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Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia

By Sharon A. Healey*

I. INTRODUCTION

From the relative safety of a one room cabin in a refugee camp in Gasinci, Croatia, 15-year-old Emina Gasi recounted the horrors of February 1994, when men in Serbian military uniforms, stockings over their faces, broke into her home in Banja Luka, slashed her grandfather's head and arms with knives, killing him, and, as he lay dying, raped her.¹ Her story is not unique. As war in the former Yugoslavia rages on, refugees have poured out wrenching accounts of systematic rapes and sexual abuses, mostly at the hands of Serbian forces.² These stories include:

repeated rapes of girls as young as 6 and 7; violations by neighbors and strangers alike; gang rapes so brutal their victims die; rape camps where Serbs routinely abused and murdered Muslim and Croat women; rapes of young girls performed in front of fathers, mothers, siblings and children; rapes committed explicitly to impregnate Muslim women and hold them captive until they give birth to unwanted Serbian babies.³

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1. John Kifner, *In North Bosnia: A Rising Tide of Serbian Violence*, N.Y. TIMES, Mar. 27, 1994, at 1.

2. See Paul Lewis, *Rape Was Weapon of Serbs, U.N. Says: But Panel Estimate of 3,000 is Far Below Earlier Study*, N.Y. TIMES, Oct. 20, 1993, at A1, A6.

As used in this paper, the terms "Serbian" or "Serb" refer to people of Serbian descent. Serbia provided economic and military aid to the Bosnian Serbs until August 1994, when Serbian President Slobodan Milosevic severed ties with the Bosnian Serbs after they rejected a peace plan that would have roughly divided Bosnia in half between the Bosnian Serbs and the Muslim-Croat federation. Mark Heinrich, *U.N. Envoy Offers Gloomy Forecast for Bosnia*, Reuters World Service, Aug. 22, 1994, available in LEXIS, World Library, REUWLD File; Chuck Sudetic, *Serbia Isolating Allies in Bosnia: Says it Cuts Links to Rebels, Who Reject Peace Plan*, N.Y. TIMES, Aug. 5, 1994, at A1.

3. Tom Post et al., *A Pattern of Rape - A Torrent of Wrenching First-Person*

In the face of ongoing atrocities occurring in the former Yugoslavia, the United Nations Security Council established a war crimes tribunal to prosecute the perpetrators.⁴ While all sides to the conflict have committed violations of international law, including rape, the reports of nongovernmental organizations (NGOs) and U.N. missions have concluded that only the Serbs have used rape as a tool of war.⁵ Using existing international law, the International War Crimes Tribunal for Former Yugoslavia (Tribunal) has the opportunity to explicitly recognize and prosecute rape as a war crime, a violation of the Genocide Convention and a crime against humanity.

This article examines the legal precedent for prosecuting rape under each of the four charges set forth in the statute of the Tribunal and, using information taken from the reports of journalists, human rights organizations, various missions and the reports of the Commission of Experts⁶ and Special Rap-

Testimonies Tells of a New Serb Atrocity: Systematic Sexual Abuse, NEWSWEEK, Jan. 4, 1993, at 32.

4. The Tribunal was established pursuant to Chapter VII of the United Nations Charter which requires a determination of a threat to international peace, breach of peace or act of aggression under the Charter of the United Nations. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., ¶ 22, U.N. Doc. S/25704 (1993). [hereinafter *Secretary-General's Report*].

The Tribunal was established after the Security Council passed a number of resolutions relating to the conflict in the former Yugoslavia. *Id.* ¶¶ 4-11. In Resolution 771, July 13, 1992, the Security Council "expressed grave alarm at the continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia . . . and demanded that the parties to the conflict cease and desist from all breaches of international humanitarian law." *Id.* ¶ 6. In Resolution 780, October 6, 1992, the Security Council requested the Secretary General to establish an impartial Commission of Experts "with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia." *Id.* ¶ 7.

5. See, e.g., *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR, 49th Sess., ¶¶ 251-253, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report of Commission of Experts*]; see also AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES 3-5 (1993); Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110, 119-20; Roy Gutman, *Ethnic Cleansing, 'Rape' Camps: Bosnia War is Savage as Ever*, ST. LOUIS POST DISPATCH, Sept. 30, 1993, at 4A.

6. The five member commission collected and analyzed information received from NGOs and governments of countries and undertook investigative missions into the territory of the former Yugoslavia. See *Final Report of Commission of Ex-*

porteur of the Commission on Human Rights,⁷ demonstrates how a prima facie case can be made against Serbian forces under these charges.

II. THE HISTORICAL OCCURRENCE OF RAPE IN ARMED CONFLICT

Mass rapes during war have occurred throughout history. For example, during World War II, Moroccan mercenary troops fighting with free French forces in Italy raped and plundered in enemy territory.⁸ Mass rapes were also perpetrated on Jewish and Soviet women by the Nazis,⁹ and the Japanese forced Asian women into sexual conscription for the Japanese Army.¹⁰ More recently, human rights groups have reported the rape of women by Peruvian security forces during their ongoing conflict with the communist guerilla group, the Shining Path.¹¹ During the Iraqi invasion of Kuwait and its aftermath, hundreds of Kuwaiti women were reportedly raped by

perts, *supra* note 5, ¶¶ 18-25. The Commission also set up a data base at DePaul University in Chicago to provide a record of all reported grave breaches of the Conventions and other violations of international humanitarian law. *Id.* ¶ 21. The Commission submitted two interim reports. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR, 48th Sess., U.N. Doc. S/25274 (1993); *Second Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR, 48th Sess., U.N. Doc. S/26545 (1993) [hereinafter *Second Interim Report*]. The Commission submitted its final report on May 27, 1994. *Final Report of Commission of Experts*, *supra* note 5.

7. Pursuant to Resolution 1992/S-1/1 of August 14, 1992, the Commission of Experts requested its chairman to appoint a special rapporteur to investigate first hand the human rights situation in the territory of the former Yugoslavia. Mr. Tadeusz Mazowiecki, the former Polish prime minister, was subsequently appointed as the special rapporteur. See Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992*, U.N. ESCOR, Comm'n on Human Rights, 49th Sess., Annex, Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993) [hereinafter *Report of the Special Rapporteur on Human Rights*].

8. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 133-34 (1977).

9. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 48-51 (1975).

10. Bell-Fialkoff, *supra* note 5, at 110, 119-20.

11. See AMERICAS WATCH & WOMEN'S RIGHTS PROJECT, *UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT* 1 (1992). In 1992 in Peru, Human Rights Watch documented more than forty cases of rape committed by soldiers during interrogations or security sweeps. *Id.* at 2.

Iraqi soldiers and scores of third country nationals, mainly Filipinos, Bangladeshis and Sri Lankans, were victimized by both Iraqi and Kuwaiti soldiers.¹² Even more recently, the forces of Haiti's military dictatorship used rape as a terror tactic against supporters of then-exiled president Jean-Bertrand Aristide.¹³

Although rape perpetrated by soldiers has historically occurred during armed conflict, it has been prohibited by the laws and customs of war for centuries. The military codes of Richard II (1385) and Henry V (1419) both subjected violators to capital punishment.¹⁴ The Lieber Code, written during the American Civil War to regulate that armed conflict, specifically prohibited rape.¹⁵ Despite the historical prohibition of war-time rape by national codes of conduct, states have hesitated to prosecute rape as a war crime.¹⁶ An example of modern states' inconsistent approach to treating rape as a war crime is shown by the Allies' failure to bring rape charges at Nuremberg, although rape was prosecuted at the war crimes trials held in Tokyo.¹⁷ This anomaly perhaps exists because rape has historically been viewed "as a byproduct of war" rather than as a war crime.¹⁸

12. See Jack Kelley, *Kuwaiti Rape Victim Breaks Silence*, USA TODAY, Feb. 24, 1992, at 4A; Jack Kelley, *Casualties of Gulf War: Children of Disgrace*, USA TODAY, May 16, 1991, at 11A.

13. Janet Reitman, *Political Repression by Rape Increasing in Haiti*, WASH. POST, July 22, 1994, at A10.

14. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

15. RICHARD S. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 47 (1983) (reprinting the War Department's General Orders No. 100 which preferred a "severe[] punishment" for an "American Soldier [who committed the crime of rape] in a hostile country against its inhabitants").

16. Meron, *supra* note 14, at 425-26. "War Crimes are [defined as] crimes against the conventional or customary law of war that are committed by persons 'belonging' to one party to the conflict against persons or property of the other side." *Id.* at 426 n.19.

17. *Id.* at 425-26. "The International Military Tribunal in Tokyo convicted some Japanese military and civilian officials of war crimes, including rape, after concluding that the officials violated their responsibility to ensure that their subordinates complied with international law." *Id.* at 426 n.14 (citing JOHN A. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 259 (1971)).

18. Barbara Franklin, *Bosnia: The New Nuremberg*, NAT'L L.J., Sept. 26, 1994, at A1, A25.

III. THE WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA

On February 22, 1993, the United Nations Security Council passed Resolution 808 by which it decided to establish an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."¹⁹ Pursuant to paragraph 2 of Resolution 808, the Security Council requested that within 60 days the Secretary-General submit a report on the establishment of the tribunal "including specific proposals and . . . options for the effective and expeditious implementation of the decision"²⁰ This task was given to the Office of Legal Affairs, which sought comments from governments and NGOs which were then incorporated into a draft statute. These items were then presented to the Security Council on May 3, 1993.²¹ Three weeks later, on May 25, the Security Council unanimously approved the statutes for the war crimes tribunal.²²

The Secretary-General took the position that the application of the principle *nullum crimen sine lege*²³ required the international tribunal to "apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence by some but not all states to specific conventions does not arise."²⁴ The Secretary-General's report stated that:

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations

19. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

20. *Id.* ¶ 2.

21. *Secretary-General's Report*, *supra* note 4.

22. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

23. The principle of "*nullum crimen sine lege*" is "[t]he principle that conduct does not constitute crime unless it has previously been declared to be so by the law." Virginia Morris & M.-Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 AM. J. INT'L L. 343, 351 n.43 (1994) (citing A CONCISE DICTIONARY OF LAW 246 (1983)).

24. *Secretary-General's Report*, *supra* note 4, ¶ 34.

annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.²⁵

In response to the Secretary-General's report, the Tribunal's statute conferred subject matter jurisdiction over the following categories of crimes: Grave Breaches of the Geneva Conventions of 1949,²⁶ violations of the Laws or Customs of War,²⁷ Genocide,²⁸ and Crimes Against Humanity.²⁹

25. *Secretary-General's Report*, *supra* note 4, ¶ 35 (footnotes omitted).

26. The Security Council provided that:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Id. art. 2.

27. The Security Council provided that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Id. art. 3.

28. The Security Council provided that:

- 1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

In prosecuting persons responsible for serious violations of international humanitarian law in the former Yugoslavia, the Tribunal cannot legislate, but has the task of applying existing international humanitarian law.³⁰ In this way, the Tribunal avoids the problems of the International Military Tribunal of Nuremberg (IMT) and the International Military Tribunal of the Far East (IMTFE), which have been criticized for applying *ex post facto* laws.³¹

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Id. art. 4.

29. The Security Council stated that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Id. art. 5.

30. *Id.* ¶ 29.

31. The IMT and IMTFE trials have been criticized as applying *ex post facto* laws because the actions of the defendants were not crimes at the time they were committed, but were only defined as crimes by the victors after the war had ended. WAR CRIMES, WAR CRIMINALS AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 22-23 (Norman E. Tutorow & Karen Winnovich eds., 1986) [hereinafter WAR CRIMES AND WAR CRIMES TRIALS]. Particularly troubling was the charge of Crimes Against Peace which was often stated as the planning and waging of an aggressive war. *Id.* This charge has been omitted from the Statutes of the Tribunal for former Yugoslavia.

While rape is specifically identified as a crime only within the definition of Crimes Against Humanity,³² the International Committee of the Red Cross (ICRC) and various states have adopted a broad construction of existing law, resulting in the recognition of rape as both a war crime and a grave breach under customary international law.³³ The following sections examine the legal precedents and factual arguments for prosecuting rape under each of the charges listed within the Tribunal's statute.

A. Grave Breaches of the Geneva Conventions

The four Geneva Conventions of 1949³⁴ (Conventions) form the core of humanitarian law or, as it is sometimes called, the law of armed conflict.³⁵ Their purpose is to provide "minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts."³⁶ The Conventions are designed to protect civilians and combatants who are outside of the conflict or are unable to participate further in it.³⁷ The Conventions are enforced through a scheme primarily consisting of common articles requiring the implementation of penal sanctions in the parties' municipal law for violation of the Conventions, the "identification of grave breaches of . . . the Conventions, . . . and the immutability of a state's liability for such viola-

In one case tried by the IMTFF, Justice Radhabinod Pal of India issued a dissenting opinion in which he insisted that the law concerning crimes against the peace amounted to *ex post facto* legislation. *Id.* at 16-17.

32. *Secretary-General's Report*, *supra* note 4, art. 5(g).

33. Meron, *supra* note 14, at 426-27 (footnotes omitted).

34. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

35. *Secretary-General's Report*, *supra* note 4, ¶ 37.

36. Major Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and the Geneva Protocol I of 1977*, 103 MIL. L. REV. 3 (1984).

37. *Id.*

tions.”³⁸ This system for suppressing breaches of the Conventions is based upon a classification of either grave or simple breaches. Grave breaches are specifically enumerated in each Convention.³⁹ All other violations constitute simple breaches.⁴⁰

The Conventions establish “an indirect enforcement scheme whereby the individual signatory states . . . are responsible for identifying the commission of grave breaches and for applying criminal sanctions to persons responsible for such violations.”⁴¹ Common articles to the Conventions impose upon states an affirmative obligation to search for persons alleged to have committed grave breaches or who have ordered them committed and, ultimately, bring those persons to trial.⁴² While the Conventions impose an affirmative obligation to suppress simple breaches, the means of prosecution are left to the parties’ discretion.⁴³ Although the Conventions embody a preference for the prosecution of grave breaches by national courts, the parties are not restricted from conferring jurisdiction upon an international tribunal.⁴⁴

Rape is prohibited by Article 27 of the Fourth Geneva Convention which states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁴⁵ Although rape is not expressly listed as a grave

38. *Id.* at 27.

39. Grave breaches are enumerated in First Geneva Convention, *supra* note 34, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 34, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, *supra* note 34, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 34, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

40. Murphy, *supra* note 36, at 27.

41. *Id.* at 31.

42. See First Geneva Convention, *supra* note 34, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 34, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, *supra* note 34, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Fourth Geneva Convention, *supra* note 34, art. 146, 6 U.S.T. at 3618, 75 U.N.T.S. at 386.

43. Murphy, *supra* note 36, at 27-28. Identical articles to the four Conventions pertaining to penal sanctions state that: “[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention defined in the following article.” See *supra* note 42.

44. Fourth Geneva Convention, *supra* note 34, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

45. Fourth Geneva Convention, *supra* note 34, art. 27, 6 U.S.T. at 3536, 75

breach of the Fourth Geneva Convention, and thus subject to universal jurisdiction, the repeated horror stories of gender-based violence⁴⁶ filtering out of the former Yugoslavia have influenced the view that rape should be encompassed within the list of grave breaches⁴⁷ set forth in article 147 of the Fourth Geneva Convention.⁴⁸ The ICRC, which played an influential role in drafting the Conventions,⁴⁹ has recognized rape as "wilfully causing great suffering or serious injury to body or health," and thus as encompassed within the grave breaches enumerated under Article 147 of the Fourth Geneva Convention.⁵⁰ In defining "wilfully causing great suffering," the Commentary to the Fourth Geneva Convention issued by

U.N.T.S. at 306.

46. While the vast majority of documented sexual assaults have been committed against women, men have also been victims of sexual atrocities such as forced sex between prisoners and sexual mutilation. *See, e.g.*, U.S. COMMITTEE FOR REFUGEES, VOICES FROM THE WHIRLWIND: BOSNIAN REFUGEE TESTIMONIES (1993).

47. *See, e.g.*, Meron, *supra* note 14, at 426; INTERNATIONAL HUMAN RIGHTS LAW GROUP, NO JUSTICE, NO PEACE: ACCOUNTABILITY FOR RAPE AND GENDER-BASED VIOLENCE IN THE FORMER YUGOSLAVIA 5 (1993) [hereinafter NO JUSTICE, NO PEACE].

48. Article 147 states that:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Fourth Geneva Convention, *supra* note 34, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

49. On February 17, 1863, the five member International Committee of the Red Cross met in Geneva in order to incorporate humanitarian rules for the protection of wounded and prisoners into the laws of nations. WALDEMAR A. SOLF ET AL., AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, INTERNATIONAL HUMANITARIAN LAW: MATERIALS AND PROBLEMS 78 (Fall 1993) (course materials). The recommendations from this conference resulted in the signature of the First Geneva Convention on August 22, 1864. *Id.* Following World War II the ICRC drafted revised texts of the first three conventions and drafted the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. *Id.* at 82-83. The Swiss government convened a Diplomatic Conference in Geneva for April 1949 with the draft conventions serving as the basis of discussion. The Conventions were signed four months later on August 12, 1949. *Id.* at 83.

50. Meron, *supra* note 14, at 426.

the Geneva ICRC in 1958 explains:

This refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. . . . Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.⁵¹

In fact, the severe suffering which rape causes to its victims necessitates that it be defined as a form of inhuman treatment and a grave breach of the Conventions. Rape often results in traumatic, long-lasting psychological trauma that includes shock, paralyzing fear of injury or death, and a profound sense of loss of control over one's life.⁵² These psychological consequences are compounded when the rape is committed during war and the victims "may have experienced: [the] death of loved ones, [the] loss of home and community, dislocation, untreated illness, and war-related injury."⁵³ Moreover, the trauma of rape is made even worse when it results in pregnancy. Health care professionals in the former Yugoslavia have described responses ranging from denial to severe depression and, in cases where the women are forced to carry the pregnancy to term, neglect or rejection of the child.⁵⁴

The ICRC Commentary's definition of inhuman treatment refers to article 27, stating, "protected persons must always be treated with humanity."⁵⁵ The commentary explains that:

[B]y 'inhuman treatment' the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off com-

51. COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 599 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter COMMENTARY].

52. Shana Swiss & Joan E. Giller, *Rape as a Crime of War: A Medical Perspective*, 270 JAMA 612, 614 (1993).

53. *Id.* One phenomenon that appears to be pervasive among rape survivors in the former Yugoslavia is post-traumatic stress disorder, a psychological disorder whose symptoms include nervousness verging on paranoia, sleep disorders, memory impairment and numbing of responsiveness to the external world. NO JUSTICE, NO PEACE, *supra* note 47, at 24.

54. Swiss & Giller, *supra* note 52, at 614.

55. COMMENTARY, *supra* note 51, at 598.

pletely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.⁵⁶

Because of the reasons behind the rape of Muslim women in the former Yugoslavia, rape should qualify as torture and inhuman treatment under article 147 of the ICRC Commentary.⁵⁷ The ICRC Commentary further explains that, "[w]hat is important is not so much the pain itself as the *purpose* behind its infliction."⁵⁸ Foreign correspondents, nongovernmental human rights organizations and United Nations investigative missions all have reported that a central purpose behind the mass rapes of Muslim women by ethnic Serbs is the eradication of the Muslim population⁵⁹ through "ethnic cleansing."⁶⁰ In his Fourth Report on the Situation of Human Rights in the Territory of the former Yugoslavia, the Special Rapporteur noted:

Rape is an abuse of power and control in which the rapist

56. *Id.*

57. *Id.*

58. *Id.* (emphasis added).

59. Roy Gutman, *U.N. Forces Accused of Using Serb-Run Brothel*, WASH. POST, Nov. 2, 1993, at A12; see also Gutman, *supra* note 5. The Commission concluded that the correlation between the decrease in reported rapes and increase in media reports about mass rapes could "indicate that commanders could control the alleged perpetrators if they wanted to. This could lead to the conclusion that there was an overriding policy advocating the use of rape as a method of 'ethnic cleansing', rather than a policy of omission, tolerating the widespread commission of rape." *Final Report of the Commission of Experts*, *supra* note 5, ¶ 237.

A European Community investigative mission into the treatment of Muslim women in former Yugoslavia concluded that:

On the basis of its investigations the mission is satisfied that the rape of Muslim women has been - and perhaps still is - perpetrated on a wide scale and in such a way as to be a part of a clearly recognizable pattern, sufficient to form an important element of war strategy.

European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, U.N. SCOR, 48th Sess., ¶ 13, U.N. Doc. S/25240 (1993) [hereinafter *Warburton Report*] (emphasis added).

60. In the context of the conflict in former Yugoslavia, "ethnic cleansing" means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area." *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, *supra* note 6, ¶ 55.

For background on the history of ethnic cleansing generally and the ethnic cleansing which occurred in the Balkan region during World War II, see Bell-Fialkoff, *supra* note 5, at 110.

seeks to humiliate, shame, degrade and terrify the victim. In all his reports, the Special Rapporteur has emphasized the variety of methods which are used to achieve ethnic cleansing. Rape is one of these methods, as has been stated from the outset. In this context, rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group.⁶¹

To achieve the Serbian objectives, the rapes of Muslim women often follow a typical pattern. As stated by Laurel Fletcher:

First, a village is taken over by Serb armed forces. Once the town is secured, women and men are separated. Women and children are taken to a detention facility and it is in these facilities that the rapes begin. The rapes are often committed in public in front of . . . witnesses, including children. Women are raped repeatedly during the time that they are held.⁶²

In addition to the high level of shame and degradation suffered by the Muslim rape victims as a result of the Muslim social structure, women face rejection by their families and their communities if they speak publicly about their rapes.⁶³

Ms. Fletcher, an attorney who participated in a delegation to the former Yugoslavia for the purpose of enhancing efforts of seeking redress for survivors of rape and other war crimes,⁶⁴ explained the ostracism that many Muslim women face in this way:

Because they have been defiled, their family has been defiled, and by extension their community has been defiled. A woman is bearing different levels of shame which have distinct repercussions. A woman who speaks out about her rape may be

61. *Report of the Special Rapporteur on Human Rights*, *supra* note 7, ¶ 85.

62. Laurel Fletcher et al., *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 320 (1994) (transcribing an edited text of a panel discussion presented at The Tenth Annual Whittier International Law Symposium on June 4 & 5, 1993).

63. One American relief worker was quoted as stating that the family shame brought on by rape was so great that Muslim rape victims were being killed by their relatives. 'Shamed' Muslims Killing Rape Victims, CHI. TRIB., Feb. 10, 1993, § 1, at 5.

64. The Mission was sponsored by the International Human Rights Law Group. The Mission's findings and conclusions can be found in its publication, NO JUSTICE, NO PEACE, *supra* note 47.

subjected to reprisals from her family. There have been reports of husbands who have beaten or abandoned their wives after their wives have revealed that they were raped.

Also, in refugee communities in Croatia, there have been reports that rape survivors who have spoken about being raped were asked to leave the community because the community did not want to be known as being a community of "raped women." These women, who have no means of support, are left in precarious circumstances. It is very difficult at this point for Bosnian Muslim refugees to find adequate housing, medical care, or protection.⁶⁵

Therefore, because ethnic cleansing is the purpose behind the rape of Muslim women in the former Yugoslavia, and because the rape of Muslim women often results in isolation, rejection by family, and profound shame, rape falls within the category of inhuman treatment.

The view that rape constitutes a war crime and may be considered a grave breach under the Conventions was recently promulgated by the U.S. State Department⁶⁶ and also adopted by several nation states in draft charters submitted to the United Nations Secretary General pursuant to Security Council Resolution 808.⁶⁷ Tadeusz Mazowiecki, the United Nations Special Rapporteur on human rights in the former Yugoslavia, also takes the position that rape is a grave breach under article 147 of the Fourth Geneva Convention, explicitly stating that "[r]ape in this context [article 27] is a grave breach of the Fourth Geneva Convention"⁶⁸

It is critical that rape be encompassed within those viola-

65. Laurel Fletcher et al., *supra* note 62, at 321.

66. Meron, *supra* note 14, at 427 n.22 (quoting Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993)). The letter noted that under the Department of the Army Law of War Manual, any violation of the Conventions constituted a war crime and that both the Convention Relative to the Treatment of Prisoners of War and the Convention Relative to the Protection of Civilian Persons in Time of War provided that women specifically be protected against acts of violence and rape. *Id.*

67. For example, France submitted a draft charter that granted the Tribunal subject matter jurisdiction over crimes that included "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and indecent assault." Meron, *supra* note 14, at 427 n.23 (quoting *Possible Provisions for the Statute of the Tribunal*, U.N. SCOR, 48th Sess., art. VI(1)(b)(iv), U.N. Doc. S/25266 (1993)).

68. *Report of the Special Rapporteur on Human Rights*, *supra* note 7, ¶ 89.

tions of the Conventions constituting grave breaches because only these are subject to universal jurisdiction and "therefore can be prosecuted by an international tribunal or by the domestic courts of any country."⁶⁹ Additionally, High Contracting Parties have an obligation to search for persons alleged to have committed or who have ordered the commission of grave breaches, and either bring such persons before their own courts, or hand the accused over to another High Contracting Party or international tribunal for trial.⁷⁰ These obligations are particularly significant to the Tribunal's successful prosecution of persons accused of committing grave breaches in light of the fact that the Tribunal's statute prohibits trials in absentia,⁷¹ and therefore it must rely on states to hand over the accused.⁷²

Whether rapes and other forms of sexual abuse committed in the former Yugoslavia can be prosecuted as grave breaches depends not only on how the international community defines rape, but also on whether one characterizes the conflict in which they occurred as internal or international. The grave breaches provisions of the Conventions, like the Fourth Hague Convention of 1907, apply to international wars only.⁷³ Viola-

69. Dorothy Q. Thomas & Regan E. Ralph, *Rape in War: Challenging the Tradition of Impunity*, 14 SAIS REV. 81, 95 (1994).

70. See *supra* notes 42-43 and accompanying text.

71. The Secretary-General's comments preceding article 20 state that:

A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence.

Secretary-General's Report, *supra* note 4, ¶ 101 (footnote omitted).

72. Article 29 of the Tribunal's statute states that:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Id. art. 29.

73. Theodor Meron, *War Crimes in Yugoslavia and the Development of Inter-*

tions of Common Article 3 of the Conventions⁷⁴ and Additional Protocol II, which concern "armed conflict not of an international character,"⁷⁵ do not constitute grave breaches.⁷⁶

The conflict raging within the former Yugoslavia may at various times be characterized as internal, international or a combination of both.⁷⁷ The artificial distinction between inter-

national Law, 88 AM. J. INT'L L. 78, 80 (1994). The criteria for the application of the Conventions are set forth in common article 2 to the four Conventions which states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

First Geneva Convention, *supra* note 34, art. 2, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Second Geneva Convention, *supra* note 34, art. 2, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Third Geneva Convention, *supra* note 34, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Fourth Geneva Convention, *supra* note 34, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Fourth Geneva Convention, *supra* note 34, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

74. Common article 3 is the only provision of the Conventions which deals with internal armed conflicts. This article establishes the minimum obligations of each party engaged in the internal conflict, but there is no explicit reference to individual criminal responsibility for breaches of these provisions. Rochus J.P. Pronk, *The War Crimes Tribunal for Former Yugoslavia: A Step Forward in International Humanitarian and Criminal Law?* 29 (Apr. 1994) (unpublished paper, on file with author).

75. First Geneva Convention, *supra* note 34, art. 3, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Second Geneva Convention, *supra* note 34, art. 3, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Third Geneva Convention, *supra* note 34, art. 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Fourth Geneva Convention, *supra* note 34, art. 3, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

76. Meron, *supra* note 73, at 80.

77. The conflict may be considered international after April 7, 1992, when the European Community recognized Bosnian independence and the United States recognized the independence of Bosnia-Herzegovina, Croatia and Slovenia, and the subsequent admission of these countries to the United Nations. *Id.* at 81. For a chronology of the events that have occurred in the former Yugoslavia, see generally *BREAKDOWN IN THE BALKANS: A CHRONICLE OF EVENTS; JANUARY, 1989 TO MAY, 1993* (Samantha Power comp., 1993) [hereinafter *CHRONOLOGY*].

The former Yugoslav republics of Serbia and Montenegro have joined together to form a state known as the Federal Republic of Yugoslavia, which they claim is the successor state of the Socialist Federal Republic of Yugoslavia. *Id.* Serbian Guerilla troops and the JNA (the predominately Serbian former Yugoslav Army) have intervened in Bosnia-Herzegovina in support of the Bosnian Serbs. *Id.* The matter is further complicated by the fact that Croatian troops have alternately supported and attacked the predominately Muslim forces of Bosnia-Herzegovina.

national and internal armed conflicts raises the potential anomaly that a Serbian soldier who rapes a Bosnian Muslim may be charged with committing a grave breach, while a Bosnian Serb who rapes a Bosnian Muslim would not, although he could be "tried for Crimes Against Humanity or Genocide."⁷⁸ Consequently, there has been some tentative movement toward erasing the distinction between internal and international conflicts.⁷⁹ "The International Law Commission has made Article 21 of its Draft Code of Crimes against the Peace and Security of Mankind, entitled 'Exceptionally serious war crimes,' applicable to both international and internal armed conflicts"⁸⁰ However, Article 21 has yet to become a norm of international law.

Various authorities on humanitarian law, including The United Nations Commission of Experts, also have expressed the view that the conflicts in the former Yugoslavia are international and thus all the laws of war are applicable.⁸¹ James

Id.

Serbia's intervention into the conflict in Bosnia-Herzegovina on behalf of the Bosnian Serbs has "internationalized" what might have been previously considered a non-international armed conflict, in which case the whole of the Conventions apply. Meron, *supra* note 73, at 81; see also Robert K. Goldman & Louis C. James Scholar, Characterization and Application of International Humanitarian Law in Non-international and Other Kinds of Armed Conflict (unpublished paper, on file with author). Goldman and Scholar contend that the present state of humanitarian law is unclear and problematical regarding such conflicts largely because the law of war is based on an artificial distinction between international (inter-state) armed conflict and non-international (internal) armed conflict, with different rules. *Id.* The solution followed by most international lawyers has been to break down the armed conflict into its international and domestic components, and based on this differentiation, to identify the humanitarian law rules governing relations between the warring parties. See Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 230 INT'L REV. RED CROSS 255, 258-261 (1982), for a description of the various relationships between parties that result in an "internationalized" armed conflict, and the applicability of the humanitarian law to these relationships.

78. Howard Dean, International Humanitarian Law: A Need to Abolish the Distinction Between Internal and International Conflicts 41 (Mar. 28, 1994) (unpublished paper, on file with author).

79. See, e.g., Meron, *supra* note 73, at 83.

80. *Id.* at 80 n.12 (citing *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 270, U.N. Doc. A/46/10 (1991)).

81. Meron, *supra* note 73, at 81 n.14 (citing the *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, *supra* note 6, ¶ 45). Paragraph 45 states that:

[T]he character and complexity of the armed conflicts concerned, com-

C. O'Brien, Attorney-Advisor to the Office of the Legal Advisor, U.S. Department of State, also takes the position that the conflict should be considered international, stating:

[T]hree nations have fought, primarily in the territory of two of them (thus far), with a number of fronts and partisan or proxy groups participating on behalf of each [I]t should not matter that some combatants are citizens of the same nation-state. It is virtually unthinkable that, for example, a Ukrainian fighting for the German Army in World War II would have succeeded in arguing that his fight was internal (against the Soviet state), regardless of the character of the broader conflict.⁸²

Thomas Meron, an international legal scholar, is of the opinion that the Secretary-General's proposals pertaining to war crimes and grave breaches of the Conventions particularly reflect the Security Council's determination that the conflict in the former Yugoslavia is international.⁸³ He noted the Secretary-General's emphasis on the Tribunal's "task of applying existing international humanitarian law."⁸⁴

While experts appear to be in consensus that international humanitarian law should be applied to the conflict in the former Yugoslavia, the Tribunal's jurisdiction extends to crimes committed after January 1, 1991.⁸⁵ This date is more than

bined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.

Id.

82. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 647-648 (1993).

83. Meron concludes that the Secretary-General's proposals on the Tribunal's subject matter jurisdiction, particularly those pertaining to war crimes and grave breaches of the Conventions, are based on the assumption that the conflicts are international as those provisions of law only apply to conflicts of an international character. Meron, *supra* note 73, at 81-82. Additionally, Meron notes that in the *Secretary-General's Report*, *supra* note 4, the Secretary-General emphasized that the Tribunal should apply only those rules of international customary law applicable in international armed conflicts. *Id.* at 82.

84. *Secretary-General's Report*, *supra* note 4, ¶ 29.

85. Article 1 of the Tribunal's statute states that "[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

nine months before Croatia and Slovenia formally seceded from Yugoslavia and nearly a year-and-a-half before the European Union and the United States recognized their independence.⁸⁶ This situation raises the possibility that defendants on trial for crimes committed in the first half of 1991 might challenge the Tribunal's jurisdiction for war crimes or grave breaches.⁸⁷

Following the drafting of the Conventions, the Red Cross adopted various resolutions designed to widen the application of humanitarian law in order to broaden the scope of protected persons.⁸⁸ These efforts culminated in the drafting of the 1977 Protocols I and II Additional to the Geneva Conventions of 1949, which pertained to the protection of victims of international and noninternational war crimes, respectively.⁸⁹ Protocol I was adopted in Geneva on June 8, 1977 and entered into force on December 7, 1978.⁹⁰ It established higher standards of conduct and responsibility in international wars for states, as well as for individuals.⁹¹ It upgraded to the status of international wars "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."⁹² Protocol I mandates that civilians may not be subjected to deliberate individual attacks in time of war since they pose no immediate threat to their adversary.⁹³ As of October

Id. art. 1.

86. Croatia and Slovenia formally seceded from Yugoslavia on September 7, 1991. CHRONOLOGY, *supra* note 77, at 21. Many view the conflict to have begun on June 27, 1991 when Yugoslav JNA troops and machinery began moving towards Slovenia's borders and were met with heavy resistance. *Id.* at 16.

87. See Meron, *supra* note 73, at 80.

88. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987).

89. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; Murphy, *supra* note 36, at 46-48.

90. Murphy, *supra* note 36, at 48.

91. For a commentary on the advances of Protocol I of 1977 over the four Conventions, see Murphy, *supra* note 36, at 46-48.

92. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679 (1994) (quoting Protocol I, *supra* note 89, art. 1(4)).

93. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 204 (1992) (quot-

1994, 135 states were party to Protocol I, making it one of the most widely ratified treaties.⁹⁴ It has been ratified by most members of North Atlantic Treaty Organization (NATO) and a number of major military powers, but it has been explicitly rejected by the United States on the grounds that its provisions provide combatant status to terrorist organizations.⁹⁵

Like the Conventions, Protocol I omits rape from the list of crimes constituting grave breaches⁹⁶ and thus subject to universal jurisdiction. However, rape is specifically prohibited by Article 76(1) of Protocol I, which, under the heading "Protection of Women," states that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."⁹⁷

Article 76 is an advancement over article 27, paragraph 2 of the Fourth Geneva Convention because it offers protection to all women in the territory of parties to the conflict.⁹⁸ Protected persons include nationals of states which are not parties to the Convention and those of neutral and co-belligerent states. However, the protection is not extended to "nationals of a Party to the conflict who are victims of offences against their honour committed on the territory of that Party under circumstances which have no relation to the armed conflict."⁹⁹

Protocol II, presently ratified by 125 states,¹⁰⁰ governs the conduct of internal armed conflicts and supplements Common Article 3 to the Conventions.¹⁰¹ It protects the civilians

ing article 48 of Protocol I, *supra* note 89, which states: "In order to ensure the respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operation only against military objectives.").

94. Meron, *supra* note 92, at 680.

95. For the United States' position on Protocol I and II, see President's Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1987 PUB. PAPERS 88 (Ronald Reagan, Jan. 29, 1987).

96. See Protocol I, *supra* note 89, 1125 U.N.T.S. 3.

97. *Id.* art. 76(1).

98. Francoise Krill, *The Protection of Women in International Humanitarian Law*, 25 INT'L REV. RED CROSS 337, 344 (1985).

99. *Id.*

100. Telephone Interview with Alan Dorson, Librarian for the International Committee of the Red Cross, in New York, N.Y. (July, 1994).

101. Common Article 3 of the Conventions requires parties to the conflict to make provisions for the humane treatment of persons not taking an active part in

and combatants who are no longer taking part in internal wars and conflicts other than those covered by Protocol I. Rape is expressly prohibited by article 4 of Protocol II which forbids "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."¹⁰² The provisions of Protocol II apply to the conduct of Serbian insurgents, regardless of their legal capacity to ratify the protocol, because they qualify under Article I of Protocol II as "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]."¹⁰³

Although rape violates provisions of both Protocol I and II to the Conventions,¹⁰⁴ the Secretary-General's list of instruments that "beyond doubt" embody customary international law does not specifically include the Protocol I and II.¹⁰⁵ How-

the hostilities, and to prohibit specified acts including, *inter alia*, "outrages upon personal dignity, in particular humiliating and degrading treatment." See *supra* note 75.

Common Article 3 of the Conventions is applicable only in situations of non-international armed conflicts. *Id.* It binds both the government and the insurgents stating: "In the case of armed attack not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to apply at a minimum." *Id.*

The provisions of Article 3 of the Tribunal's statute governing violations of the laws and customs of war also embrace violations of the Conventions not constituting grave breaches. Thus, even if rape was not considered as encompassed within the grave breaches of torture or inhuman treatment, and Protocol I and II were found to be beyond the scope of the Tribunal's jurisdiction, rape is specifically prohibited under Article 27 of the Fourth Geneva Convention and would still be considered a war crime. Meron, *supra* note 73, at 79.

102. Protocol II, *supra* note 89, art. 4, 1125 U.N.T.S. at 612.

103. HELSINKI WATCH, *supra* note 93, at 237 (citing Protocol II, *supra* note 89, art. 1, 1125 U.N.T.S. at 611).

104. Rape is expressly prohibited by Article 76, para. 1 of Protocol I, *supra* note 89, 1125 U.N.T.S. at 38, and by Article 4, para. 2(e) of Protocol II, *supra* note 89, 1125 U.N.T.S. at 612.

105. In his report, the Secretary General states:

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and annexed Regulations of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

ever, when voting to approve the statutes for the war crimes tribunal, representatives from the United States, the United Kingdom, and France explained that the charge of war crimes under Article 3 of the Tribunal's statute included all laws of armed conflict in force in the territory of the former Yugoslavia, including the Protocol I and II to the Conventions, as well as customary international law.¹⁰⁶ Moreover, Madeleine K. Albright, the U.S. Ambassador to the United Nations, argued forcefully for an interpretation of Article 3 that would encompass Protocol I and II stating:

[I]t is understood that the "laws or customs of war" referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the Conventions, and Protocol I and II to these Conventions.¹⁰⁷

This construction of the Tribunal's statute is important because atrocities committed in the former Yugoslavia constitute war crimes and grave breaches under Protocol I, which expands the categories of protected persons under the Conventions.¹⁰⁸ Additionally, rape and other offenses occurring prior to the secession of the various Yugoslav republics could be prosecuted under Protocol II.¹⁰⁹

Moreover, all parties to the conflict have either ratified the Conventions and Protocols or made declarations of succession with respect to their obligations under these instruments.¹¹⁰ The four Conventions and Protocol I and II were ratified by the former Yugoslavia in 1950 and 1978, respectively.¹¹¹ The current Yugoslavia, consisting of Serbia and Montenegro, has indicated that it should be recognized as the successor to the former Yugoslavia.¹¹² Accordingly, it has assumed and is

Secretary-General's Report, supra note 4, ¶ 35.

106. O'Brien, *supra* note 82, at 646 (citing *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR, 48th Sess., 3217 mtg. at 11, 15, 19, U.N. Doc. S/PV.3217 (1993)).

107. *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, supra note 106, at 15.*

108. Meron, *supra* note 92, at 684.

109. See HELSINKI WATCH, *supra* note 93, at 201.

110. See *id.* at 201-02.

111. *Id.* at 201.

112. *Id.*

bound by all international obligations of the former Yugoslavia including its obligations under international humanitarian law.¹¹³ Slovenia and Croatia became High Contracting Parties to the Conventions and Protocol I and II on March 26 and May 11, 1992, respectively.¹¹⁴ The government of Bosnia-Herzegovina succeeded to the Geneva Convention and Protocol I and II on December 31, 1992.¹¹⁵ All three states have explicitly declared their intentions to be bound by both the Convention and Protocols.¹¹⁶

Although the Security Council unanimously adopted the Secretary-General's charter for the Tribunal without changes, James O'Brien argues that the interpretive statements of the members should not be viewed as representing what states failed to obtain in negotiations leading up to the endorsement of the statute.¹¹⁷ Instead, he argues that the statements should be viewed as having been negotiated among the members.¹¹⁸ O'Brien notes that these statements reflect the intentions of the states that established the Tribunal and "reasonably interpret the terms of the statute in context and in the light of its object and purpose. [Therefore,] [t]he tribunal should treat them as an integral part of the statute."¹¹⁹ However, at this time it remains unclear whether Protocol I and II to the Conventions will be included within the jurisdiction of

113. Section 208 of the Restatement (Third) of the Foreign Relations Law of the United States provides that "[w]hen a state succeeds another state with respect to particular territory, the capacities, rights and duties of the predecessor state with respect to that territory terminates and are assumed by the successor state, as provided in §§ 209-10." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (1987). Section 210(3) states that "[w]hen part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce." *Id.* § 210.

114. HELSINKI WATCH, *supra* note 93, at 201; M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Resolution 780 (1992)*, 88 AM. J. INT'L L. 784, 794 n.67 (1994).

115. Bassiouni, *supra* note 114, at 794 n.67.

116. *Id.* at 794.

117. O'Brien, *supra* note 82, at 657-58. O'Brien notes that: "The statements are fully consistent with one another and are redundant on issues of special importance . . . [And] [t]he International Court of Justice has relied upon statements made by a state when voting in the General Assembly in determining that state's obligations under the resolution in question." *Id.* at 658 (footnotes omitted).

118. *Id.* at 657.

119. *Id.* at 658 (footnotes omitted).

the Tribunal.

B. Violations of the Laws and Customs of War

The 1907 Convention Respecting the Laws and Customs of War on Land¹²⁰ and the Charter of the Nuremberg Tribunal¹²¹ form the bases for Article 3 of the Tribunal's statute, which gives the Tribunal subject matter jurisdiction over violations of international humanitarian law.¹²² War crimes are committed against the conventional or customary law of war in the course of a conflict by persons "belonging" to one party to the conflict against persons or property of the other side.¹²³ The perpetrator of the crime need not necessarily be a soldier but must be on the opposing side of the conflict.¹²⁴ Article 46 of the Hague Regulations, which states in part that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected,"¹²⁵ can, under a broad interpretation, be construed as covering rape.¹²⁶ For example, the survivors of rape and other forms of gender based violence taking place in the former Yugoslavia "typically experience profound shame, humiliation, a sense of defilement, and guilt."¹²⁷ The husbands of rape victims also experience shame by their failure to protect their wives.¹²⁸ Mass rapes, often committed in public settings, appear calculated to bring the resulting shame on the survivor's family and community.¹²⁹ Furthermore, Muslim culture has attached a profound stigma to rape that has resulted in a re-

120. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

121. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

122. *Secretary-General's Report*, *supra* note 4, ¶ 34.

123. *See supra* note 16.

124. INTERNATIONAL COMMITTEE OF THE RED CROSS, UPDATE ON THE AIDE-MEMOIRE (1992).

125. Convention Respecting the Laws and Customs of War on Land, *supra* note 120, art. 46.

126. Meron, *supra* note 14, at 425.

127. NO JUSTICE, NO PEACE, *supra* note 47, at 23.

128. *Id.*

129. *Id.* In many societies and cultures, women who have been raped are shunned or fear ostracism from their families and communities and mental or physical repulsion from their relatives. AMNESTY INTERNATIONAL, WOMAN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 18 (1991).

luctance of victims to report the crime.¹³⁰

However, the concept of the violation of honor embodied in both Article 27 of the Fourth Geneva Convention¹³¹ and Article 46 of the 1907 Hague Convention is problematic, because it is the victim's husband or male relatives that are traditionally viewed as having been violated by the rape, and not the woman herself.¹³² Additionally, viewing sexual assault as a violation of a woman's honor perpetuates the notion that rape somehow stains its victims.¹³³

Writers have said that "[m]en of a conquered nation traditionally view the rape of 'their women' as the ultimate humiliation, a sexual coup de grace."¹³⁴ This attitude is reflected in the testimony of one Muslim man whose wife was raped at a Serbian run camp:

Every night they took our women and raped them. They knew our customs. They know that there is nothing worse for a Muslim than to take his wife. It is the greatest humiliation a person can suffer If anyone tried to resist, they made an example of him, and no one else could do anything. I was made such an example¹³⁵

"The mischaracterization of rape as a crime against honor," as opposed to a crime against the victim's integrity, has contributed to the failure to prosecute wartime rape.¹³⁶ Therefore, it is

130. See *supra* note 65; see also Elizabeth A. Kohn, *Rape As A Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 204 (1995) (noting that "[b]ecause of their culture, many Bosnian women, especially those in small villages, are ashamed to come forward and testify publicly about the torture they endured").

For an explanation of the importance of women's chastity in Muslim cultures, see generally NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD* (Sherif Hetata trans., 1980).

131. Fourth Geneva Convention, *supra* note 34, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

132. ANN TIERNEY GOLDSTEIN, CENTER FOR REPRODUCTIVE LAW & POLICY, *RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW* 19-20 (1993); Kohn, *supra* note 130, at 203 (stating that "[m]any cultures view the rape of women as an affront to men, women's protectors, and mass rape as a conspiracy against national honor and manhood").

133. TIERNEY GOLDSTEIN, *supra* note 132, at 20.

134. *Id.* (quoting BROWNMILLER, *supra* note 9, at 38); see generally YOUNGINDRA KHUSHALANI, *DIGNITY AND HONOR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS* (1982).

135. U.S. COMMITTEE FOR REFUGEES, *supra* note 46, at 19.

136. Thomas & Ralph, *supra* note 69, at 92.

unwise to bend the meaning of article 46 to encompass rape as a violation of family honor in contravention of the laws and customs of war.

C. Crimes Against Humanity

Crimes against humanity were first formally defined in the Charter of the International Military Tribunal at Nuremberg,¹³⁷ although they had their genesis in the Hague Conventions of 1899 and 1907 and their annexed regulations respecting the laws and customs of war on land.¹³⁸ The Preamble to both of these conventions used the undefined term "laws of humanity."¹³⁹ Prior to the Nuremberg prosecutions, international law had not imposed criminal sanctions for a state's treatment of its own citizens.¹⁴⁰ The Allied Powers justified this expansion of international law by claiming that crimes against humanity could be punished by international courts because the conduct, by its nature, offended humanity.¹⁴¹

The legal elements of crimes against humanity remain unclear. At a minimum, the charge requires that:

1. The specific crimes are committed as part of "state action or policy;" 2. The action or policy is based on discrimination-persecution against an identifiable group of persons; 3. The acts committed are otherwise crimes in the national criminal laws of that State; [and] 4. They are committed by the state officials or their agents in furtherance of state action or policy¹⁴²

However, the IMT and IMTFE imposed a significant restriction on the charge of Crimes Against Humanity by limiting its jurisdiction to acts undertaken "in execution of or in connection with any crime" against peace or war crimes.¹⁴³

137. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 1-2 (1992).

138. *Id.* at 165-66.

139. *Id.*

140. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991).

141. *Id.* at 2555-56.

142. BASSIOUNI, *supra* note 137, at 248. Bassiouni notes that under the law of the Nuremberg Charter, the specific crimes had to be connected to war, but this requirement was removed in post charter legal developments. *Id.*

143. Charter of the International Military Tribunal, *supra* note 121, art. 6(c),

Article 6(c) of the Nuremberg Charter condemned:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁴⁴

The charge of crimes against humanity under the charter of the IMTFE was substantially similar to the Nuremberg Charter. However, it differed by adding to the categories of persons held responsible for the crime and by not making "persecution" subject to "religious" grounds.¹⁴⁵

Following the IMT and the IMTFE, the Allies held a number of additional war crimes trials in their respective zones of occupation.¹⁴⁶ These military tribunals were based on Allied Control Council Law No. 10 (Law No. 10) adopted by the four major Allied powers on December 20, 1945, and on Ordinance No. 7 which authorized the Allies to arrest and try anyone suspected of war crimes.¹⁴⁷ The definition of crimes against humanity embodied in Article II(c) of Law No. 10, and adhered to by these military tribunals, essentially followed the precedent of the IMT and IMTFE with several significant differences. Law No. 10 specifically included imprisonment, rape, and torture within the definition of crimes against humanity.¹⁴⁸ The language of Law No. 10 also omitted the nexus requirement between the crime and the waging of war.¹⁴⁹ However,

59 Stat. at 1547, 82 U.N.T.S. at 288.

144. *Id.*

145. See BASSIOUNI, *supra* note 137, at 34 (discussing Article 5(c) of the Tokyo Charter). Bassiouni states that the first variance between the charters is only in the drafting of the two charters as the same responsibility towards enumerated persons occurs in both, while "[t]he second variance is due to the fact that the Nazi crimes against Jews did not have a counterpart in the Asian conflict." *Id.*

146. *Id.* at 213.

147. WAR CRIMES AND WAR CRIMES TRIALS, *supra* note 31, at 11.

148. BASSIOUNI, *supra*, note 137, at 38-39. The NMT and the U.S. Military Tribunals in Nuremberg interpreted Crimes Against Humanity as requiring the following elements: first, they comprised only grave crimes such as murder and extermination, and not less serious forms of "inhumane acts"; second, these acts constituted crimes against humanity only when committed on a mass scale. *Id.*

149. Article II(1)(c) of Control Council Law No. 10 defined Crimes Against Humanity as: "Atrocities and offences, including but not limited to murder, extermi-

"[t]he Preamble asserted that the law 'was enacted to give effect to the . . . London Agreement of 8 August 1945, and the Charter issued pursuant thereto,' and Article I provided that the Nuremberg Charter was made an integral part of the Control Council Law [Law No. 10]."¹⁵⁰

The nexus requirement between the crime and the waging of war is a clouded issue. "A codification of the 'Nuremberg Principles' adopted by the United Nations General Assembly in 1950 preserved a nexus requirement," but Diane F. Orentlicher¹⁵¹ states that "the principles were intended to be a restatement of Charter/IMT law rather than of potentially broader international law."¹⁵² The Draft Code of Offenses Against the Peace and Security of Mankind,¹⁵³ prepared by the International Law Commission, omitted a war nexus element from the definition of crimes against humanity set forth in this draft international criminal code. Indeed, its Special Rapporteur asserted that the autonomy of crimes against humanity from war crimes "has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict."¹⁵⁴ Although the draft code has not been

nation, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace And Against Humanity, Dec. 20, 1945, art. II(1)(c), *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at XIX (1951).

150. Orentlicher, *supra* note 140, at 2589 n.231 (quoting the preamble to Control Council Law No. 10, *supra* note 149, at XVIII). Orentlicher notes that the IMT tribunals reached differing conclusions when faced with the issue of whether crimes against humanity must be limited to war-related acts. *Id.* at 2589.

151. Diane Orentlicher is a professor of law at The American University, Washington College of Law. She is a member of the advisory board to the Women in Law Project of the International Human Rights Law Group and chaired the Law Group's delegation to the former Yugoslavia in February 1993 to provide training to local organizations documenting rape and other violations of international law, and to assess the need of survivors of those violations.

152. *Id.* at 2590 n.233 (citing *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950)).

153. *Report of the International Law Commission on the Work of its Forty-Third Session*, *supra* note 80.

154. Doudou Thiam, Special Rapporteur, *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, Int'l Law Comm'n, 38th Sess., at 6, U.N. Doc. A/CN.4/398 (1986).

adopted, international criminal law experts such as Cherif Bassiouni¹⁵⁵ have taken the position that subsequent international instruments to the Charter of the International Military Tribunal have affirmed that crimes against humanity need not be linked to actual combat.¹⁵⁶ Orentlicher takes the position that, while international instruments coming after the Charter have failed to decide the issue of whether a war nexus is a necessary element to crimes against humanity, the original justification for this element is no longer necessary.¹⁵⁷ "Subsequent ratification of the principles of law applied by the IMT has obviated the ex post facto concerns underlying insistence on the nexus requirement at Nuremberg."¹⁵⁸

The statute of the international war crimes tribunal and the Secretary-General's commentary are in conflict with regard to the need for a war nexus to the crime. The Secretary-General's report asserts that "[c]rimes against humanity are aimed at any civilian population and are prohibited *regardless of whether they are committed in an armed conflict*, international or internal in character."¹⁵⁹ However, Article 5 of the Statute states that "[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes *when committed in armed conflict*, whether international or internal in character"¹⁶⁰ Orentlicher believes that the statute's requirement that the crimes be committed in armed conflict should be understood as a jurisdictional limitation of the Tribunal and not as a codification of crimes against humanity.¹⁶¹ She states that such an interpretation is consistent with the fact that the Tribunal was established as an enforcement action under Chapter VII of the U.N. Charter.¹⁶²

The Tribunal's statute also leaves unsettled the meaning

155. M. Cherif Bassiouni is a professor of law at DePaul University and President of DePaul's International Human Rights Law Institute. He was a member of the Commission of Experts and served as its chairman following the resignation of Frits Kalshoven of the Netherlands in October 1993.

156. BASSIOUNI, *supra* note 137, at 191.

157. Orentlicher, *supra* note 140, at 2590.

158. *Id.*

159. *Secretary-General's Report*, *supra* note 4, ¶ 47 (emphasis added).

160. *Id.* art. 5 (emphasis added).

161. Diane Orentlicher, *Yugoslavia War Crimes Tribunal*, ASIL NEWSL., June-Aug. 1993, at 1, 3 (ASIL Focus insert).

162. *Id.*

of the term "committed in armed conflict."¹⁶³ States have issued clarifying statements in order to resolve this ambiguity, when Resolution 827 was adopted establishing the Tribunal. To remove any possibility that the term "when committed in armed conflict" might be construed to cover *only* acts in the course of fighting, the U.S. Ambassador to the United Nations, Madeleine K. Albright, observed that Article 5 "applies to all acts listed in that article, when committed . . . *during a period of armed conflict in the territory of the former Yugoslavia . . .*"¹⁶⁴

Regardless of the controversy over the war nexus element, crimes against humanity differ from war crimes in several ways. War crimes are committed during war against nationals of another state. On the other hand, crimes against humanity obviate the requirement that the victims be of a different nationality than the perpetrators.¹⁶⁵ Additionally, crimes against humanity require that the specific crimes are committed as part of state action or policy of discrimination or persecution against an identifiable group of persons.¹⁶⁶

Although crimes against humanity cannot be committed unless they are part of a state's policy, the perpetrators of each specific crime, such as rape, are individually accountable for each crime perpetrated against the individual victim.¹⁶⁷ Thus, there is no immunity for those who commit crimes under the orders of a superior.¹⁶⁸ Furthermore, those who encourage or implement the policy can be charged with crimes against humanity even though they did not personally carry out the crime.¹⁶⁹ As a consequence of the "state action" requirement,

163. *Id.*

164. *Id.*

165. BASSIOUNI, *supra* note 137, at 179. The Charters of the IMT and IMTFF required a connection between crimes against humanity and war crimes or crimes against peace, but this limitation was removed in Control Council Law 10. *Id.* at 186. The necessity of the nexus to war today remains in dispute.

166. *Id.* at 248.

167. *Id.*

168. This position has been adopted by the Tribunal. Article 7(4) of the Tribunal's statute states: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." *Secretary-General's Report, supra* note 4, art. 7(4).

169. Two of the Nuremberg defendants, Julius Streicher and Baldur von Schirach, were only charged with crimes against humanity. BASSIOUNI, *supra* note

the traditional immunity of obedience to superior orders has been eliminated.¹⁷⁰

Crimes against humanity are collective crimes that can only be committed pursuant to a state policy because "their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes" ¹⁷¹ Numerous news reports have asserted that the rapes of Bosnian women are being committed as part of a state policy to ethnically cleanse Muslims from large regions of Bosnia.¹⁷² Captured Serbs claim they were ordered or encouraged to rape by their commanding officers.¹⁷³ In his article, *Politics of Rape*, George Rodrigue reports that, while all sides in the war have attacked one another, only Karadzic's Serb nationalists have made rape a national policy. He writes:

They raped as they invaded villages. And again as they pillaged and 'ethnically cleansed' entire cities, attacking the women after killing or caging the men.

They raped in concentration camps built to warehouse and torture their former Muslim neighbors.

They raped in bordellos created for the convenience of their soldiers, police and local leaders. For troops too busy to patronize those rape centers, they dispatched bus-loads of teen-age Muslim girls to the front lines.¹⁷⁴

137, at 187. Von Schirach was involved in the forced labor program in Vienna and the deportation of Jews from that city while Streicher was an anti-Semite who advocated the persecution of Jews through his magazine publication, but did personally carry out any crimes against them. *Id.* Some Nuremberg authoritarians have questioned the basis of the IMT's charge against Streicher. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 426 (1992).

Article 7 of the Tribunal's statute places individual criminal responsibility on those who planned, instigated or aided in the execution of a crime against humanity and holds superiors responsible for the crimes of their subordinates if they "knew or had reason to know that the subordinate was about to commit such acts" and failed to take preventive measures. *Secretary-General's Report*, *supra* note 4, art. 7. Article 7 also does away with head of state immunity. *Id.*

170. BASSIOUNI, *supra* note 137, at 249.

171. *Id.* at 248.

172. See, e.g., Roy Gutman, *Mass Rape: Muslims Recall Serb Attacks*, *NEWSDAY*, Aug. 23, 1992, at 5, 36; Roy Gutman, *Rape Camps: Evidence Serb Leaders in Bosnia OK'd Attacks*, *NEWSDAY*, Apr. 19, 1993, at 5 [hereinafter Gutman, *Serb Leaders OK'd Attacks*]; see also John F. Burns, *A Serbian Fighter's Path of Brutality: A Killer's Tale*, *N.Y. TIMES*, Nov. 27, 1992, at A1, A12.

173. See *infra* notes 268-75 and accompanying text.

174. George Rodrigue, *Politics of Rape*, *DALLAS MORNING NEWS*, May 5, 1993,

A report by a team of medical experts, charged by the Special Rapporteur to investigate the widespread occurrence of rape in the former Yugoslavia, concluded that "[i]n Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing."¹⁷⁵ After a preliminary visit, a special mission of the European Council concluded that the rapes of Muslim women were widespread and "point[ed] towards a deliberate pattern."¹⁷⁶ The delegation frequently heard that a repeated feature of Serbian attacks on Muslim towns and villages was the use of rape or the threat of rape as a weapon of war. The mission concluded: "documents from Serbian sources . . . very clearly put such actions in the context of an expansionist strategy. . . . [Thus,] rape cannot be seen as incidental to the main purpose of the aggression but as serving a strategic purpose in itself."¹⁷⁷ The Commission of Experts also concluded that many rapes appeared to be part of an overall pattern strongly suggesting that a systematic rape policy existed in certain areas.¹⁷⁸

The element of discrimination required for crimes against humanity "is the exclusion, without valid legal justification, of a group of persons from the protection of criminal laws afforded to others, or the subjection of that identified group of persons to laws from which others are exempted, with the result that harm befalls the targeted group."¹⁷⁹ While all of the sides to the conflict in Bosnia-Herzegovina have committed rapes,¹⁸⁰ human rights groups as well as a U.N. investigative mission have concluded that Muslims comprise the vast majority of victims and the Serbian military and para-military forces bear the responsibility for the vast majority of human rights

at 1A, 26A.

175. *Report of the Special Rapporteur on Human Rights*, *supra* note 7, ¶ 84.

176. *Warburton Report*, *supra* note 59, ¶ 20.

177. *Id.* ¶¶ 19-20.

178. *Final Report of Commission of Experts*, *supra* note 5, ¶¶ 241-253.

179. BASSIOUNI, *supra* note 137, at 251.

180. See generally HELSINKI WATCH, 2 WAR CRIMES IN BOSNIA-HERZEGOVINA (1993) [hereinafter HELSINKI WATCH II]. In this volume, Helsinki Watch documents numerous incidents of rape of Muslim women by Serbs and also the rape of two Serbian women by Croatian forces. *Id.* It notes that these women were located for them by the Yugoslav State Commission on War Crimes and Genocide in Belgrade. *Id.* Although the volume states that all the parties to the conflict in Bosnian-Herzegovina have used rape as a weapon of war, it contains no reports of rapes of Serbian women by Muslim forces. *Id.*

abuses, including rape.¹⁸¹

Crimes against humanity require that acts committed against targeted groups are:

- (a) criminal in the national criminal laws of the state if they were committed against anyone other than those belonging to the discriminated-persecuted group; (b) that the criminality of the conduct carried out against the targeted group is not enforced; or (c) the acts performed constitute a violation of international criminal law.¹⁸²

Rape was prohibited under the laws of the former Yugoslavia.¹⁸³ Rape victims have complained of local authorities' apparent complicity in the rapes or refusal to prosecute the perpetrators, even when the rapes were occurring next door to the police station.¹⁸⁴

Moreover, as discussed above, rape may be violative of the Conventions¹⁸⁵ and provisions of Protocol I and II to the Conventions.¹⁸⁶ All the parties to the conflict in the former Yugoslavia have acceded to the obligations under the Geneva Convention and Protocol I and II.¹⁸⁷ As discussed in the following section, rape may constitute genocide in violation of the Con-

181. Amnesty International concludes that "all sides have committed these abuses, but . . . Muslim women have been the chief victims and the main perpetrators have been members of Serbian armed forces." AMNESTY INTERNATIONAL, *supra* note 5, at 3; see also *Report of the Special Rapporteur on Human Rights*, *supra* note 7. The report adopted the findings of an international team of medical experts that investigated the allegations of mass rape. The Special Rapporteur's report stated that "[w]hile the team of experts has found victims among all ethnic groups involved in the conflict, the majority of rapes that they [the team of experts] have documented had been committed by Serb forces against Muslim women from Bosnia and Herzegovina." *Id.* ¶ 84.

182. BASSIOUNI, *supra* note 137, at 253.

183. Swiss & Giller, *supra* note 52, at 613 (referring to crime rate statistics on rape in the Federal Republic of Yugoslavia between 1979-1988).

184. See, e.g., Kifner, *supra* note 1, at 1 (stating that "[r]efugees and relief workers describe a 22-month reign of terror in the Banja Luka region, where organized gangs of Serbs, aided by the police and by the military authorities, are going street by street, systematically driving out Muslim and Croat families through intimidation that includes murder, rape, beatings, robbery"); see also Gutman, *Serb Leaders OKd Attacks*, *supra* note 172, at 5 (stating that in the Bosnian town of Foca, a sports hall located next door to a police station was used as a "rape camp" where Muslim women were subjected to repeated rapes by the Serb military police and local police claimed that they had no power to intervene).

185. See *supra* notes 45-68 and accompanying text.

186. See Meron, *supra* note 14, at 426.

187. HELSINKI WATCH, *supra* note 93, at 201.

vention for the Prevention and Punishment of the Crime of Genocide.¹⁸⁸ In addition, rape violates the provisions of Protocol I and II to the Conventions. Consequently, rapes occurring in the context of the conflict constitute crimes under both domestic and international law.

The requirement that acts be committed by state officials or agents in furtherance of a state policy means that the discriminatory, criminal acts "be performed by agents of the State."¹⁸⁹ The state agents "may be military, para-military, police personnel, other public officials or private individuals acting under the orders of or at the behest of responsible state officials."¹⁹⁰ With regard to the Bosnian conflict, media reports have quoted Bosnian-Serb soldiers who claimed that they were ordered to commit rapes by their superiors,¹⁹¹ and victims who contended that state officials and military superiors not only authorized a policy of rape, but on occasion participated in the implementation of this policy.¹⁹²

In addition to the elements of crimes against humanity discussed above, Helsinki Watch adds the requirement that the crimes be committed on a "mass scale."¹⁹³ Orentlicher writes that this element is reflected in the phrase "any civilian population" which appears in the definition of crimes against humanity contained within both the Nuremberg Charter and Law No. 10.¹⁹⁴ In *the Justice Case*, tried pursuant to Law No. 10, the IMT noted that specific criminal acts constituted "evidence of the intentional participation of the defendants and serve as

188. See *infra* Section III.D.

189. BASSIOUNI, *supra* note 137, at 255.

190. *Id.*

191. See, e.g., Burns, *supra* note 172, at A1 (reporting that "Serbian fighters were encouraged to rape women and then take them away to kill them").

192. See, e.g., Roy Gutman, *Rapes, Killings are Described by Camp Survivors*, THE PLAIN DEALER, Feb. 23, 1993, at 1-A, 8-A (in which Jadranka Cigelj, an ethnic Croat who was repeatedly raped along with other women detainees at Omarska, a Serbian detention camp, alleged that one of the men who raped her was the commander of the guards at the camp); Gutman, *Serb Leaders OK'd Attacks*, *supra* note 172, at 5 (stating that a three-month Newsday investigation into ethnic cleansing in Foca, including the operation of a rape camp adjacent to the police station, "suggests that those directing the process were members of Karadzic's inner circle").

193. This element was included in the Memorandum of Law, Elements of the International Crime of "Crimes Against Humanity" Applied in the Former Yugoslavia. HELSINKI WATCH II, *supra* note 180, at 394 app. A.

194. Orentlicher, *supra* note 140, at 2588 n.225.

illustrations of the nature and effect of the greater crimes charged in the indictment."¹⁹⁵ Orentlicher concludes that individual crimes of murder and rape "were punishable as crimes against humanity if undertaken as part of a mass program of similar crimes."¹⁹⁶

Estimates of the number of women raped in Bosnia-Herzegovina vary widely from 10,000 to 60,000.¹⁹⁷ In October 1992, the Bosnian Interior Ministry estimated that 50,000 women and girls had been raped.¹⁹⁸ A study by the European Union estimated that Serbian forces had raped 20,000 Muslim women in Bosnia; however, the study did not cite evidence to support this figure.¹⁹⁹ Catharine MacKinnon, a prolific feminist writer and University of Michigan law professor who has sued Bosnian Serb leader Radovan Karadzic under the Alien Tort Claims Act²⁰⁰ and the Torture Victim's Protection Act²⁰¹ on behalf of two victims of atrocities committed in the former Yugoslavia,²⁰² has estimated that more than 50,000

195. *Id.* (citing *United States v. Altstoetter*, (Case No. 3), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 149, at 985).

196. Orentlicher, *supra* note 140, at 2588 n.225.

197. Swiss & Giller, *supra* note 52, at 613.

198. Aryeh Neier, *Watching Rights*, THE NATION, Mar. 1, 1993, at 259.

199. *Warburton Report*, *supra* note 59, ¶ 17.

200. The Alien Tort Claims Act, 28 U.S.C. § 1350 (1988), gives United States federal courts original jurisdiction over actions brought by aliens for civil torts committed against them in violation of international law, provided that the defendant is served within the United States. This act, enacted in 1789, was used in the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), to impose US federal jurisdiction over a defendant who commits a tort in violation of international law outside the United States. In *Filartiga*, the Circuit Court held that it had jurisdiction to hear the civil action of a Paraguayan citizen whose son had been tortured to death by a former police official. *Id.* at 887. The plaintiff obtained personal jurisdiction over the defendant by serving him while he was in the United States. *Id.* at 879.

201. The recently amended Torture Victim Protection Act, 28 U.S.C. § 1350 (Supp. V 1994), provides federal jurisdiction for a civil action against an individual who subjects another individual (alien or U.S. national) to torture.

202. See Yolanda S. Wu, *Genocidal Rape in Bosnia: Redress in the United States Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L.J. 101, 107 (1993). Professor MacKinnon and the NOW Legal Defense Fund filed suit on March 2, 1993 in the United States District Court in the Southern District of New York. *S.K. v. Karadzic*, No. 93 Civ. 1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993). The lawsuit sought compensatory and punitive damages and also injunctive relief for personal injury due to genocidal acts. *Doe v. Karadzic*, 866 F. Supp. 734, 735 (S.D.N.Y. 1994) (citing Plaintiffs Complaint at ¶ 1, *S.K. v. Karadzic*, No. 93 Civ. 1163 (PKL)). The plaintiffs included a rape survivor and her two twin sons, one

women and girls have been raped and another 100,000 have been killed.²⁰³ However, she has not proffered any evidence to support these estimates.²⁰⁴ Therefore, whether rape was com-

dead, one living. Wu, *supra*. The dead son was decapitated in her arms by a Serbian soldier and the mother was gang raped more than ten times a day during 21 days spent in a detention camp. *Id.*

Karadzic had been previously served in another suit. Doe v. Karadzic, No. 93 Civ. 0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993). The February class action suit was brought by the Center for Constitutional Rights, the City University of New York Law School, the CUNY International Women's Human Rights Clinic and the International League for Human Rights. Wu, *supra*, at 106. It sought compensatory and punitive damage for rape and other gross human rights abuses committed by forces under Karadzic's command and damages for torture and other violations of international law. *Karadzic*, 866 F. Supp. at 735 (citing Plaintiff's Complaint at ¶¶ 1, 6, Doe v. Karadzic, No. 93 Civ. 0878 (PKL)). The plaintiffs were two Bosnian women, identified as Jane Doe I and Jane Doe II, now living in Zagreb, Croatia. Wu, *supra*, at 107. Jane Doe I was raped on eight occasions and had her breasts slashed; Jane Doe II was beaten and witnessed the gang rape of her mother. *Id.* The complaint identified a class of all women and men who suffered rape, execution and other torture by Bosnian Serb military forces. *Id.* at 106-07.

"Karadzic . . . retained former United States Attorney General Ramsey Clark to represent him in both suits." *Id.* at 108. The above suits were joined into *Karadzic*, 866 F. Supp. 734. Defendant Karadzic's motion to dismiss for lack of subject matter jurisdiction was granted and the actions were dismissed. *Id.*

203. Judy Mann, *Rape and War Crimes*, WASH. POST, Jan. 13, 1993, at D22.

204. See Neier, *supra* note 198, at 259. Human rights activists have criticized the use of unsubstantiated estimates of the number of women raped. Aryeh Neier, former director of Human Rights Watch and currently president of the Open Society Fund, stated:

Citing inflated numbers that are not based on firm evidence could depreciate the horror of the crimes if it turns out that "only" 2,000 or 5,000 rape victims can be identified. Moreover, there have been times when cynicism engendered by past exaggerations has made the world unwilling to respond to the suffering of victims of great atrocities.

The most notable example of the pernicious effect of overstatement occurred as a result of the horrifying stories during World War I about German mutilations of Belgian babies and rapes of Belgian nuns. After the war, a Belgian commission of inquiry found that these atrocity stories, which had been based on hearsay, could not be confirmed. The consequences were long-lasting. As George Orwell wrote a quarter of a century later, in March 1944: "Anyone who tried to awaken public opinion during the years of Fascist aggression from 1933 onwards knows what the after-effects of that hate propaganda were like. 'Atrocities' had come to be looked on as synonymous with 'lies.'"

Id.

Kenneth Anderson, a law professor who has monitored human rights in Yugoslavia on behalf of Human Rights Watch, has also decried MacKinnon's use of unsupported statistics. In scathing criticism of MacKinnon, Anderson writes:

Words do not fail, however, when it comes to assessing the contributions of University of Michigan law professor Catharine MacKinnon to promoting the rule of law in the former Yugoslavia. Professor MacKinnon has,

mitted on a mass scale is factually uncertain.

However, some experts, such as M. Cherif Bassiouni, believe that the discrimination element "evidences the collective nature of the crime" and that "a limited number of persons in a discriminated category, no matter how defined, should suffice."²⁰⁵ Bassiouni writes that the *intent* of the policy of targeting victims should be the controlling element.²⁰⁶ In this regard, the European Union mission's conclusion that rapes are being committed with the intent of ethnically cleansing regions in Bosnia-Herzegovina would satisfy this discrimination element.²⁰⁷

While the requisite elements of crimes against humanity remain ambiguous, Orentlicher states that the "enduring significance" of these elements can best be understood by the world community's powerful commitment that "it will not countenance impunity for massive atrocities against persecuted groups."²⁰⁸ Systematic rapes are examples of such massive atrocities which must be considered a crime against humanity

in my estimation, done more than any single person to trivialize the issue of rape as a method of warfare in this conflict-particularly through her use of specious statistics. . . . After a certain point, of course, one runs out of things to say to those, like Professor MacKinnon, who cannot be overly bothered with the facts because they prefer the Big Metaphor.

Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT'L L. 385, 397 n.39 (1993).

"While the true numbers [of rapes] may be very high, unsubstantiated claims risk creating questions about the credibility of the numbers themselves and the scale of human rights violations against women in general." Swiss & Giller, *supra* note 52, at 613. Swiss and Giller suggest using medical data on abortions, deliveries, and known pregnancies due to rape to determine the prevalence of rape. *Id.* By way of illustration, the authors cite the methods of the Warburton Commission sent by the United Nations to investigate reports of rape in the former Yugoslavia in 1993. *Id.* Using a small sample of six hospitals in Bosnia, Croatia, and Serbia, the team identified 119 pregnancies that resulted from rape. *Id.* Using medical studies estimating that a single act of unprotected intercourse will result in pregnancy between 1 and 4 % of the time, the team concluded that the 119 pregnancies represented some 11,900 rapes. *Id.* However, the authors recognized that under-reporting, along with the reluctance of physicians to ask women seeking abortions whether they had been raped, would lead to under-reporting of the crime, while multiple and repeated rapes of the same women were often over-reported, and could lead to an overestimate as to the number of women (as opposed to the number of incidents of rapes) involved. *Id.*

205. BASSIOUNI, *supra* note 137, at 251.

206. *Id.* at 252 (emphasis added).

207. Warburton Report, *supra* note 59, ¶ 20.

208. Orentlicher, *supra* note 140, at 2595.

and its perpetrators punished.

D. Violations of the Genocide Convention

On December 11, 1948, the fledgling United Nations adopted its first major human rights instrument, the Convention for the Prevention and Punishment of the Crime of Genocide.²⁰⁹ The Convention was drafted in response to the atrocities committed by the Nazis during World War II.²¹⁰ The term "genocide" was coined by Polish attorney, Raphael Lemkin, to describe "the destruction of a nation or of an ethnic group."²¹¹ Lemkin defined genocide as both the "mass killings of all members of a nation," and the "coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."²¹² Although the NMT dealt with the substantive charge of genocide in great detail,²¹³ it did not fully develop the elements of the offense.²¹⁴

209. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

210. Matthew Lippman, *The 1948 Convention on the Prevention And Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994). Although the Nuremberg defendants were accused of committing genocide against the Jews, Poles and Gypsies, under Count Three—Violations of the Laws and Customs of War, none of them were specifically charged with the crime of genocide. *Id.* at 5. The four charges under the Charter for the International Military Tribunal were: "(1) common plan or conspiracy, (2) crimes against peace, (3) war crimes, and (4) crimes against humanity." WAR CRIMES AND WAR CRIMES TRIALS, *supra* note 31, at 10.

211. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (Howard Fertig Inc. 1973) (1944).

212. *Id.* Genocide, according to Lemkin, does not necessarily entail the immediate destruction of a group or nation. *Id.* It may also involve coordinated actions against a group's culture, religion, language, social institutions, and physical integrity which are undertaken with the intent to annihilate the group. *Id.* Lemkin notes that although acts of genocide target individuals, the ultimate aim is to exterminate the group. *Id.* Genocide is typically comprised of two phases: the destruction of the cultural and social life of the "oppressed group" and the imposition of the national pattern of the "oppressor." *Id.* Alternatively, the indigenous population may be partially or totally expelled and their territory colonized by the occupying power's own nationals. *Id.*

213. "The Nuremberg defendants were indicted for genocide under both the war crimes and crimes against humanity. The International Military Tribunal, in Count Three—war crimes—charges the defendants with the murder and ill-treatment of civilian populations. In particular, the defendants are alleged to have 'conducted deliberate and systematic genocide . . .'" Lippman, *supra* note 210, at 5.

214. *Id.* at 6.

Article I of the Genocide Convention asserts that genocide is a crime under international law regardless of whether it occurs during time of peace or war.²¹⁵ Matthew Lippman notes that genocide is a war crime when committed during war, but it is most aptly described as an aggravated crime against humanity.²¹⁶ Lippman, who served as of counsel for Bosnia-Herzegovina in its suit against the current Yugoslavia (Serbia and Montenegro) in the International Court of Justice,²¹⁷ and has written extensively about genocide,²¹⁸ says that genocide, depending on the circumstances, may constitute a crime against humanity as well as a war crime although it is not identical to either offense.²¹⁹ Unlike war crimes, genocide may occur outside the parameters of armed conflict.²²⁰ It "is distinguished from other crimes against humanity, such as mass murder or racial and religious persecution, by the fact that it requires a *specific intent* to exterminate a group."²²¹

215. Article I states that "[t]he Contracting Parties confirm that genocide, whether committed in the time of peace or time of war, is a crime under international law which they undertake to prevent and to punish." Genocide Convention, *supra* note 209, art. I, 78 U.N.T.S. at 280.

216. See Lippman, *supra* note 210, at 11. Lippman also notes that the Israeli District Court of Jerusalem has recognized that genocide falls within the definition of crimes against humanity: "[I]t is superfluous to add that the 'crime against the Jewish people,' which constitutes the crime of 'genocide,' is nothing but the gravest type of 'crime against humanity . . .'" *Id.* at 9 n.48 (citing Attorney General of the Government of Israel v. Adolf Eichmann, 36 INT'L L. REP. 5, 41 (1968), *aff'd*, Text of Judgment of the Supreme Court, 36 INT'L L. REP. 277 (1968)).

217. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 3 (Apr. 8).

218. See, e.g., Matthew Lippman, *The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture*, 15 LOY. L.A. INT'L & COMP. L.J. 395 (1993); Matthew Lippman, *They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary*, 23 CAL. W. INT'L L.J. 257 (1993); Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1 (1992); Matthew Lippman, *Nuremberg and American Justice*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 951 (1991); Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1 (1991); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1985).

219. Lippman, *supra* note 210, at 11.

220. Article I states that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and to punish." Genocide Convention, *supra* note 209, art. I, 78 U.N.T.S. at 280.

221. Lippman, *supra* note 210, at 11-12 (emphasis added).

Crimes against humanity are punishable under customary international law and are therefore binding on all members of the international community.²²² "Accordingly, the prohibition on genocide, as a crime against humanity, is applicable to states which have failed to ratify the Genocide Convention."²²³ Stefan Glaser explains the distinction between genocide and crimes against humanity as follows:

It is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act - for example, murder - may be, or rather may be described as, either a crime against humanity or an act of genocide, depending on the motives of the person committing it; if his aim is to eliminate the victim because of the latter's race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, whereas if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it will qualify as genocide.²²⁴

The element of intent in the crime of genocide²²⁵ means that "[n]egligent or reckless acts which result in the destruction of a group . . . do not satisfy the specific intent requirement of Article II of the Genocide Convention."²²⁶ The phrase "with intent" centers around the degree of mens rea necessary

222. *Id.* at 12 n.68 (citing *Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other*, U.N. Secretariat, at 1, 6, U.N. Doc. E/AC.25/3 (1948)).

223. Lippman, *supra* note 210, at 12 n.68.

224. *Id.* (quoting STEFAN GLASER, *DROIT INTERNATIONAL PÉNAL CONVENTIONNEL* 109 (1970)).

225. Bill Frelick, *Refugees: Contemporary Witnesses to Genocide*, in *GENOCIDE WATCH* 45, 47 (Helen Fein ed., 1992). Article II is the heart of the Convention and defines the crime of genocide as follows:

In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 209, art. II, 78 U.N.T.S. at 280.

226. Lippman, *supra* note 210, at 27.

to establish guilt, although this issue has never been fully resolved.²²⁷ Consequently, in the absence of an explicit affirmation or confession by the defendant, the element of intent must be established by evidentiary material in light of surrounding circumstances.²²⁸

In most genocide cases, the evidence of intent is difficult to obtain. Kurt Jonassohn notes that the Holocaust is the only case in which the perpetrators' leader wrote a book outlining his genocidal plans.²²⁹ However, Jonassohn believes that the element of intent can be proven by "obtaining accurate and reliable information about killing operations."²³⁰ Bill Frelick, a senior policy analyst with the U.S. Committee for Refugees, agrees that "[p]atterns of persecution are important in establishing intent,"²³¹ and explains that testimony from refugees is one way of obtaining information on genocide.²³² Other scholars have proposed definitions of genocide that do away with the intent requirement.²³³ However, as discussed previously, it is the difficulty of proving intent that distinguishes

227. In defining genocide, Lemkin used words such as "aiming at" and "the objectives of such a plan," but transcripts of the debates during the drafting of the Convention held a varied array of interpretations as to the required degree of *mens rea*. Bunyan Bryant & Robert H. Jones, Comment, *The United States and the 1948 Genocide Convention*, 16 HARV. INT'L L.J. 683, 692 (1975).

For example, during a meeting of the Sixth Legal Committee of the U.N. General Assembly, the Soviet Union, supported by the French, proposed the words "aimed at the physical destruction" of groups instead of with "intent to destroy" groups, objecting that "intent" centered on the likelihood that a defendant could use the requirement as a basis for denying guilt for lack of intent. Lippman, *supra* note 210, at 26 & nn.170-73 (citing U.N. GAOR 6th Comm., 3d Sess., 73d mtg. at 97 (1948)). In contrast, the United States argued that intent was an important factor in the definition of the crime of genocide. *Id.* at 26 n.174.

228. Gabriel Eckstein, *Acts of Rape in the Former Yugoslavia: A Crime of Genocide Under Article II of the Genocide Convention?* 15 (Fall 1993) (unpublished paper, on file with author).

229. Kurt Jonassohn, *What is Genocide?*, in GENOCIDE WATCH, *supra* note 224, at 17, 20 (citing generally ADOLF HITLER, MEIN KAMPF (Ralph Manheim trans., Houghton Mifflin 1971) (1924)).

230. Jonassohn, *supra* note 229, at 20-21.

231. Frelick, *supra* note 225, at 49.

232. *Id.* at 54.

233. See generally GENOCIDE AND THE MODERN AGE (Isidor Wallimann & Michael N. Dobkowski eds., 1987); Israel W. Charny, *Toward a Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 75 (George J. Andreopoulos ed., 1994). Israel Charny proposes a generic definition of genocide in which the term refers to the "mass killing of a substantial number of human beings, when not in the course of military action against the military forces of an avowed enemy" *Id.*

genocide from crimes against humanity.²³⁴

Likewise, the definition of the word "destroy" is not included in the Genocide Convention. However, it is clear from the list of acts comprising genocide set forth in Article II of the Convention,²³⁵ as well as scholarly interpretation, that the term "destroy" has a broad meaning and goes beyond the absolute destruction of the individual members of the national, ethnic, racial or religious groups.²³⁶ According to Lemkin, genocide does not necessarily entail the immediate destruction of a group or nation, but may involve coordinated actions against a group's culture, religion, language, social institutions, and physical integrity which are undertaken with the intent to annihilate the group.²³⁷ He explains that although acts of genocide target individuals, the ultimate aim is to exterminate the group.²³⁸

Lemkin claims that genocide typically is comprised of two phases: (1) the destruction of the cultural and social life of the "oppressed group" and (2) the imposition of the national pat-

234. See *supra* notes 225-28 and accompanying text.

235. Genocide Convention, *supra* note 209, art. II, 78 U.N.T.S. at 280.

236. Article II of the Genocide Convention limits its applicability to persecuted members of "national, ethnical, racial or religious" groups. *Id.*

Some scholars have criticized the omission of other categories such as social, political, and economic groups from the Convention's definition. See generally Jonassohn, *supra* note 229; Barbara Harff, *Recognizing Genocides and Politicides*, in GENOCIDE WATCH, *supra* note 225, at 27. However, efforts to amend the Convention have thus far proved unsuccessful. See Jonassohn, *supra* note 229, at 18.

Jonassohn writes that this lack of success is particularly puzzling given the 1951 U.N. Convention Relating to the Status of Refugees which defines a refugee as "any person who, . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality." *Id.* (citing Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152). Jonassohn states that "[t]hese two conflicting definitions, arising from the same organization, seem to produce the paradox that some people fleeing from genocide are recognized as refugees while those unable to flee from the same genocide are not acknowledged as being its victims." Jonassohn, *supra* note 229, at 18. Jonassohn instead proposed the following definition: "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator." *Id.* at 19. Jonassohn's definition has no restrictions on the types of groups to be included. *Id.* However, as genocide is a legal term in international criminal law, it cannot be replaced by sociological definitions. Helen Fein, *Introduction*, in GENOCIDE WATCH, *supra* note 225, at 3.

237. Lemkin, *supra* note 211, at 79.

238. *Id.*

tern of the "oppressor."²³⁹ Alternatively, the indigenous population may be partially or totally expelled and their territory colonized by the occupying power's own nationals.²⁴⁰ Moreover, the destruction of members of these targeted groups may reflect a range of motives having nothing to do with hatred.²⁴¹ Furthermore, these genocidal acts need not even be premeditated.²⁴²

1. The Rape of Bosnian Muslim Women Violates Article II of the Genocide Convention

The acts proscribed by Article II of the Genocide Convention are all applicable to Bosnian-Muslim rape victims. There have been numerous reports of Bosnian-Muslim women being killed after being raped in violation of article II, section (a).²⁴³ Many of the women suffer serious physical and mental harm as a result of the rapes in violation of article II, section (b).²⁴⁴ Not only is rape an insufferable violation of a woman's physical and mental integrity under any circumstance, it also stigmatizes her family honor and social placement.²⁴⁵ It can result in harsh social consequences such as alienation from family or being labeled unpure and not worthy of marriage.²⁴⁶

239. *Id.*

240. *Id.*

241. *Id.*

242. Lippman, *supra* note 210, at 23.

243. See, e.g., John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, N.Y. TIMES, Mar. 31, 1993, at A6 (discussing Borislav Herak, one of two Serbian Soldiers sentenced to death by a court in Sarajevo, who confessed to raping and killing women); AMNESTY INTERNATIONAL, *supra* note 5, at 6-14 (the report includes details of cases of women whose throats were slit after they were raped; a woman whose parents were killed after she and her mother were raped; and an interview with a Bosnian Serb soldier, captured by Bosnian government forces, who admitted to the rape and murder of eight young Muslim women in, or near Vogošca); see *supra* note 225 for text of Article II.

244. See, e.g., NO JUSTICE, NO PEACE, *supra* note 47, at 24-27 (discussing the psychological problems such as post traumatic stress disorder, suicidal tendencies, psychotic episodes and severe clinical depression suffered by rape survivors); see *supra* note 225 for text of Article II.

245. See generally AMNESTY INTERNATIONAL, *supra* note 5.

246. In the final report of the European Communities investigative mission into treatment of Muslim women in the former Yugoslavia, the mission stated that "rape is a violation of a woman's physical and psychological integrity and the crime carries with it a formidable social stigma. For many Muslim women this may lead to social marginalization and rejection by their former communities, unless there is positive action to counteract this." *Warburton Report*, *supra* note

In addition, the mass rapes of Muslim women impose conditions on the group that contribute to their physical destruction in violation of article II, section (c).²⁴⁷ This destruction includes the murder of rape victims and the creation of an environment of fear in the community brought on by the rapes, which are often committed in public.²⁴⁸ This fear sometimes forces the civilian population to flee their homes and become dispersed,²⁴⁹ contributing to the destruction of the group.²⁵⁰

The rape and forced impregnation of Muslim women should be considered as preventing births within the group in violation of Article II, paragraph (d) of the Genocide Convention.²⁵¹ Unfortunately, forced impregnation of women in war has historically been treated as a byproduct of rape rather than a specific crime deserving of its own remedy.²⁵² However, there have been numerous instances where Serbian soldiers have raped for the express purpose of making sure the victims produce "chetnik" babies.²⁵³ Additionally, for at least the nine months it takes to carry the rapist's child to term, the woman is incapable of conceiving and bearing a child of her

59, ¶ 8.

Moreover, the investigative team sponsored by International Human Rights Law Group noted that it was aware of "several reports of women being violently abused by their spouses after revealing that they had been raped." NO JUSTICE, NO PEACE, *supra* note 47, at 27.

247. See *supra* note 225 for text of Article II.

248. To illustrate the systematic strategy employed by Serbian forces in committing rape, one United Nations investigative mission reported the following pattern of events in Vukovar, Croatia:

Serb paramilitary units would enter a village. Several of the women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. Several days later, Yugoslav Popular Army [] officers would arrive at the village offering permission to the non-Serb population to leave the village. Those villagers who wanted to stay then decided to leave with their women and children in order to protect them from being raped.

Report of the Special Rapporteur on Human Rights, supra note 7, Annex II, ¶ 48(a).

249. *Id.*

250. Adrien K. Wing & Sylke Merchán, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

251. TIERNEY GOLDSTEIN, *supra* note 132, at 23-24; see *supra* note 225 for text of Article II.

252. See generally TIERNEY GOLDSTEIN, *supra* note 132. The author makes the case that forced impregnation should be recognized as a separate crime from rape, and analyzes forced impregnation as a war crime and a form of Genocide.

253. *Id.* at 23.

own ethnicity.²⁵⁴

For the Muslim population, forced impregnation of women is particularly destructive because "[u]nder Islamic law and Muslim culture, the ethnicity of Muslim children is determined by the ethnicity of the father."²⁵⁵ In this way, the children born of Croatian and Muslim mothers are effectively transferred out of those groups as defined in article II, section (e) of the Genocide Convention.²⁵⁶ Consequently, the mass rapes and forced impregnations carried out consciously and methodically are calculated to bring about the physical destruction of the group and thus they fall within the purview of the Genocide Convention.²⁵⁷

2. Establishing Intent in Bosnia-Herzegovina

In the absence of a specific affirmation or confession by the defendants, the intent to carry out the proscribed acts must be established upon the evidentiary material available. Despite the difficulty of this task, testimony of both victims and perpetrators have provided prima facie evidence of an intent to use rape as a means of destroying the Bosnian-Muslim population.²⁵⁸ The first reports of mass rapes occurring in the former Yugoslavia came to light in 1992 when refugees fleeing the war torn region recounted atrocities that included stories of repetitive gang rapes, rapes in front of family members, the mass rape of women in detention centers, rapes during interrogation, and rapes of children.²⁵⁹ As part of its investigations into the atrocities committed in the former Yugoslavia, the Commission of Experts set up a database to catalogue reports of violations of human rights and humanitarian law in the Balkans.²⁶⁰ By September 1993, the Commission had over

254. *Id.* at 25.

255. Wing & Merchán, *supra* note 250, at 18 (quoting Mary E. Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. COMP. L. 127 (1987)).

256. Wing & Merchán, *supra* note 244, at 19-20; see *supra* note 225 for text of Article II.

257. Wing & Merchán, *supra* note 250, at 17-18.

258. But see Anderson, *supra* note 204, at 393-94, for the opinion that, up to that point in the conflict, the argument had not been cohesively made that "what has gone on in Bosnia thus far constitutes genocide within the strict meaning of the Genocide Convention."

259. See *supra* note 3 and accompanying text.

260. The database was established by the International Human Rights Law In-

3,000 prima facie rape cases.²⁶¹

Medical evidence about the refugees can also provide useful information.²⁶² In January 1993, an international team of four physicians sent by the United Nations to investigate rapes in the former Yugoslavia collected data on abortions, deliveries, known pregnancies due to rape, and sexually transmitted diseases.²⁶³ The team identified 119 pregnancies resulting from rape in a small sample of six hospitals in Bosnia, Croatia, and Serbia.²⁶⁴ The report noted that since medical studies indicate that a single act of unprotected intercourse will result in pregnancy between one and four percent of the time, the identification of 119 pregnancies may represent more than 11,900 rapes.²⁶⁵

Another report estimated that 30,000 pregnancies resulting from rape have occurred in Bosnia-Herzegovina.²⁶⁶ The report of a delegation commissioned by the European Council to investigate the treatment of Muslim women asserted:

[A]t least some of the rapes have been committed in particularly sadistic ways, so as to inflict maximum humiliation on the victims, on their family and on the whole community. In many cases there seems little doubt that the intention is deliberately to make women pregnant and then to detain them until pregnancy is far enough advanced to make termination impossible, as an additional form of humiliation and constant reminder of the abuse done to them.²⁶⁷

But nothing is perhaps so indicative of intent as the words of Serbian soldiers themselves. Captured soldiers admit to raping women and young girls in an effort to ethnically cleanse

stitute at DePaul University on behalf of the Commission of Experts. The primary objective was to "provide a comprehensive, consistent and manageable record of all reported alleged breaches of the Conventions and other violations of humanitarian law being committed in the former Yugoslavia."

Second Interim Report, supra note 6, ¶ 28.

261. *Id.* ¶ 29.

262. *See* Frelick, *supra* note 225, at 57.

263. Swiss & Giller, *supra* note 52, at 613.

264. *Id.*

265. *Id.* Estimates of rapes must be interpreted carefully. Additionally, as discussed above, inflated estimates of rapes may undermine the credibility of witnesses and NGOs. *See supra* note 204.

266. VECERNJI LIST, Sept. 11, 1992.

267. Warburton Report, *supra* note 59, ¶ 15.

the community, and some contend that they were ordered to commit the rapes by their commanding officers and threatened with death if they refused.²⁶⁸ "Cvijetan Maksimovic, a Serbian soldier captured last year by Croats near Brcko, said his superiors ordered him to prove that he was a 'real Serb' by killing more than 80 men and sexually assaulting 12 girls."²⁶⁹ Borislav Herak, a Serb who was sentenced to death by Bosnia-Herzegovina for war crimes, explained to a journalist how he was instructed to slit the throats of Bosnians and gang rape and murder Bosnian women in order to increase morale.²⁷⁰ Another rapist reportedly told his victim: "We have to do it, because our commanders ordered it, and because you are Muslim—and there are too many of you Muslims. We have to destroy and exterminate you, so that the heroic Serbian people can take over the reins in this area again."²⁷¹

Victims from different cities recount strikingly similar stories of systematic rapes in schools and detention centers, public rapes designed to force the community to flee,²⁷² Serbian run rape camps,²⁷³ and rapes committed for the purpose of impregnating the women with Serbian children.²⁷⁴ In its Second Interim Report, the U.N. Commission of Experts noted that:

[There are] a variety of factors . . . [that] lead to the conclusion that a systematic rape policy existed Among these factors is the coincidence in time between military action designed to displace civilian population and widespread rape of the same populations. Group involvement of the members of the same military units in rape suggest[ing] command responsibility by commission or omission, . . . the manner in which this type of rape was conducted in multiple locations and within a fairly close period of time [And] the contemporaneous existence of other violations of international

268. Post et al., *supra* note 3, at 34-35.

269. Rodrigue, *supra* note 174, at 26A.

270. David B. Ottaway, *Bosnia Convicts 2 Serbs in War Crimes Trial*, WASH. POST, Mar. 31, 1993, at A21, A24.

271. MASS KILLING AND GENOCIDE IN CROATIA 1991/92: A BOOK OF EVIDENCE (Ivica Kostović & Miloš Judaš eds., 1992) (documenting genocide); Carl G. Ströhm, *Serben Vergewaltigen auf Obersten Befehl* [Serbs Rape on Highest Orders], DIE WELT, Oct. 1, 1992 at 6.

272. Warbuton Report, *supra* note 59, ¶¶ 18-20.

273. Gutman, *Serb Leaders OK'd Attacks*, *supra* note 172.

274. Warburton Report, *supra* note 59, ¶ 15.

humanitarian law in a given region occurring simultaneously in prison camps, in the battlefield and in the civilian regions of occupied areas²⁷⁵

Helsinki Watch has also concluded that the ethnic cleansing of Muslims and Croats by Serbian military forces provides "at the very least *prima facie* evidence that genocide is taking place."²⁷⁶

On April 8, 1993, the International Court of Justice issued its provisional ruling on an action by Bosnia-Herzegovina against Serbia and Montenegro alleging violations of the Genocide Convention.²⁷⁷ The Court called upon the current Yugoslavia to "take all measures within its power to prevent commission of the crime of genocide."²⁷⁸ In addition, the Court urged the current Yugoslavia to:

ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group²⁷⁹

Should the Court's final ruling recognize that human rights and humanitarian law violations have been perpetrated against the Bosnian Muslim population, it may prove to be a significant step in the development of the Genocide Convention as a mechanism for punishing violators of human rights.

275. *Second Interim Report*, *supra* note 6, ¶ 69.

276. HELSINKI WATCH, *supra* note 93, at 1.

277. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3 (Apr. 8). In its order indicating provisional measures pending the final decision on the case, the Court is not entitled to reach determinations of fact or law, but is able to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of rights under the Genocide Convention. *Id.* at 26 (Declaration of Judge Tarassov).

278. *Id.* at 24.

279. *Id.*

IV. PUNISHING VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

International law imposes a duty upon states to punish human rights abuses committed in their territorial jurisdiction.²⁸⁰ The Genocide Convention²⁸¹ and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁸² require states parties to prosecute conduct proscribed by the conventions.²⁸³ While the International Covenant on Civil and Political Rights,²⁸⁴ The European Convention for the Protection on Human Rights and Fundamental Freedoms²⁸⁵ and the American Convention on Human Rights²⁸⁶ do not explicitly require states parties to prosecute or punish violations of the Conventions, they have been authoritatively interpreted as requiring states to investigate serious violations of physical integrity and prosecute those responsible.²⁸⁷ Orentlicher writes:

The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression. By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers

280. Orentlicher, *supra* note 140, at 2551.

281. See Genocide Convention, *supra* note 209.

282. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984).

283. Orentlicher, *supra* note 140, at 2562.

284. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

285. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5.

286. American Convention on Human Rights: "Pact of San Jose, Costa Rica," *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

287. Orentlicher, *supra* note 140, at 2568. In the cases of Velasquez Rodriguez, Case 7920, Inter-Am. C.H.R. 40, OAE/ser. L/V/II.68, doc. 8 rev. 1 (1986), and Godinez Cruz, Case 8097, Inter-Am. C.H.R. 49, OEA/ser. L/V/II.68, doc. 8 rev. 1 (1986), brought by the Inter-American Commission on Human Rights against the government of Honduras for the disappearance of the victims, the Inter-American Court of Human Rights interpreted Article 1(1) of the American Convention, which requires States Parties to ensure that all persons subject to their jurisdiction have the free and full exercise of the rights and freedoms under the Convention without discrimination, as imposing on each state party a "legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation." *Velasquez Rodriguez Case*, *supra*, ¶ 174.

and inoculate the public against future temptation to be complicit in state-sponsored violence.²⁸⁸

Despite a clear duty under international law to investigate and prosecute those accused of committing human rights abuses, the last quarter century has witnessed a trend in which regimes that have perpetrated these abuses have been given amnesty in exchange for their promise to relinquish power.²⁸⁹ An amnesty prospectively bars criminal prosecutions and is often contrasted with pardons which typically exempt convicted criminals from serving all or part of their sentences without expunging the conviction.²⁹⁰ However, these distinctions are inexact. Pardons, like amnesties, can be used to foreclose prosecutions, and amnesties sometimes cover persons serving prison terms.²⁹¹

The Inter-American Commission on Human Rights squarely addressed the issue of amnesty laws in 1992 when it found that Uruguay's 1986 amnesty law (*Ley de Caducidad*) violated provisions of the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.²⁹² The Commission found that "by sanctioning and applying the *Ley de Caducidad*, Uruguay had . . . dismissed all criminal proceedings against perpetrators of past human rights abuses" and had failed to undertake official investigation to establish the truth about those past events.²⁹³ In its decisions involving the amnesty laws of Uruguay and Argentina, the Commission has "clearly and authoritatively established the duty of States Parties to the American Convention, to investigate, identify and prosecute the perpetrators of State-sponsored human

288. Orentlicher, *supra* note 140, at 2542.

289. *Id.* at 2539.

290. Claudio R. Santorum & Antonio Maldonado, *Political Reconciliation or Forgiveness for Murder-Amnesty and Its Application in Selected Cases*, HUM. RTS. BRIEF, Winter 1993, at 3.

291. *Id.*

292. See Robert K. Goldman, *Uruguay: Amnesty Law in Violation of Human Rights Convention*, 49 REV. 37, 37 n.1 (1992) (citing Report No. 29/92 (Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375) Uruguay, OEA/ser. L.V/II.82, doc. 25 (1992)). The Commission found that similar laws in Argentina also violated the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. *Id.*

293. *Id.* at 42-43.

rights violations.”²⁹⁴ While modern law favors domestic enforcement of human rights laws, a recent trend favors conventions which “establish universal jurisdiction to ensure prosecution in the event that the government most responsible for suppressing violations fails to bring offenders to account.”²⁹⁵

Human rights activists have debated the Tribunal’s usefulness to end the atrocities being committed in the former Yugoslavia. One writer has said that in addition to punishing the guilty for their crimes, a second reason to hold the war crimes tribunals is “to acknowledge the victims, to inscribe their sufferings on the collective memory of mankind.”²⁹⁶ But others have claimed that tribunals “raise unrealistic expectations, hinder diplomacy and set dangerous precedents. They muddy the waters by bringing morals into politics.”²⁹⁷ One charge, in particular, made against the Tribunal is that it is a substitute for the kind of tough action that might have stopped ethnic cleansing by the Serbs.²⁹⁸ As the President of the Tribunal himself admitted in a January 21, 1994 speech:

Some assert outright that the creation of the Tribunal reflects the incapacity of the international community to deal . . . with the tragic conflict raging in the former Yugoslavia. (For them) the judicial solution has been adopted for want of a better one, as an ‘ersatz’ for the political solution; the establishment of the Tribunal is thus viewed as no more than a sign of weakness, if not hypocrisy, on the part of the United Nations.²⁹⁹

One of the biggest threats to the credibility of the Tribunal comes from the efforts to achieve a settlement in Bosnia. “War crime trials fly in the face of peace negotiations. Either you are negotiating with Serb leaders, or you are prosecuting them for war crimes,” goes one argument.³⁰⁰ Lawrence Eagleburger,

294. *Id.* at 45.

295. Orentlicher, *supra* note 140, at 2561-62.

296. Fintan O’Toole, *Not Easy to Draw a Line Under Political Violence*, IRISH TIMES, Nov. 11, 1994, at 14.

297. *War Crimes Crying Out for Justice*, INDEPENDENT (London), Nov. 2, 1994, at 1.

298. See IAIN GUEST, ON TRIAL: THE UNITED NATIONS, WAR CRIMES, AND THE FORMER YUGOSLAVIA 3-5 (1995) (a publication of the Refugee Policy Group).

299. *Id.* at 2 (quoting from a speech of Justice Antonio Cassese, welcoming the United Nations Secretary-General to the Hague).

300. Madeleine Bunting, *The Evil That Men Do . . .*, GUARDIAN, Aug. 19,

former Secretary of State, advocated amnesty for the likes of Bosnian Serb leader Radovan Karadzic in exchange for a peace agreement. "It's not a nice choice, but probably it's the choice to be made."³⁰¹ The U.N. military commander for Bosnia, Lt. Gen. Philippe Morillon, criticized the Bosnians for having tried two Serbs accused of war crimes themselves, rather than taking them before the international war crimes tribunal being set up for Bosnia. He suggested that a general amnesty for accused war criminals would be "the only way to calm the anguish and mutual mistrust" between Muslims and Serbs.³⁰²

Lord David Owen who, along with Cyrus Vance, was a member of the joint United Nations-European negotiating team, flatly denied that amnesties have been offered in exchange for a peace settlement and notes that he and Vance have advocated the establishment of a war crimes tribunal.³⁰³ But as the Serbs have intensified their efforts to take control of Bosnia, the impression persists in some United Nations circles that the prosecution of war crimes is incompatible with settlement negotiations.³⁰⁴

On April 24, 1995, the Tribunal named Bosnian Serb leader Radovan Karadzic and Bosnian Serb military commander, Ratko Mladic, as suspected war criminals,³⁰⁵ and subsequently indicted them in July of 1995.³⁰⁶ Russia protested the decision to name the Bosnian Serb leaders as suspected war criminals, because it believed the move would jeopardize the inter-

1994, at 18.

301. *Just in Case You Were Feeling Nostalgic for George Bush*, NEW REPUBLIC, Oct. 24, 1994, at 8.

302. Ottawa, *supra* note 270, at A24.

303. On December 16, 1992, Cyrus Vance reminded a Ministerial Meeting of the Steering Committee of the International Conference that he and Owen favored prosecuting war criminals: "Lord Owen and I believe that atrocities committed in the former Yugoslavia are unacceptable, and persons guilty of war crimes should be brought to justice. We, therefore, recommend the establishment of an international criminal court." Guest, *supra* note 298, at 106 (citing U.N. SCOR, 48th Sess., ¶ 9, U.N. Doc. S/25221 (1993)).

304. Guest, *supra* note 298, at 45.

305. Roger Cohen, *Tribunal to Cite Bosnia Serb Chief as War Criminal*, N.Y. TIMES, Apr. 24, 1995, at A1. The names of Karadzic and Mladic appeared in a written request to the Bosnian government that it defer its own investigations of the two men to the Tribunal. *Id.* The move is a precursor to indictments.

306. *UN has Enough Evidence to put Karadzic and Mladic on Trial*, THE HERALD, Aug. 3, 1995, at 1; *Hague Tribunal Stands in Judgment Over Warlords*, THE LAWYER, Aug. 1, 1995, at 2.

national contact group's efforts to reach a peace settlement by preventing Karadzic and Mladic from traveling to participate in settlement negotiations.³⁰⁷ Consequently, if a peace settlement is ever reached, it remains questionable whether the Tribunal will be allowed to fulfill its mission.

In addition, because the Tribunal does not have the authors of the Balkans atrocities in custody and cannot try them in absentia, it must rely on other countries to turn over the accused. On November 7, the Tribunal handed down its first indictment against Dragan Nikolic, the former commander of a concentration camp operated by the Bosnian Serbs.³⁰⁸ Nikolic was charged with the murder, torture, mutilation and illegal imprisonment of Muslim and Bosnian prisoners.³⁰⁹ Mr. Nikolic is believed to still be in Serbian-held Bosnia and the Serbian authorities have indicated they will not hand suspects over for trial by the Tribunal.³¹⁰ As of April 27, 1995, the Tribunal had begun proceedings against twenty-two Bosnian Serbs, with only one suspect currently in custody.³¹¹ This suspect, Dustko Tadic, a former karate teacher, is accused of torturing and killing Muslim prisoners in the camp of Omarska, in Northwest Bosnia.³¹² He was captured in Germany in February 1994 and handed over to the Tribunal in April 1995.³¹³

Because some believe the Tribunal is doomed to failure due to the above shortcomings, they advocate the creation of a truth commission similar to the one established in El Salvador.³¹⁴ Others claim that "a 'truth' commission would amount

307. The International Contact Group, consisting of Russia, France, Germany and the United States, has been involved in settlement negotiations with the warring factions. Guest, *supra* note 298, at 183. The group had proposed a peace plan that would give 49% of Bosnia to the Serbs and the remaining 51% to a federation of Croats and the Bosnian government. *Id.* The rejection of the plan by the Bosnian government resulted in the expulsion of Bosnian Serb leaders from Serbia and Serbian enforcement of an embargo against the Bosnian Serbs. *Id.*

308. Roger Cohen, *Serb is First to Face Post-World War II War-Crimes Indictment*, N.Y. TIMES, Nov. 8, 1994, at A5. Much of the evidence against Mr. Nikolic was produced by Pero Popivic, a Serbian guard at the camp, who fled Bosnia and is now outside the former Yugoslavia. *Id.* Popivic "estimated that about 3,000 Muslims from the Vlasenica area were killed in or close to the Susica camp." *Id.*

309. *Id.*

310. *Id.*

311. Tony Barber, *Serb Goes Before War Crimes Court*, INDEPENDENT, Apr. 27, 1995, at 11.

312. *Id.*

313. *Id.*

314. See Herman Schwartz, *War Crimes Trials - Not a Good Idea*, HUM. RTS.

to a further wringing of the hands of the international community."³¹⁵ Orentlicher writes:

Whatever salutary effects it can produce, an official truth-telling process is no substitute for enforcement of criminal law through prosecutions. Indeed, to the extent that such an undertaking purports to replace criminal punishment . . . , it diminishes the authority of the legal process; it implicitly concedes that the machinery of justice is powerless to punish even those crimes that any civilized society views as most pernicious.³¹⁶

Still others advocate both the Tribunal and the creation of a truth commission. "Thomas Buergenthal, the American law professor who had survived the Holocaust in World War Two and also sat on the UN Truth Commission for El Salvador, argued publicly for both a Truth Commission and a Tribunal at a Congressional hearing of the US CSCE Commission."³¹⁷ While Bassiouni finds merit with the suggestion of a truth commission, he states that justice in the declarative and retributive senses and compensation for the victims are also necessary.³¹⁸

V. THE CURRENT STATUS OF THE TRIBUNAL

The Tribunal has the opportunity to strengthen and clarify the prohibition against rape and other sexual assaults in international law.³¹⁹ However, the precedential value of the Tribunal will be determined by its success in bringing the perpetrators of these crimes to justice. To date, the Tribunal has been besieged with problems. For example, in October 1993, five months after the Tribunal was established, Ramon Escobar Salom of Venezuela was named to the post of chief prosecutor and soon thereafter resigned to become his country's minister of interior.³²⁰ Following this resignation, six candidates were

BRIEF, Spring 1994, at 7.

315. Aryeh Neier, *War Crimes Tribunal is an Imperative*, HUM. RTS. BRIEF, Spring 1994, at 6.

316. Orentlicher, *supra* note 140, at 2546 n.32.

317. Guest, *supra* note 298, at 1350.

318. Bassiouni, *supra* note 114, at 804 n.143.

319. Thomas & Ralph, *supra* note 69, at 98.

320. *S. African to Head War-Crimes Tribunal: U.N.-Appointed Panel to Sift Through Mounds of Evidence and Prosecute Those Suspected of Balkan Atrocities*,

proposed and rejected before South African Judge Richard Goldstone finally took over the position in July.³²¹ Meanwhile, the Commission of Experts was forced to cut short or abandon two significant investigations, one of which concerned mass rapes, when it was forced to conclude its work prematurely in April 1993.³²² Although it was anticipated that the work of the Commission would be transferred to the Tribunal, there was no chief prosecutor in place.³²³

The ambivalence of the United Nations to the Tribunal is reflected in its budget. "Some \$32.5 million has been proposed for 1994 and 1995, of which only \$11 million has been allocated. Most of the budget - \$32 million - is salaries for judges and lawyers."³²⁴ Only \$8.7 million has been proposed for the prosecutor's budget, of which only \$550,000 is earmarked for investigations which is supposed to cover "travel, forensic work, tracking new war crimes, interviews, witness transport, document compiling - the real labor of building a case."³²⁵ This money would fund all investigations into "areas such as death camps, rape, shelling of civilian targets, mass graves and destruction of monuments."³²⁶

Recent developments in the war also raise questions as to the viability of the Tribunal. As of this writing, the war in the former Yugoslavia rages on, and the practice of ethnic cleansing continues,³²⁷ while the United Nations prepares to drastically curtail its peacekeeping missions in Bosnia-Herzegovina and virtually abandon the six declared "safe areas."³²⁸ Mean-

VANCOUVER SUN, July 9, 1994, at A18.

321. *Id.*

322. Guest, *supra* note 298, at 91-99.

323. *Id.* at 96.

324. Robert Marquand, *Sandbagging a Probe of Bosnia War Crimes*, SACRAMENTO BEE, Sept. 4, 1994, at Forum 3.

325. *Id.*

326. *Id.* By way of contrast, "[t]he cost to prosecute crime boss John Gotti was \$75 million. Iran-contra, examining an illegal layer of federal activity, was \$40 million." *Id.*

327. As of this writing, hundreds of Muslims and Croat civilians are being expelled from Serb-held villages while tens of thousands of Serbs are fleeing villages falling back to the hands of the Muslims and Croats. Tracy Wilkerson, *Bosnian Serb Bombings Reverse Croatian Offensive*, CONTRA COSTA TIMES, Sept. 22, 1995, at 1C.

328. Michel Moutot, *UN Prepares to Revise and Reduce Peacekeeping Presence in Bosnia*, Agence France Presse, May 20, 1995, available in LEXIS, News Library, AFP File.

while, Bosnian-Serbs have taken peace-keepers hostage in retaliation for NATO air strikes against ammunition storage sites, and have used the peacekeepers as human shields.³²⁹ The Serbs have refused to recognize the legitimacy of the Tribunal,³³⁰ casting further doubt on the Tribunal's ability to collect evidence and extradite those responsible for war crimes and crimes against humanity.³³¹ As of this writing, only one defendant is in the Tribunal's custody.³³² Despite the continuing hostilities and ongoing budgetary problems, Justice Goldstone has been pressing forward with investigations and the first case, against Dustko Tadic, is expected to begin in October of 1995.³³³ However, some human rights activists question the commitment of the prosecutor's office to aggressively prosecute rape and other sexual abuses. On November 7, 1994, several human rights activists requested leave of the court to attach an amicus curiae memorandum on the treatment of rape and other sexual abuse in the matter of Dustko Tadic.

The memorandum alleges that rape is down-played in the indictment and states that the treatment of "rape and other sexual abuse is characterized, explicitly and implicitly, as less severe than and as distinct from other forms of torture and other violations," and makes no mention of the abuses of women that occurred in the removal of Muslims from their homes and in the camps.³³⁴

329. *Bosnian-Serbs Give Immediate Response to U.N. Bombing* (Cable News Network broadcast, May 26, 1995).

330. *Will Serbs Come to Trial?*, INDIANAPOLIS NEWS, Aug. 3, 1995.

331. *Id.* at 210.

332. Dustko Tadic was arrested in Munich in early 1994 and was extradited from Germany in April this year. He is accused of murdering at least 13 Muslim civilians at the Omarska camp in Bosnia in 1992. He is charged with rape, torture and assault in 16 cases. In August, the Tribunal rejected the argument that it was not competent to hear Tadic's case. *U.N. Tribunal Rejects Competency Plea by Tadic Lawyers*, DEUTSCHE PRESSE-AGENTUR, Aug. 10, 1995.

333. Agence France Presse, Aug. 10, 1995, available in LEXIS, News Library, AFP File.

334. Memorandum from Rhonda Copelon, Felice Gaer, Jennifer Green to the Judges of the Trial Chamber International Criminal Tribunal for the Former Yugoslavia, Re: Application for Deferral by the Republic of Germany in the Matter of Dustko Tadic also Known by the Names Dusan 'Dule' Tadic at 1-2 (1994) (unpublished memorandum, on file with the author).

VI. CONCLUSION

Impunity for war-time rape and other sexual abuses must end. The International War Crimes Tribunal has the opportunity to clarify international law and explicitly recognize rape as a serious crime encompassed within the grave breaches of the Geneva Conventions, and where evidence indicates that rapes were committed as part of a state policy or with the intent to exterminate a particular group, they should be recognized as crimes against humanity and genocide respectively. The Tribunal must also live up to its obligation to pursue and punish those guilty of rape and other sexual abuses in this and other armed conflicts and refuse to permit the indictment and prosecution of those responsible for the Balkans atrocities to be bargained away in "peace negotiations." However, the Tribunal must not be used by the international community as a substitute for committed, decisive action to end the perpetration of rape and other violations of humanitarian law within the context of the war in Bosnia.

