.

<sup>56</sup> Amelia Hoover, "Disaggregating Violence during Armed Conflict: Why and How", unpublished manuscript, 2007; and Hoover Green, 2011, see *supra* note 12.

ence of small group dynamics in armed units, all or nearly all combatants must endorse the norm, and enforce it against the few who attempt to transgress it. The likelihood that combatants continue to adhere to such a norm is significantly higher if the armed group itself endorses and attempts to reinforce such norms.

### **11.5.2. Explaining Rape as a Strategy of War**

As we saw above, sexual violence may be adopted by commanders as a strategy of war against particular populations, as in the case of sexual torture of political prisoners or the public rape of members of particular groups as they are “cleansed” from an area; as a form of collective punishment (usually in the context of orders to terrorize civilians); or as a form of compensation. The conditions for its top-down emergence as a strategy are the inverse of those for the absence of sexual violence: commanders must perceive the benefits of the strategy – a terrorized detainee, community or population; a territory not only ‘cleansed’ of the targeted population, but with memories making return unlikely; and troops compensated by rape of civilians – as outweighing its costs – less disciplined troops who may engage in rape in contexts where it is not strategically beneficial; decreased civilian loyalty and cooperation; and violation of domestic and international norms. In this case, combatants are never punished for engaging in sexual violence; indeed, there may be evidence of punishment for failing to do so, as in the case of Guatemala (mentioned above). If strategic, the overall pattern should be that sexual violence occurs when strategically beneficial, and is absent when not.

Michele Leiby analyzes rape as a counterinsurgency strategy on the part of states engaged in irregular warfare.<sup>57</sup> In this case, where and when rebel forces are visibly active, but not strong enough to engage the state in frequent combat, state forces engage in sexual torture and rape (as well as other forms of violence) against purported and potential supporters, as well as rebels, to extract information but also to punish and terrorize. If such efforts fail and the rebel organization gains sufficient strength to engage in numerous attacks in the area, state forces abandon strategic violence against civilians in favor of combat. Using the Peruvian data she compiled as the dependent variable in a statistical analysis, she shows that

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<sup>57</sup> Leiby, 2011a and 2011b, see *supra* note 10.

sexual violence on the part of state forces conforms to the pattern predicted by her analysis of rape as counterinsurgency, and was thus strategic.

Maria Eriksson Baaz and Maria Stern analyze how soldiers of the DRC state military understand the widespread rape of civilians by the group. In the context of deeply inadequate salaries that often go unpaid for extended periods, many of the 200 soldiers interviewed by the authors linked the high rates of rape with the frustration and anxiety occasioned by the failure to live up to masculine ideals of establishing and providing for a family. Soldiers also distinguished (but not sharply, and with some ambivalence) between what they see as ‘lust’ rapes – namely, rape involving forced sexual intercourse born out of frustration, but without mutilation and gratuitous violence – and what they term ‘evil’ rapes – namely, rape involving both forced sexual intercourse as well as mutilation and gratuitous violence. The former were rapes that are “somehow more ‘ok,’ morally defensible, ethically palatable and socially acceptable (and therewith, arguably not really rapes in their eyes), and those that are ‘evil,’ and not acceptable – but still ‘understandable’”.<sup>58</sup> While sexual violence does not appear to have been ordered, it appears to be broadly tolerated by the military, arguably as a form of compensation. (On the other hand, it could be the case that the hierarchy tolerates the violence as a practice whose curtailment would be too costly. More evidence is needed for a definitive judgment.)

### 11.5.3. Explaining Rape as a Practice of War

Rape may emerge as a practice of war – that is, unordered and occurring even when not providing a strategic benefit – for a number of reasons explored in current literature. When commanders tolerate rape as a practice by combatants, they do so not because they perceive the benefits of rape as outweighing the costs, but because they perceive the costs of effective prohibition as too high. Such costs may include the diversion of scarce resources to strengthen relevant institutions, particularly disciplinary and intelligence institutions, or the consequences of moving against

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<sup>58</sup> Maria Eriksson Baaz and Maria Stern, “Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)”, *International Studies Quarterly*, 2009, vol. 53, p. 497. See also Jocelyn Kelly, “Rape in War: Motives of Militia in DRC”, USIP Special Report, 2010, no. 243.

the practice, for instance, the loss of experienced field commanders were they held accountable for rape.

Dara Kay Cohen argues that gang rape reinforces cohesion in groups that rely on forced recruitment and thus have to create cohesion among hostile and bewildered recruits. Gang rape effectively built cohesion, she argues, because it was an act understood by participants to be very costly in terms of the breaking of local social norms and the likelihood of venereal disease, which might go untreated. Drawing on the literature on urban and prison gangs, she argues that it was effective in creating cohesion precisely because of its costliness: public gang rape broke recruits' ties to their communities and cemented new ones to the group. Cohen does not argue that rape in these cases is ordered or purposefully adopted by the group's leadership. Rather, senior members of small units insist that new recruits also rape, and it occurs in non-strategic as well as strategic settings. Thus according to her theory (in the terms of this paper), gang rape is a practice.

Cohen shows that gang rape played this role in the Revolutionary United Forces of Sierra Leone.<sup>59</sup> The Revolutionary United Forces was heavily reliant on forced recruitment: 87% of combatants reported being forced to join. The pattern of gang rape was understood as costly, according to her interviews with perpetrators, and was enforced by members of small units. Indeed, in analyzing a household survey of wartime violence, she finds that female combatants participated in approximately a quarter of gang rape events.<sup>60</sup> In the analysis of her cross-national data on wartime sexual violence, Cohen shows that non-state armed groups that practice abduction are more likely to engage in high levels of sexual violence, as are state militaries that engage in press-ganging of conscripts.<sup>61</sup> Her forced recruitment explanation explains more of the observed variation than the other theories that she tests. However, it is not yet clear whether the mechanisms of gang rape as socialization is as general as she suggests, as there are other causal processes that may link gang rape with forced recruitment.

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<sup>59</sup> Cohen, 2011a, see *supra* note 24; and Cohen, 2011b, see *supra* note 28.

<sup>60</sup> Cohen, 2011b, see *supra* note 28.

<sup>61</sup> Cohen, 2011a, see *supra* note 24, in her analysis of Asher, 2004, see *supra* note 29.

### 11.6. Conclusion: Policy Implications

The variation in patterns of wartime rape and other forms of sexual violence documented and analyzed here suggests that many common beliefs about wartime sexual violence are unsubstantiated, or at best, only partially true. Rape of civilians is not, throughout history, ubiquitous in war or committed by all armed groups, as is sometimes asserted. The victims of wartime sexual violence are not always overwhelmingly female; men and boys suffer high levels of rape and sexual torture by some armed groups. An armed group may engage in frequent rape without it being a strategy of war. Conflicts with high levels of rape, as measured by the percentage of conflicts characterized by such high levels, are not more frequent in Sub-Saharan Africa than other regions. Nor is it likely the case that wartime rape is more frequent today than historically.

Most importantly, rape is not inevitable during war. Recognition that some armed groups do not engage in sexual violence should strengthen efforts to hold accountable those groups that do, whenever the usual criteria for command and/or superior responsibility under international law are met, irrespective of which analytical (not legal) category best describes the pattern of violence (strategic, opportunistic, or as a practice).<sup>62</sup> The existence of such groups demonstrates that it is possible for armed groups to build institutions that inculcate and enforce norms against rape, sexual slavery, forced prostitution, sexual torture, and other forms of sexual violence of civilians.

Thus recent analysis by social scientists of variation in patterns of wartime sexual violence, including variation in form, frequency, and targeting, may help policy-makers establish accountability for sexual violence. In the hope that the argument presented here may strengthen the efforts of policymakers who seek to end sexual violence and other violations of the laws of war – be they government, military, or insurgent leaders, United Nations officials, or members of non-governmental organizations – I here offer some tentative policy implications of this analysis.

It would be rash to suggest that policy-makers try to compel armed groups to copy the institutions of those groups that do not engage in sexual violence. Nonetheless, some more implementable policy implications follow from this discussion. Policy-makers can point to the existence of

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<sup>62</sup> Wood 2008, see *supra* note 3; and Hoover Green, 2011, see *supra* note 12.

the latter groups to bring together two constituencies that often hold dramatically different presumptions about wartime sexual violence, namely, feminist advocates and military commanders. The fact that some of the armed groups prohibiting sexual violence are strong, professional state or rebel armies should undermine any notion that a truly professional group need not concern itself with such ‘soft’ issues. Effective fighting forces, that is, excellent ‘warriors’, need not engage in the profoundly misogynistic rituals too often celebrated as ‘masculine’ values.

Of course it is precisely in the settings where change is most needed, namely where group members are already engaged in wartime rape and other forms of sexual violence as a strategy or practice, that resistance to changing institutions is likely the most strong. Appeal to the normative condemnation of rape under traditional teaching, for example, is not likely to be successful where armed groups have displaced and sharply undermined the authority of traditional leaders. Lessons could perhaps be learned from campaigns against the practice of female genital cutting, the success of which often depends not on persuasion of individual family members, but on widespread community pledges not to require cutting as a condition of marriageability of daughters.<sup>63</sup> Ideally, reinforcing traditional norms against sexual violence would be possible without also reinforcing gender inequalitarian practices and beliefs.

A distinct approach is to address the historical impunity of wartime leaders for sexual violence: the prosecution of commanders as well as perpetrators would increase the costs to the armed group, strengthening incentives to effectively prohibit its occurrence. (See the many relevant chapters of this volume.) Prosecution of sexual violence as a war crime; as a crime against humanity, which is possible only where the sexual violence is part of widespread or systematic attack on civilian population; or as genocide, would likely increase those costs more than its prosecution under other relevant law. The same argument applies to groups where

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<sup>63</sup> Gerry Mackie, “Ending Footbinding and Infibulation: A Convention Account”, in *American Sociological Review*, 1996, vol. 61, no. 6, pp. 999–1017; Gerry Mackie, “Female Genital Cutting: The Beginning of the End”, in Bettina Shell-Duncan and Ylva Hernlund (eds.), *Female Circumcision in Africa: Culture, Controversy and Change*, Lynne Rienner Publishers, Boulder, 2000, pp. 253–281; and Elizabeth Levy Paluck and Laurie Ball, *Social norms marketing aimed at gender based violence: A literature review and critical assessment*, International Rescue Committee, New York, 2010.



sexual violence is a practice: increasing the costs of toleration by commanders would strengthen their incentives to punish combatants for sexual violence. In short, the implication is to strengthen commander incentives to build strong disciplinary institutions and possibly, strong political education institutions, to effectively prohibit sexual violence.

Direct indicators of strategic sexual violence includes copies of orders, credible combatant or witness reports of such orders, credible reports that combatants who refused to participate were punished, and the abrogation from above of attempts to curtail the practice. Such direct evidence is increasingly unlikely as international and perhaps domestic prosecution of sexual violence occurs more frequently. Commands that use euphemisms for general terror may support a claim of sexual violence as a strategy of war: for example, commands such as ‘total war’ or ‘all forms of vengeance’, when they are unqualified by any phrase such as ‘against enemy troops’ or where they explicitly include violence against civilians. Such commands establish a climate of tolerance for human rights violations, in the same way that allowing a hostile workplace climate that is permissive of harassment supports charges of sexual harassment in some countries.

More realistically, perhaps the approach advocated here – to document and analyze patterns of sexual violence – should contribute to proving command responsibility for sexual violence in the absence of direct proof. In the absence of such evidence and in the face of leaders’ claims that they did not exercise control of troops, how might the ‘effective control’ necessary to show command responsibility be documented? This discussion suggests some indicators of an effective chain of command. First, the ability of leaders to command combatants into harm’s way is itself evidence of effective command: a key indicator of loss of command is the refusal of troops to engage in combat (and to fire weapons at commanders). Evidence of effective control is still stronger in the case where the armed group carries out offensive or defensive maneuvers over an extended area or period, because orders must be transmitted down the chain of command, and information about present position and capacity, as well as intelligence about enemy position, must travel up the chain of command. And it is stronger still if such movements require coordination across many different units. Second, analysis of local patterns of where and when sexual violence occurs may help establish the purposeful adoption of sexual violence, as suggested by the analysis of sexual violence by



state forces in Peru discussed above. If prosecutors can show that rape occurred only where and when it was strategically beneficial, and did not occur where and when it was not, a charge of command or superior responsibility should be more credible.

Third, an armed group that is able to gather and distribute financial resources across various branches of its organization without substantial ‘deviation’ of those resources for private purposes demonstrates a cohesive command structure. Fourth, if an armed group routinely punishes its members for breaking rules other than those nominally prohibiting sexual violence, it could also punish combatants for sexual violence.

Other indirect indicators that sexual violence occurs under an effective chain of command include the occurrence of sexual violence in military bases, prisons, or state-run facilities (that is, sites that are evidently under commander control); against political opponents, when commanding officers are present; under order of commanding officers; or when commanding officers themselves participate in sexual violence.<sup>64</sup> In some contexts, evidence of collective targeting of particular groups implies purposeful engagement in sexual violence, as it suggests that commanders successfully prohibit sexual violence against groups not so targeted.

Rape is not an unavoidable collateral damage of war. Its victims, women and men of all ages, were not brought down by cross-fire or an errant missile. They were intentionally violated. As Neil Mitchell emphasized, “[...] rape is not done by mistake”.<sup>65</sup> Is anyone beyond the immediate perpetrator responsible for the crime? Armed groups, whether they are non-state actors or state militaries, often choose to prohibit sexual violence by their members and do so effectively. The fact that many armed groups do not engage in sexual violence should help to strengthen accountability for wartime sexual violence and to put the stigma of sexual violence on the perpetrators, rather than on the victims themselves.

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<sup>64</sup> Leiby, 2009, see *supra* note 31.

<sup>65</sup> Neil Mitchell, *Agents of Atrocity: Leaders, Followers, and the Violation of Human Rights during Civil War*, Palgrave MacMillan, New York, 2004, p. 50.