Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*

By
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The last decade witnessed explosive developments in efforts to impose criminal responsibility on leaders and others responsible for the most serious international crimes committed during periods of armed conflict or mass violence. One of the most revolutionary advances in these efforts has been in redressing crimes committed disproportionately against women and girls, particularly rape and sexual slavery. Laws prohibiting wartime sexual violence languished ignored for centuries, so the recent progress in prosecuting various forms of gender-related crimes is unparalleled in history and has established critical precedential authority for redressing these crimes in other fora and conflicts.

While the post-World War II trials held in Nuremberg and Tokyo largely neglected sexual violence, the Yugoslav and Rwanda Tribunals have successfully prosecuted various forms of sexual violence as instruments of genocide, crimes against humanity, means of torture, forms of persecution and enslavement, and crimes of war. The Tribunal Judgements have compellingly verified that warring parties use sexual violence as a mighty instrument of war and an illicit weapon that causes extensive terror and devastation throughout the enemy group. Not only are rape crimes increasingly committed systematically, but they also continue to be routinely committed opportunistically, essentially because the atmosphere of war and the violence it engenders creates the opportunity. Whether organized or random, orchestrated or opportunistic, sexual violence generates mass terror, panic, and destruction.

This article first reviews the historical development of international laws most relevant to women during periods of war or mass violence, particularly interna-

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tional humanitarian law, emphasizing that for centuries, treaties and customary practices overwhelmingly failed to take women and girls, and crimes committed against them, into account. It then examines the treatment of gender-related crimes in the post-World War II trials held in Nuremberg and Tokyo. Finally, this article reviews the most salient gender jurisprudence developed in the Yugoslav and Rwanda Tribunals and by the Statute of the International Criminal Court (ICC).

I.
INTERNATIONAL LAW AND GENDER CRIMES: CONFLUENCE AT A SNAIL'S PACE

International humanitarian law, commonly referred to as the law of war, is the body of law that attempts to lessen the horrors of armed conflict on both combatants and noncombatants. It does so through establishing mandatory rules that include setting limits on the means and methods in which war can be waged, regulating the conduct of hostilities on the ground, by air, and at sea, standardizing the treatment of combatants rendered *hors de combat* (out of battle), such as the wounded and prisoners of war, and requiring that a distinction be made between combatants and noncombatants.[1] A fundamental principle of humanitarian law is that warring parties may never target civilians for attack and must make continuous efforts to spare them from harm to the maximum extent possible.[2] Another fundamental principle is that of humane treatment, yet the proscriptions intended to minimize wartime suffering are frequently disregarded in the atmosphere of violence, hatred, revenge, and fear that is endemic to war. Consequently, armed conflicts are rife with breaches of the laws and customs of war.

Serious violations of humanitarian law impose individual or superior criminal responsibility on the perpetrator or others responsible for their commission or omission (usually military, civil, or political leaders who fail to take appropriate measures to prevent the crimes, to stop the crimes once commenced, or to punish the crimes afterwards),[3] even when applicable treaties do not overtly

1. *See, e.g.*, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000); INGRID DETTER, THE LAW OF WAR (2d ed. 2000).

2. Articles 48-58 of Additional Protocol I stipulate requirements for protecting civilians from the effects of hostilities. Essentially, attacks may only be directed against military objectives and precautions must be taken to the maximum extent possible under the circumstances and in correlation to the military advantage anticipated, to prevent incidental death to civilians and harm to civilian objects. Thus, death of civilians does not necessarily imply criminal sanction, as the law recognizes that civilian casualties are inevitable during war; the law does however impose duties upon combatants and their superiors to minimize harm to civilians and civilians may never under any circumstances be intentionally targeted for attack. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I].

3. *See, e.g.*, ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW (2002). In the context of international humanitarian law, a "serious" violation has been held to be a violation that breaches a rule protecting important values and which

impose criminal sanctions. Many international crimes carry individual criminal responsibility, regardless of whether a state or non-state actor is involved.[4]

The principal international humanitarian law treaties that regulate contemporary armed conflicts are the 1907 Hague Conventions and Regulations,[5] the four 1949 Geneva Conventions along with annexes to these conventions,[6] and the two 1977 Additional Protocols to the Geneva Conventions.[7] All or parts of these instruments are now recognized as comprising customary international law.[8] International humanitarian law governs international, and increasingly non-international, armed conflicts.[9] The characterization of a conflict as international, internal, or mixed often poses crucial legal questions, in part because the body of law pertaining to international conflicts is far more developed and codified than laws governing internal conflicts.[10] Nevertheless, there is a palpable trend in humanitarian law to reduce the disparity between the two because "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."[11] Indeed, the Yugoslav Tribunal in particular has

involves grave consequences for the victim. Prosecutor v. Delalić, Judgement, IT-96-21-T, 16 Nov. 1998, at para. 394 [hereinafter *Čelebići* Trial Chamber Judgement.]

4. *See, e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2552 (1991); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (2d ed. 1999).

5. *See* Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 [hereinafter Hague Convention IV]. Essentially, Hague law governs the conduct of hostilities and duties of combatants. Article 19 of the 1954 Hague Cultural Property Convention provides for the application of certain parts of the Convention to non-international conflicts. *See also* DOCUMENTS ON THE LAWS OF WAR 380 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). The 1907 Hague Conventions supercede the 1899 Hague Conventions. *See* Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949.

6. The Conventions signed at Geneva on August 12, 1949, consist of the following: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The 1949 Geneva Conventions supersede the 1864, 1906, and 1929 Geneva Conventions.

7. *See* Additional Protocol I, *supra* note 2; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. TREATY DOC. NO. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II].

8. *See, e.g.*, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72, at paras. 96-137, *reprinted in* 35 I.L.M. 32 (1996) [hereinafter *Tadic* Appeals Chamber Decision on Jurisdiction].

9. The extension of international humanitarian law to internal armed conflicts has been greatly assisted by the jurisprudence of the ICTY. *See, e.g.*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

10. *See, e.g.*, Richard A. Falk, *Janus Tormented: The International Law of Internal War, in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 185-248 (James N. Rosenau ed., 1964); Rosalyn Higgins, *International Law and Civil Conflict, in* THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 169-86 (Evan Luard ed., 1972); Howard J. Taubenfeld, *The Applicability of the Laws of War in Civil War, in* LAW AND CIVIL WAR IN THE MODERN WORLD 499, 499-517 (John Norton Moore ed., 1974).

11. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 97.

made unprecedented inroads in bridging these gaps in redressing crimes committed in international, internal, and mixed armed conflicts.[12]

There are substantial similarities and important distinctions between international humanitarian law, international criminal law, and international human rights law, although each body of law provides certain protections during armed conflict and there is significant overlap in their protections of individuals, including women and girls.[13] International humanitarian law is only invoked once an armed conflict exists,[14] whereas crimes against humanity and genocide do not need a connection to war in order to be prosecuted (unless the enabling legislation imposes the connection as a jurisdictional requirement). International human rights and international humanitarian law prohibit torture and slavery, yet redress efforts depend upon which body of law is applied. For example, international human rights law requires state action or acquiescence, whereas international humanitarian law requires a connection to an armed conflict.[15] Slavery and torture also form part of international criminal law, and indeed, there is growing recognition that the most serious human rights or humanitarian law violations may constitute international crimes.[16] Moreover, certain treaties, such as the Genocide Convention, explicitly impose criminal sanction for violation.[17]

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12. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8; Prosecutor v. Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999; *Čelebići* Trial Chamber Judgement, *supra* note 3; *see also* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2d ed. 2000); Kelly Dawn Askin, *The ICTY: An Introduction to its Origins, Rules and Jurisprudence, in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 19, 19-23 (Richard May et al. eds., 2001).

13. For a discussion of overlaps and distinctions between international humanitarian law, international criminal law, international human rights law, and to some extent refugee law, see Juan E. Mendez, *International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 65, 67-71 (Dinah Shelton ed., 2000).

14. An armed conflict has been defined as "exist[ing] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 70. The Appeals Chamber further clarified that

> [i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Id.

15. *See, e.g.,* Prosecutor v. Kunarac, Judgement, IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001, at paras. 467-97 (stating that "The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law") [hereinafter *Kunarac* Trial Chamber Judgement] *Id.* at para. 496.

16. *See, e.g.*, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Princeton Project on Universal Jurisdiction ed., 2001).

17. For example, Article I of the Genocide Convention requires states parties to "prevent and punish" genocide, "a crime under international law." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 3, 1948, S. EXEC. DOC. 0, 81-1, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). For more information, see generally M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (1999). Despite a legal obligation to act in the face of genocide, that obligation is all too often ignored. See the chilling descriptions of failures in SAMANTHA POWER, A PROBLEM FROM

Even within the context of war, international human rights law can still provide protections. The Universal Declaration of Human Rights (UDHR)[18] and the International Covenant on Civil and Political Rights (ICCPR) denounce all forms of slavery, torture, and inhuman or degrading treatment and the right to be free of these abuses is explicitly nonderogable.[19] The Convention on the Rights of the Child obliges states to protect children from sexual assault and torture and to respect rules of humanitarian law.[20] The Convention Against Torture prohibits torture at all times, stipulating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[21]

Even in human rights instruments that focus specifically on women, most provisions continue to be applicable during wartime. The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)[22] prohibits discrimination and disparaging treatment on the basis of "sex." This prohibition extends to violence against women, as interpreted by the Committee on the Elimination of Discrimination Against Women (CEDAW).[23] The Declaration on Elimination of Violence Against Women[24] and the Inter-American Convention on Violence[25] also provide protection against all forms of violence against women, including sexual violence, whether committed in so-called "peacetime" or in wartime, in the public sphere or in the private sphere. The Optional Protocol to the Women's Convention provides enforcement measures to monitor and ensure compliance with the Women's Convention.[26]

HELL: AMERICA AND THE AGE OF GENOCIDE (2002) and MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA (2002).

18. Universal Declaration of Human Rights, U.N. GAOR, 3d Sess. Part I, at arts. 1, 2, 3, 4, 5, 7, 12, U.N. Doc. A/810, 171, (1948).

19. International Covenant on Civil and Political Rights, Dec. 16 1966, arts. 4.2, 6-8, 999 U.N.T.S. 171, 174-5, 6 I.L.M. 368, 370-71 (1967) (entered into force on Mar. 23, 1976).

20. Convention on the Rights of the Child, Nov. 20 1989, arts. 34, 37, 38, 28 I.L.M. 1448, 1469-70 (entered into force on Sept. 2 1990).

21. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

22. Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981).

23. Committee on the Elimination of Discrimination of Violence Against Women, General Recommendation No. 19, U.N. GAOR, 49th Sess., Supp. No. 38, at 1, U.N. Doc A/47/38 (1993) (adopted on Jan. 29, 1992).

24. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, vol. 1, at 217, U.N. Doc. A/48/49 (1993).

25. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, General Assembly of the O.A.S., Doc. OEA/Ser.P AG/ doc.3115/94 rev.2 (commonly referred to either as the Convention of Belém do Pará or the Inter-American Convention Against Violence).

26. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. A/54/4, 54th Sess., Supp. No. 4, U.N. Doc. A(01)/R3 (Oct. 6, 1999) (entered into force Dec. 22, 2000). The Optional Protocol has a communications procedure that allows women to submit claims for violation of the Women's Convention; it also has an inquiry procedure which enables the CEDAW Committee to initiate inquiries for gross violations when the state is a party to the Women's Convention and the Optional Protocol.

The principle of nondiscrimination, including "sex" discrimination, is enshrined throughout all human rights instruments and recognized as the most fundamental principle of human rights law.[27] Therefore, these instruments may not be interpreted or applied in a manner discriminatory to women. While international humanitarian laws apply only in the context of an armed conflict, human rights laws, especially nonderogable rights, apply regardless of the presence of an armed conflict or public emergency. Common Article 2 to the 1949 Geneva Conventions stipulates that the articles of these conventions apply *"[i]n addition to* the provisions which shall be implemented in peacetime."[28] The Martens Clause of the Hague Conventions provides additional support for the principle that fundamental human rights norms do not cease to be applicable during armed conflict.[29] International human rights law thus supplements, reinforces, and complements international humanitarian law. As the Yugoslav Tribunal Appeals Chamber notes, "[b]oth human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity."[30]

Additionally, several crimes, including genocide, war crimes, torture, slavery, and crimes against humanity, have achieved *jus cogens* status, making the crimes prohibited at all times, in all places.[31] These peremptory norms supersede any treaty or custom to the contrary. *Jus cogens* norms constitute principles of international public policy, and serve as rules "so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. . . . [I]t is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice."[32] In other words, these crimes (except for war crimes) do not need a nexus to a war and do not require ratification of a treaty; they are crimes that can be prosecuted by any state on the basis of universal jurisdiction. *Jus cogens* crimes subject to universal jurisdiction are justiciable by any state, even if such acts do not violate municipal law in the state in which they were committed, and even when the prosecuting state lacks a traditional nexus with the crime, of-

27. *See* Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703 (1997) ("The only unambiguous provision . . . is the prohibition of discrimination").

28. First, Second, Third and Fourth Geneva Conventions, *supra* note 6, at art. 2 (emphasis added).

29. The famous Martens Clause, contained in the preamble of the 1899 and 1907 Hague Convention IV, *supra* note 5, and reproduced almost verbatim in art. 1(2) of Additional Protocol I, *supra* note 2, states: "Until a more complete code of the laws of war has been issued . . . inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

30. Prosecutor v. Delalic, Judgement, IT-96-21-A, 20 Feb. 2001, at para. 149 [hereinafter *Celebici* Appeals Chamber Judgement].

31. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 12 (1996); Lauri Hannikainen, *Implementation of International Humnanitarian Law in Finnish Law*, *in* IMPEMENTING HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT 118 (Lauri Hannikainen et al. eds., 1992).

32. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 64 (2d ed. 1993).

fender, or victim.[33] As discussed *infra*, there is increasing evidence that sexual violence has now reached the level of a *jus cogens* norm.

Customary international law also regulates armed conflict, mass violence, and situations of occupation or transition. Customary international law is based on state practice and grounded in the notion of implied agreement, derived from acceptance of or acquiescence to a legal obligation. Whereas customary international law is derived from state practice based on *opinio juris* (a sense of legal obligation), *jus cogens* norms have their foundation in upholding an international *ordre public.* In the *Siderman* case, a civil suit brought in the U.S. against Argentina for torture and other abuses inflicted by the military, Judge Fletcher noted that while "customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent."[34] That crimes such as torture, genocide, slavery, crimes against humanity, and war crimes have attained *jus cogens* status reflects state condemnation of these crimes and the international community's desire to prevent and punish them.

There is thus a rich body of international law that protects individuals during periods of armed conflict, occupation, mass violence, or transition. The law's treatment of women and the crimes committed against them is not so rich however. Even on the rare occasion when the law explicitly prohibits rape crimes, enforcement of the law has been minimal or non-existent.

A. *Disparate Reference to Women in International Humanitarian Law Documents*

International humanitarian law instruments provide both general and extremely detailed guidelines on the treatment of protected persons during periods of armed conflict; however, protections for women are minimal and weak. Laws of war regulate everything from the minimum number of cards or letters a prisoner of war can receive each month, to provisions requiring opportunities for internees to participate in outdoor sports, to the maximum number of warships a belligerent may have at any one time in the port of a neutral power.[35] Yet despite the fact that many regulations protecting either combatants or civilians are often described in minute and exhaustive detail, very little mention is made of female combatants or civilians. The same is true for collections documenting war crimes trials. For example:

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33. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785, 788 (1988).

34. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

35. Article 71 of the Third Geneva Convention, *supra* note 6, stipulates that "[p]risoners of war shall be allowed to send and receive letters and cards . . . [of which] the said number shall not be less than two letters and four cards monthly"; Article 95 of the Fourth Geneva Convention, *supra* note 6, requires that internees be given opportunities to participate in sports and outside games in "sufficient open spaces"; Article 15 of Hague Convention IV, *supra* note 5, Convention Concerning the Rights and Duties of Neutral Powers in Naval War, provides that "the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that [Neutral] Power simultaneously shall be three."

—In the entirety of the Hague Conventions and Regulations, one single article (IV, art. 46) vaguely and indirectly prohibits sexual violence as a violation of "family honour."

—The forty-two-volume set of transcripts of the Nuremberg Trial contains a 732-page index. Neither "rape" nor "women" is included in any heading or subheading in this index, despite the fact that crimes of sexual violence committed against women were extensively documented in the transcripts.[36]

—In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo Trial, "rape" is only included under the subheading "atrocities." Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts.[37]

—The four 1949 Geneva Conventions came after the Second World War and the Nuremberg and Tokyo war crimes trials. Within the 429 articles that comprise the four 1949 Geneva Conventions, only one sentence of one article (IV, art. 27) explicitly protects women against "rape" and "enforced prostitution," and only a few other provisions can be interpreted as prohibiting sexual violence.

—The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict omits any reference to sexual violence.[38]

—In the two 1977 Additional Protocols to the Geneva Conventions, only one sentence in each explicitly prohibits sexual violence (Protocol I, art. 76; Protocol II, art. 4).

Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes. Until the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes.[39] While males remain the principal actors in international (and domestic) fora, in recent years, women have

36. The official documents of the Nuremberg Trial are contained in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NOV. 14, 1945 TO OCT. 1, 1946 (1947) [hereinafter IMT Docs]. For some examples of documentation of sexual violence by the tribunal, see, e.g., vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.

37. Documents of the Tokyo Trial are reproduced in THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. Pritchard & S. Zaide eds., 1981) [hereinafter IMTFE Docs]. For some examples of documentation of sexual violence by the tribunal, see, e.g., IMTFE Docs, vol. 2, transcript at 2568-73, 2584, 2593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647; vol. 6, transcript at 12521-48, 12995, 13117, 13189, 13641-42, 13652.

38. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/9631 (1974). An obvious place for the inclusion of explicit prohibitions of sexual violence would have been para. 5, which states: "All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal."

39. *See* Christine M. Chinkin, *Peace and Force in International Law, in* Reconceiving Reality: Women and International Law 212 (Dorinda G. Dallmeyer ed., 1993) ("Despite the far-reaching consequences of conflict upon women, their voices are silenced in all levels of decision-making about war. . . . The whole area of the use of force is the one from which women's exclusion is most absolute.") For a review of women in high level positions of power in international law, see Kelly D. Askin, *Introduction, in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW xxv-xxix (Kelly Askin & Dorean Koenig eds., 1999).

broken through the glass ceiling and are changing the traditional landscape by securing high-level positions in international legal institutions and on international adjudicative bodies.[40] It is impossible to overemphasize how crucial it is to women's issues, gender crimes, and the law in general to have women in decision-making positions in international fora, particularly within the United Nations structure, and as judges, prosecutors, and peacemakers.

B. Treatment of Women and Girls During Armed Conflict or Mass Violence

The progress made globally in recognizing, prohibiting, and finally enforcing gender-related crimes has been painstakingly slow. Historically, women were considered "property," owned or controlled by men (typically fathers, then husbands). The rape of a woman was not considered a crime against her, but instead a crime against the man's property.[41] During war, women were considered legitimate spoils of war, along with livestock and other chattel. By the Middle Ages, the rape and slavery of women were inducements to war, such that anticipation of unrestricted sexual access to vanquished women was used as an incentive to capture a town. When customary law began prohibiting rape crimes, as discussed below, sexual violence did not tend to be officially encouraged, but the crimes were largely ignored or tolerated by commanders, many of whom believed sexual violence before a battle increased the soldiers' aggression or power cravings and that rape after a battle was a well-deserved reward, a chance to release tensions and relax. As rape became explicitly prohibited, the crimes were still deemed mere inevitable consequences or side effects of armed conflict and were rarely punished. Efforts to enforce the prohibitions against rape generated little interest, as most considered sexual vio-

40. For example, two of the three Chief Prosecutors of the ICTY/R Tribunals have been women (Louise Arbour from Canada and Carla del Ponte from Switzerland), one of the three Registrars of the ICTY has been a woman (Dorothy De Sampayo from the Netherlands), and both the ICTY and ICTR have had a woman as President of the Tribunal (Gabrielle Kirk McDonald from the U.S. (ICTY) and Navanethem Pillay from South Africa (ICTR)), and several other women have been permanent judges (Elizabeth Odio-Benito from Costa Rica, Florence Mumba from Zambia, and Patricia Wald from the U.S. to the ICTY and Arlette Ramaroson from Madagascar and Andrésia Vaz from Senegal to the ICTR) as well as ad litem judges (Sharon Williams from Canada, Carmen Argibay from Argentina, Maureen Harding Clark from Ireland, Ivana Janu from Czech Republic, Chikako Taya from Japan, and Fatoumata Diarra from Mali.) The ICTY Prosecutor's Office also created the vital position of gender issues legal advisor, held by Patricia Viseur Sellers from the U.S. In 2001, for the first time in over fifty years, the UN's influential International Law Commission elected women (Paula Escarameia from Portugal and Xue Hanqin from China), and the International Court of Justice elected a female judge in 1995 (Rosalyn Higgins from the UK.) These are modest advances but revolutionary nonetheless when considering that for decades, no women held high (or typically even mid- or low-level) positions of power in international law bodies or courts. *See also* statistical delineations in Jan Linehan, *Women in Public Litigation*, P.I.C.T. (July 13, 2001), *available at* http://www.pict-pcti.org/publications; Thordis Ingadottir, *The International Criminal Court, The Nomination and Election of Judges*, P.I.C.T. (June 2002), *available at* http://www.pict-pcti.org/publications.

41. There are many publications devoted to this issue. *See, e.g.*, Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J. L. & SOC. PROBS. 459 (1997).

lence incidental byproducts of the conflict.[42] By the twentieth century, men and boys still principally waged the wars, but combatants increasingly targeted the most vulnerable for attack: women, children, the ill, and the elderly.

In modern wars, the greatest casualties of the conflict are civilians.[43] During these attacks, female civilians are subjected to the same violence to which male civilians are subjected. Both are murdered, tortured, displaced, imprisoned, starved, and subjected to slave labor. Yet in addition to these crimes, women and girls are also singled out for additional violence—gendered violence—that is commonly manifested in the form of sexual violence. Outside a domestic prison context, targets of sex crimes are overwhelmingly female. Certain crimes, such as forced impregnation and forced abortion, are exclusive to women and girls.

History is replete with reports of women being raped, sexually enslaved, impregnated, sexually mutilated, and subjected to myriad other forms of sexual violence during periods of armed conflict, mass violence, occupation, resistance, and transition.[44] For thousands of years, in conflicts in every region of the world, women have been subject to both androgynous crimes and crimes of a sexual nature.[45] Despite increased codified protections afforded to civilians in wartime and purported advances in creating more civilized societies, the situation did not improve during the twentieth century, which was the bloodiest in history.[46] Indeed, despite the creation of the United Nations and the proliferation of a broad range of humanitarian law and human rights instruments after World War II, it appears that women's situations during armed conflict actually worsened in the twentieth century.

Evidence indicates that rape crimes are increasingly committed systematically and strategically, such that sexual violence forms a central and fundamental part of the attack against an opposing group. Indisputably, rape and other forms of sexual violence are used as weapons of war. In some cases, such as the sexual slavery of some 200,000 of the so-called "comfort women" during World

42. For a more detailed analysis of the development of gender crimes in customary law, see KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 1-48 (1997).

43. THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 478 (Antonio Cassese ed., 1979); THE AMERICAN NATIONAL RED CROSS, HUMANITY IN THE MIDST OF WAR 1-7 (1993).

44. *See generally* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAW, PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES (1993); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); PETER KARSTEN, LAW, SOLDIERS AND COMBAT (1978); M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965).

45. *See, e.g.*, GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 95, 306-07 (1999); JULIE A. MERTUS, WAR'S OFFENSIVE ON WOMEN (2000); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 654 (1996); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmayer ed., 1994); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326 (1994); ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 18-33.

46. *See, e.g.*, JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY (1999); ROBERT CONQUEST, REFLECTIONS ON A RAVAGED CENTURY (2000).

War II by the Japanese military,[47] sexual violence forms a core part of the war machinery, such that military personnel target women and girls to conveniently and efficiently service the male soldiers and to improve their morale.[48] Thus, instead of being a weapon used to attack the opposing side, sexual violence is used as part of the military machinery to fuel the fighting soldiers.

Rape is a potent weapon for a number of reasons. The destructive stereotypes and harmful cultural and religious attitudes associated with female chastity or notions of so-called "purity" make sex crimes useful tools for destroying lives. Prevailing attitudes and beliefs often create an erroneous impression that a woman is "spoiled goods" if she has sex, whether voluntarily or involuntarily, outside a marital context, a stereotype rarely imposed upon victims of non-sexual crimes. Rape crime survivors (and those who do not survive) are not the only victims of sexual violence. The impact and the harms often extend to families, local communities, and society at large.

Furthermore, evidence suggests that women are also commonly killed in a gender-related manner:

> [T]he murder of the women did not tend to occur in an androgynous way—the means and method of death was often sexualized, such as by having a sexual organ or body part mutilated or exploded, by having a fetus ripped from the womb, or by being raped with broken glass or crude weapons. So even their deaths frequently had a gendered, particularly a reproductive, component.[49]

It is only recently that the international community is beginning to grasp the moral, social, economic, and legal importance of taking adequate measures to prevent and punish gender crimes. The international community has been even slower in providing other forms of accountability to victims of sex crimes.[50]

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47. *See* Prosecutors v. Hirohito Emperor Showa, The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery Judgement [hereinafter Women's International War Crimes Tribunal], Dec. 4, 2001, PT-2000-1-T (*corr.* Jan. 31, 2002); YOSHIMI YOSHIAKI, THE COMFORT WOMEN SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., 2000); GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1995).

48. *See* Christine Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335, 340 (2001) ("[R]ape as practiced in the comfort stations was not an inevitable consequence or war, nor even an instrument of war but was part of the very engine of war where the sexual enslavement of women was considered necessary to the pursuit of military objectives"); Kelly D. Askin, *Comfort Women – Shifting Shame and Stigma from Victims to Victimizers*, 1 INT'L CRIM. L. REV. 5, 29 (2001) ("The Japanese did not establish the 'comfort' houses as a strategic weapon of war *per se*. Indeed, the Japanese tried to keep the 'comfort facilities' secret and even murdered countless victims in an attempt to protect their secret. Thus, the facilities were not used, for example, as a weapon of terror and humiliation against the enemy group to cause them to flee the area, or in an attempt to destroy a group mentally, physically or reproductively, or to impregnate women. They were established primarily for expediency of the military: it was considered essential to the military image to not have their soldiers randomly raping local women, and it was important to the military structure to have women readily accessible for 'safe' sex for the weary soldier.")

49. Askin, *Comfort Women, supra* note 48, at 21.

50. For example, most Truth and Reconciliation Commission reports have completely ignored or given short shrift to crimes committed against women. *See, e.g.*, Kelly Askin & Christine Strumpen-Darrie: *Truth Commission Reports: Reporting Only Half the Truth?: Listening for the Voices of Women, in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly Askin, Martina Vandenberg, & Deena Hurwitz eds., vol. IV, forthcoming 2003). Essentially, the Guatemala, Haiti, and

C. *Development of Gender Crimes Under International Law*

Prior to the mid-1800s, the laws of war existed primarily in custom, domestic military codes, and religious instruction.[51] Long before international humanitarian law was codified, the customs of war prohibited rape crimes. For example, in the 1300s, Italian lawyer Lucas de Penna urged that wartime rape be punished as severely as peacetime rape;[52] in the 1474 trial of Sir Peter Hagenbach, an international military court sentenced Hagenbach to death for war crimes, including rape, committed by his troops.[53] In the 1500s, eminent jurist Alberico Gentili surveyed the literature on wartime rape and contended that it was unlawful to rape women in wartime, even if the women were combatants;[54] in the 1600s international law pioneer Hugo Grotius concluded that sexual violence committed in wartime and peacetime alike must be punished.[55]

In 1863, the United States codified international customary laws of war into the U.S. Army regulations on the laws of land warfare. These regulations, known as the Lieber Code,[56] were the cornerstone for many subsequent war codes.[57] The Lieber Code listed rape by a belligerent as one of the most serious war crimes. Article 44 of the Code declared that "all rape . . . is prohibited under the penalty of death," and Article 47 dictated that "[c]rimes punishable by all penal codes, such as . . . rape . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred." Wartime rape was thus considered so serious that it warranted the death penalty.

Customary international law dates back thousands of years and codified international humanitarian law has been in place for well over a century. When World War I began in 1914, the 1907 Hague Conventions governed the means

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South Africa commissions were the only ones, as of 2001, that even attempted to cover gender crimes or address women's issues.

51. Adam Roberts, *Land Warfare: From Hague to Nuremberg, in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 116, 119 (Michael Howard et al. eds., 1994).

52. *See* RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN 50 (1982).

53. William Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1 (1973); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE 8 (1980); TELFORD TAYLOR, NUREMBERG AND VIETNAM, AN AMERICAN TRAGEDY 81-82 (1970); LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 18-19 (1992); Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 AM. J. INT'L L. 1 (1992); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 576-79 (1996).

54. *See* ABERICO GENTILI, DE JURE BELLI LIBRI TRES 258-59 (John C. Rolfe trans., 1995) (1612).

55. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 656-57 (Francis W. Kelsey trans., 1995) (1646).

56. Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington, D.C. (Apr. 24, 1863); Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914) [hereinafter Lieber Code]. The Lieber Code is also known as General Orders No. 100.

57. *See* Telford Taylor, *Foreword, in* THE LAW OF WAR, A DOCUMENTARY HISTORY xv (Leon Friedman ed., 1972).

and method of warfare.[58] The original Geneva Conventions were also in force, but they did not provide protections to civilians.[59] The 1907 Hague Conventions and Regulations contain a provision that implicitly prohibits sexual violence by mandating that "[f]amily honour and rights . . . must be respected."[60] At the turn of the twentieth century, a violation of family "honor" was commonly understood as encompassing sexual assault.[61] Thus, both customary and Hague law prohibited wartime rape.

As a result of the ruthless atrocities committed during World War I, the major Allied powers established the 1919 War Crimes Commission to investigate crimes and make recommendations concerning methods of punishing suspected Axis war criminals. In its report, the War Crimes Commission listed thirty-two non-exhaustive violations of the laws and customs of war that had been committed by the Axis powers. "Rape" and "abduction of girls and women for the purpose of forced prostitution" were two of the enumerated offenses that were deemed punishable offenses, yet again reinforcing their status as war crimes in the early twentieth century.[62] However, the attention to sex crimes in enforcement endeavors was minimal at best.

D. International Military Tribunals at Nuremberg and Tokyo in the Wake of World War II

The intentional extermination of millions of innocent civilians during World War II stunned the world community and shattered illusions of state security and protection. Men, women, and children alike were slaughtered, tortured, starved, and forced into slave labor. In addition to these crimes, countless women and girls were also singled out for rape, sexual slavery, and other forms of sexual violence and persecution.[63] When the war ended after years of catastrophic devastation, the Allies held trials for individuals considered most culpable for the atrocities. In establishing the International Military Tribunals in Nuremberg (IMT) and Tokyo (IMTFE) to prosecute leaders for crimes against

58. *See* Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 (entered into force Jan. 26, 1910).

59. *See* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7. The 1864 Geneva Convention was revised and expanded in 1906 and 1929. The four 1949 Geneva Conventions, including the Fourth Geneva Convention applicable to civilians, replace the earlier conventions.

60. *See* Hague Convention IV, *supra* note 5, at art. XLVI. The 1899 Hague Convention held a similar provision.

61. For instance, when Professor J.H. Morgan reported the rape of Belgian women during the First World War, the terminology he used was the "[o]utrages upon the honour of women by German soldiers have been frequent." *See* BROWNMILLER, *supra* note 44, at 42.

62. U.N. WAR CRIMES COMMISSION, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 124 (1949); HISTORY OF THE U.N. WAR CRIMES COMMISSION 34 (1948); Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report presented to the Preliminary Peace Conference, March 29, 1919*, 14 AM. J. INT'L L. 95, 114 (1920).

63. *See* ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 49-95. Some offenses, such as sexual mutilation, (en)forced sterilization, sexual humiliation, and forced nudity are also commonly committed against men, although women do tend to be subjected to these abuses more frequently and often for different reasons.

peace, war crimes, and crimes against humanity,[64] both trials focused principally on what was considered the "supreme" crime: crimes against peace.[65] In part because of the trial's focus on those responsible for waging aggressive war, sexual violence was largely ignored.

In the post-war proceedings held in Nuremberg, Germany against twenty-two Nazi leaders, the IMT Charter failed to include any form of sexual violence, and the tribunal did not expressly prosecute such crimes, even though they were extensively documented throughout the war and occupation.[66] Nonetheless, the trial records contain extensive evidence of sexual violence. While not explicit, gender-related crimes were included as evidence of the atrocities prosecuted during the trial and can be considered subsumed within the IMT Judgement.[67] For example, the Nuremberg Tribunal implicitly recognized sexual violence as torture:

> Many women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off . . . .[68]
>
> [W]omen were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman or a young girl, of being stripped nude by her torturers. Pregnancy did not save them from lashes. When brutality brought about a miscarriage, they were left without any care, exposed to all the hazards and complications of these criminal abortions.[69]

The Nuremberg Trial thus did implicitly prosecute sexual atrocities as part of the Nazi atrocities committed during the war.

Similarly, in the subsequent Nuremberg trials held by the Allied forces under the auspices of Control Council Law No. 10 (CCL10),[70] which did explic-

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64. Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 59; 279 Stat. 1544 [hereinafter IMT Charter]; Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20. The Annex to the Special Proclamation contains the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 21, *as amended* Apr. 26, 1946, 4 Bevans 27 [hereinafter IMFTE Charter].

65. *See, e.g.*, John Murphy, *Crimes Against Peace at the Nuremberg Trial, in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 141 (George Ginsburg & V.N. Kudriavtsev eds., 1990).

66. For arguments on how sex crimes could have been prosecuted in the Nuremberg Trial if there had been the political will to do so, see ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 129-63. Professor Robertson states that the Allies declined to indict Nazi war criminals for sexual violence because they themselves committed the worst abuses: "[T]he worst example of tolerated and systematic rape was during the Russian army advance on Germany through eastern Europe, during which an estimated two million women were sexually abused with Stalin's blessing that 'the boys are entitled to their fun'." GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 306 (1999).

67. *See, e.g.*, IMT DOCS, *supra* note 36, at vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.

68. IMT DOCS, *supra* note 36, vol. 7, transcript at 494.

69. IMT DOCS, vol. 6, transcript at 170.

70. *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity*, Allied Control Council Law No. 10, Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, (Jan. 31, 1946) [hereinafter CCL10].

itly list rape as a crime against humanity,[71] gender crimes were given only cursory treatment. In the trials of some of the so-called "lesser" war criminals, such as medical doctors performing unethical experiments and concentration camp guards facilitating the commission of grave crimes within the camps, forced sterilization, forced abortion, and sexual mutilation were mentioned.[72]

In the post-World War II trials held in Tokyo, Japan, rape crimes were expressly prosecuted, albeit to a limited extent and in conjunction with other crimes. The Tokyo Tribunal charged twenty-eight Japanese Axis defendants with various war-related crimes.[73] Like the Nuremberg Charter, the Tokyo Charter did not specifically enumerate any sex crime. Unlike the Nuremberg Indictment however, the Tokyo Indictment did include allegations of gender-related crimes: it characterized the rape of civilian women and medical personnel as "inhumane treatment," "mistreatment," "ill-treatment," and a "failure to respect family honour and rights," and prosecuted these crimes under the 'Conventional War Crimes' provision in the Charter.[74] A substantial number of gender-related crimes were cited as evidence of atrocities committed in Asia during the war.[75] As a result of these charges, the IMTFE held General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota criminally responsible for a series of crimes, including rape crimes, committed by persons under their authority.[76] It should also be noted that in war crimes trials held in Batavia (Jakarta) after the war, some Japanese defendants were convicted of "enforced prostitution" for forcing Dutch women into sexual servitude to the Japanese military.[77]

In another war crimes trial held in Asia by the U.S. military commission, General Tomoyuki Yamashita,[78] commander of the 14th Area Army of Japan, was charged with failing to exercise adequate control over his troops, who had committed widespread rape, murder, and pillage in Manila (known as the "Rape

71. *Id.* at art. II(1)(c).

72. *See, e.g.*, U.S. v. Brandt, *in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1946) (forced sterilization and castration); U.S. v. Pohl, *in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1947) (evidence of forced abortion and concentration camp "brothels"); U.S. v. Greifelt, *in* 4-5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1947) (forced abortion, gender/ethnic persecutions, genocide, and reproductive crimes).

73. IMTFE DOCS, *supra* note 37, at vol 1.

74. *See* IMTFE DOCS, *supra* note 37, at 31, and *id.* at 111-17.

75. Sexual violence was documented in the IMTFE transcripts, *supra* note 37 at vol. 2, transcript at 2568-73, 2584, 2593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647, 4660; *see also* IMTFE DOCS, vol. 6, transcript at 12521-48, 12995, 13117, 13189, 13641-42, 13652.

76. THE TOKYO JUDGEMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 446-54 (B.V.A. Roling & C.F. Ruter eds., 1977).

77. *See, e.g.*, *Trial of Washio Awochi*, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122-25 (1949) (a Japanese hotel/club/restaurant manager was found guilty of the war crime of enforced prostitution for forcing Dutch women into sexual servitude in his club from 1943-1945).

78. Because Yamashita was not charged with "crimes against peace," he was not tried by the IMTFE. *See generally* RICHARD L. LAEL, THE YAMASHITA PRECEDENT, WAR CRIMES AND COMMAND RESPONSIBILITY (1982).

of Manila") during the war.[79] Yamashita insisted that he knew nothing of the atrocities because of a complete breakdown of communications; he also alleged that his troops were disorganized and out of control, and thus, inferentially, he could not have prevented the crimes even if he had known of them. He further protested that because he was actively fighting a war and planning military strategies, he could not be held responsible for failing to control all persons under his authority. The Commission concluded, however, that because the crimes were committed over a large area during an extended period of time, Yamashita either did know of the crimes, or he could have and should have known of them unless he intentionally remained willfully blind to them, and intentional ignorance would provide no excuse for being derelict in his duties. Thus, the crimes did not need to be ordered and it was not necessary to prove that the commander had actual knowledge of the crimes being committed by persons under his authority; indeed, the widespread commission of crimes over an extended period of time was enough to impute knowledge to Yamashita, the commander. The Tribunal found Yamashita guilty of failing his command responsibility, and sentenced him to death.[80] Thus, under the rubric of command responsibility or superior authority, leaders who have a duty to prevent, halt, or punish crimes committed by their subordinates may be held criminally responsible for abrogating this duty.

E. The 1949 Fourth Geneva Convention

In response to the systematic slaughter and persecution of millions of civilians during World War II, the original Geneva Conventions[81] were deemed inadequate. The Geneva Conventions were thus amended in 1949, resulting in four conventions, the fourth of which is devoted to protecting civilians during wartime. The four Conventions, including the interdicts against sexual violence, are not only part of conventional international law, they are also part of customary international law and are binding universally, regardless of whether states are parties to the treaties.[82]

The four 1949 Geneva Conventions govern the treatment of certain belligerents (the sick, wounded, and shipwrecked), civilians, and prisoners of war during periods of armed conflict.[83] In 1977, these conventions were supple-

79. *See In re Yamashita,* 327 U.S. 1 (1946). Although appealed to General Douglas MacArthur and the U.S. Supreme Court, the decision stood and Yamashita was executed. *See* William H. Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1, 69-73 (1973); Gordon Ireland, *Uncommon Law in Martial Courts,* 4 WORLD AFF. Y.B (1950).

80. *In re Yamashita, id.*

81. *See supra* note 59, referring to the 1864, 1906, and 1929 Geneva Conventions. These conventions are no longer in force, as the 1949 Conventions supercede the earlier documents.

82. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 97.

83. First Geneva Convention, *supra* note 6, protects wounded and sick armed forces on land; Second Geneva Convention, *supra* note 6, protects wounded and sick armed forces at sea; Third Geneva Convention, *supra* note 6, protects prisoners of war; and Fourth Geneva Convention, supra note 6, protects civilians. For more information on the First, Second and Third Geneva Conventions' protections of women, see Karen Parker, *Human Rights of Women During Armed Conflict,* in 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 283 (Kelly Askin & Dorean Koenig eds., 2001).

mented by two Additional Protocols to the 1949 Geneva Conventions, one devoted to international and the other to non-international armed conflicts.[84] As previously noted, a single article in the Fourth Geneva Convention and in each of the two Additional Protocols explicitly prohibits rape and (en)forced prostitution.[85] More specifically, Article 27 of the Fourth Geneva Convention, which provides protection to the civilian population in times of war, mandates the following:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[86]

Similarly, Article 76(1) of Protocol I states: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."[87] Article 4(2)(e) of Protocol II prohibits "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." Thus, the Conventions expressly include rape and forced prostitution, although they erroneously link rape with crimes of honor or dignity instead of with crimes of violence. Such a demarcation grossly mischaracterizes the offense, perpetuates detrimental stereotypes, and conceals the sexual and violent nature of the crime.[88]

There is now broad consensus that serious violations of the Geneva Conventions can carry criminal liability and be punished as crimes of war. It was recognized at the Nuremberg trials that it "is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally."[89] Grave breaches of the Geneva Conventions and violations of Common Article 3 of the Geneva Conventions, discussed *infra*, can also be used to punish torture or inhuman or cruel treatment, including rape.

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84. Additional Protocol I, *supra* note 2, regulates international armed conflicts; Additional Protocol II, *supra* note 7, regulates non-international armed conflict.

85. *See* Fourth Geneva Convention, *supra* note 6; Additional Protocol II, *supra* note 7; Additional Protocol I, *supra* note 2.

86. Fourth Geneva Convention, *supra* note 6, at art. 27.

87. Notice that the language in Protocol I is "forced" prostitution instead of the "enforced" prostitution used in Article 27 of the Fourth Geneva Convention and in Protocol II. *See* Additional Protocol I, *supra* note 2, at art. 76(1); Fourth Geneva Convention, *supra* note 6, at art. 27.

88. *See, e.g.*, Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 11-16 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

89. U.S. v. List, II TRIALS OF WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 1239 (commonly known as the Hostage Case).

In conclusion, the laws of warfare have both implicitly and explicitly prohibited the rape of combatants and noncombatants for centuries. Increasingly, this prohibition extends to other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking.[90]

II.
RECENT EFFORTS TO ENFORCE GENDER-RELATED CRIMES IN INTERNATIONAL CRIMINAL TRIBUNALS

In the early 1990s, the United Nations Security Council established a Commission of Experts to investigate the allegations of gross violations of humanitarian law committed during the conflict raging on the territory of the former Yugoslavia.[91] Based on documented reports and preliminary findings, including evidence of widespread or systematic rape to further the policies of "ethnic cleansing," the United Nations Security Council, acting under Chapter VII of the U.N. Charter, called for the establishment of an *ad hoc* international war crimes tribunal.[92] Consequently, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established to prosecute "Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."[93]

The following year, as a result of mass slaughter and other crimes committed during the ensuing genocide in Rwanda, the United Nations appointed a Special Rapporteur for Rwanda in mid-1994.[94] Shortly thereafter, the U.N. Security Council established a Commission of Experts to investigate reports and allegations of serious crimes committed during the armed conflict in Rwanda.[95] Compelled by evidence that over 600,000 people had been slaughtered during a nearly 100-day period in Rwanda, the Security Council, again acting under Chapter VII of the U.N. Charter, established the International Criminal Tribunal

90. Rome Statute of the International Criminal Court, 1998 Sess. at arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002) [hereinafter ICC Statute]; Prosecutor v. Kvočka, Judgement, IT-98-30-T, 2 Nov. 2001, at para. 180 & n.343 [hereinafter *Kvočka* Trial Chamber Judgement]. *See also* ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42; Jennifer Green, Rhonda Copelon, Patrick Cotter, Beth Stephens & Kathleen Pratt, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique,* 5 HASTINGS WOMEN'S L.J. 171, 185 (1994).

91. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 36-37, U.N. Doc. S/780/1992 (1992).

92. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. S/808/1993 (1993). S.C. Res. 808 endorsed the principle of establishing a tribunal.

93. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993). The Statute is contained in U.N. Doc. S/25704, Annex (1993) which is attached to the "Report on the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808." [hereinafter ICTY Statute or Yugoslav Statute].

94. Hum. Rts. Comm. Res. S-3/1.L, 3d.sp. Sess., U.N. Doc. E/CN.4/S-3/1.L (1994).

95. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 11-12, U.N. Doc. S/935/1994 (1994).

for Rwanda (ICTR) for the "Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994."[96] The Final Report of the Commission of Experts for Rwanda,[97] while recording few substantive crimes in depth, nevertheless noted that "[d]isturbing reports have been filed with the Commission of Experts that document the abduction and rape of women and girls in Rwanda." The U.N. Special Rapporteur on Rwanda concluded that "rape was the rule and its absence the exception,"[98] adding that many of these rapes resulted in pregnancy.[99]

A. *The Yugoslav and Rwanda Tribunals*

The Statutes of the Yugoslav and Rwanda Tribunals authorize the *ad hoc* Tribunals to prosecute war crimes, crimes against humanity, and genocide. Whereas genocide is defined identically in the two Statutes, and mirrors the definition contained in the Genocide Convention, the war crime and crime against humanity provisions differ. The differences largely reflect the different nature of the armed conflict in the two territories, the principal crimes committed, and the interests of the U.N. Security Council in establishing the two Tribunals. For example, Articles 2 and 3 of the ICTY Statute contain the war crime provisions, and grant the Yugoslav Tribunal jurisdiction over grave breaches of the 1949 Geneva Conventions and serious violations of the laws or customs of war.[100] Article 4 of the ICTR Statute contains the war crime provisions and

96. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994) [hereinafter ICTR Statute or Rwanda Statute].

97. *Final Report of the Commission of Experts on Rwanda*, Annex, U.N. Doc. S/1994/1405 (1994).

98. *See Report on the Situation of Human Rights in Rwanda by Reneé Degni-Segui, Special Rapporteur of the Commission on Human Rights*, at para. 16, U.N. Docs. E/CN.4/1996/68 (1996) & E/CN.4/1995/7 (1995).

99. *Id.* at para. 16.

100. The ICTY Statute grants subject matter jurisdiction over:

> Article 2
>
> Grave breaches of the Geneva Conventions of 1949
>
> 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.

grants the Rwanda Tribunal jurisdiction over serious violations of 1977 Additional Protocol II and Common Article 3 of the 1949 Geneva Conventions.[101]

Article 3
Violations of the laws or customs of war
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.

Article 4
Genocide
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.
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.

Article 5
Crimes against humanity
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.

101. The ICTR Statute grants subject matter jurisdiction over:
Article 2: Genocide
1. The International Tribunal for Rwanda 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
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;

The core of the provisions encompassing gender or sex crimes is discussed below. The Statutes provide for individual responsibility for one who participated by planning, instigating, ordering, committing, or otherwise aiding or abetting any of the aforementioned crimes; they provide superior responsibility for one who was in a position of authority and knew or had reason to know "that a subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof."[102]

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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.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
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.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b) Collective punishments;
c) Taking of hostages;
d) Acts of terrorism;
e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f) Pillage;
g) The passing of sentences and the carrying out of executions without previous Judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
h) Threats to commit any of the foregoing acts.

102. ICTY Statute, *supra* note 93, at art. 7(1)&(3); ICTR Statute, *supra* note 96, at art. 6(1)&(3).

B. War Crimes: Grave Breaches and Other Serious Violations of the Laws or Customs of War

Although the offenses included in Article 3 of the ICTY Statute derive primarily from Hague law, there is broad consensus that "laws or customs of war" also encompass the Geneva Conventions, Additional Protocols, and customary international law.[103] War crimes include grave breaches of the Geneva Conventions and serious violations of other laws (including Hague and Geneva Conventions and Additional Protocols) and customs of war.

1. Grave Breaches (ICTY, Art. 2)

Each of the 1949 Geneva Conventions provide a list of acts considered "grave breaches" and violation of these provisions is considered among the most egregious violations of international humanitarian law. The Geneva Conventions expressly confer criminal liability for violations of the articles of the Convention enumerating the grave breaches. The language ascribing criminal liability to the grave breaches is contained in the article immediately preceding the enumeration of grave breaches. Article 146 of the Fourth Geneva Convention provides:

> The 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. . . .
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

Article 147 of the Fourth Geneva Convention, which protects the civilian population, enumerates the grave breaches as: "willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or unlawful confinement of a protected person."[104] The caveat in each Convention is that the grave breach must be committed against "persons or property protected by" the particular Convention. Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, and Article 130 of the Third Geneva Convention list identical grave breaches to those included in Article 147 of the Fourth Geneva Convention. Protocol II does not mention grave breaches, although Additional Protocol I in Article 11(4) and in Article 85 includes and expands upon them.

There are differing views as to whether criminality for grave breach provisions extends to non-international conflicts.[105] As Professor Meron observes:

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103. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 87.

104. Fourth Geneva Convention, *supra* note 6, at art. 147.

105. *See Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at paras. 84-89 indicating that in the early 1990s, the law was not yet developed enough to apply grave breaches to internal armed conflicts. For alternative views, *see, e.g.*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 243 (1996) (grave breach provisions may have an "independent existence as a customary norm" and are applica-

"There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars."[106] States have the right to punish grave breaches on the basis of universal jurisdiction.[107] Moreover, although there was disagreement prior to the establishment of the Yugoslav and Rwanda Tribunals as to whether violations of the Geneva Conventions outside the grave breach provisions carry criminal sanctions, the Tribunals have successfully disabused assertions that criminal liability for violations rests exclusively with grave breaches.[108]

The Geneva Conventions do not specifically list any form of sexual violence as a grave breach, although case law confirms that sex crimes are covered by the grave breaches provisions, particularly the prohibitions of "torture," "inhuman treatment," "willfully causing great suffering," and "serious injury to body or health."[109] The grave breach language is intentionally expansive to provide as much protection as possible to persons protected by the Conventions, and there is general consensus that the provisions should be interpreted liberally.

As noted above, in order to prosecute a grave breach of the Geneva Conventions, the prosecution must establish that the grave breaches were committed against persons or property protected by the relevant Convention. The "protected persons" under the Fourth Geneva Convention are "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[110] The ICTY Trial and Appeals Chambers have interpreted this provision generously in order to afford "protected person" status to as many persons as possible, including victims who could be considered as being of the same nationality as their victimizers (for example, Bosnian Muslims victimized by Bosnian Serbs.)[111]

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ble to Common Article 3, and thus apply also in internal armed conflicts); Jordan Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994) (interpreting the grave breaches to apply only to "protected persons" is too restrictive); LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 685 (1988) (grave breaches comprise *jus cogens* and apply to internal or international conflicts); Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79, 83 (1995) (change of "protected persons" to "civilians" in Article 3 of the ICTY Statute extends grave breach provisions to internal conflicts).

106. Meron, *International Criminalization of Internal Atrocities*, *supra* note 9, at 561.

107. *See, e.g.*, *Čelebići* Trial Chamber Judgement, *supra* note 3.

108. *See, e.g.*, *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 94.

109. *See, e.g.*, *Čelebići* Trial Chamber Judgement, *supra* note 3.

110. Fourth Geneva Convention, *supra* note 6, at art 4(1).

111. *See, e.g.*, *Prosecutor v. Tadić*, Judgement, 1T-94-1-A, 15 July 1999 [hereinafter *Tadić* Appeals Chamber Judgement] at paras. 164-68; *Aleksovski* Appeals Chamber Judgement, *supra* note 12, at paras. 151-52; *Čelebići* Appeals Chamber Judgement, *supra* note 3, at paras. 73-84. The Chambers essentially determined that ethnicity may be taken into account in determining nationality because, during conflict situations, factors such as religion or ethnicity may be more determinative of where an individual's alliance lies than formal nationality. According to *Čelebići*: "The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterizations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State." *Čelebići* Appeals Chamber Judgement, *id.* at para. 84.

In practice, the ICTY has limited its Article 2 "grave breach" charges in indictments. Instead, it has simply brought most war crimes charges under Article 3 of its Statute, which means that the prosecution does not have to prove that the conflict was international in nature at the time and place charged in the indictment, as such proof may entail a lengthy and arduous evidentiary process. Prerequisites for Article 3 crimes merely require proof that the crime was committed in either an international or internal armed conflict and was "closely related" to the armed conflict.[112] Grave breaches are not included within the terms of the ICTR Statute because the conflict in Rwanda in 1994 is generally regarded as non-international in character.

2. Violations of the Laws or Customs of War (ICTY, Art. 3)

Serious violations of the laws and the customs of war may be prosecuted as war crimes. Article 3 of the ICTY Statute has been interpreted as having a "catch-all" residual function.[113] Originally, there was some discussion as to whether serious violations of the Geneva Conventions outside the grave breach provisions carry criminal penalties. Article 146 of the Fourth Geneva Convention requires each state to "take measures necessary for the suppression of all acts contrary to the provisions of the . . . [c]onvention other than the grave breaches." Indeed, Meron accurately insists that "[j]ust because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions."[114] Thus, simply because the grave breaches are specifically attributed "war crime" status does not mean that criminal responsibility cannot attach to other provisions. The ICTY Appeals Chamber has articulated the requirements for when an act constitutes a serious violation of the laws or customs of war:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .;
> (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. . .;
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[115]

It is now beyond dispute that serious violations of Hague and Geneva law, the Additional Protocols, and customary international law, impose criminal re-

112. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 70.

113. *Id.* at para. 91.

114. Meron, *International Criminalization of Internal Atrocities, supra* note 9, at 569. Support is also provided by the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *supra* note 38, at art. 5 ("[C]ruel and inhuman treatment of women and children. . . shall be considered criminal"). *Aut dedere aut judicare* is essentially the duty to extradite or adjudicate persons accused of international crimes, on the basis of universal jurisdiction or treaty obligation. *See, e.g.*, M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW (1995).

115. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para 94.

sponsibility upon the individuals and superiors responsible for the violations. The ICTY has expressly noted that violations of the provisions of the Fourth Geneva Convention and Additional Protocols expressly prohibiting rape, enforced prostitution, and any other form of indecent assault, may be prosecuted.[116] In practice, however, most gender or sex crimes have been prosecuted under Article 3 of the ICTY Statute and Article 4 of the ICTR Statute, through the Common Article 3 provisions.

3. *Common Article 3 to the Geneva Conventions (ICTR, Art. 4)*

The term "Common Article 3" refers to the identical language found in Article 3 of each of the four 1949 Geneva Conventions. Common Article 3 is regarded as a "mini convention" within the Geneva Conventions, as it was originally intended to be the article in the Conventions dedicated to dictating the treatment of persons in internal conflicts. However, Common Article 3 is now recognized as part of customary international law, applicable to both internal and international armed conflicts alike.[117] Additional Protocol II, which governs internal conflicts, and which is also included within the jurisdiction of the Rwanda Tribunal, uses similar language.[118] Common Article 3 requires that humane treatment be afforded to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause." It explicitly prohibits the following acts: "(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . (c) Outrages upon personal dignity, in particular humiliating and degrading treatment."[119]

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116. *Kvočka* Trial Chamber Judgement, *supra* note 90, at 63-64 & n.409 ("The Trial Chamber notes that, under Article 3 of the Statute, violations of the laws or customs of war, rape is a crime also explicitly protected against by Article 27 of the Fourth Geneva Convention, Article 76(1) of Additional Protocol I, and Article 4(2)(3) of Additional Protocol II. Rape is a war crime under these provisions as well, and not solely under Common Article 3 of the Conventions.")

117. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at paras. 98-127. *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 35 (1991); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Prosecutor v. Tadić, Decision on the Defence Motion on Jurisdiction, IT-94-1, 10 Aug. 1995, at paras. 65-74, *revised and affirmed in part* by the Appeals Chamber (2 Oct. 1995).

118. *See* Additional Protocol II, *supra* note 7, at art. 4(2).

119. Common Article 3 to the 1949 Geneva Conventions, *supra* note 6. The language used in Article 4 of the ICTR Statute is nearly identical to that used in Additional Protocol II and is strikingly similar to Common Article 3. Article 4 of the ICTR Statute confers jurisdiction over, in pertinent part: "(a) Violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; . . . (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." *See also* ICTR Statute, *supra* note 96, at art. 4, Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. While most of the language in the ICTR Statute is identical to the language in Protocol II, Article 4(2), there are two significant differences: Subarticles (a)-(e) and (h) are exactly the same in both, and "pillage" is included in both (under differing subarticle letters), but the ICTR Statute adds: "The passing of sentences and the carrying out of executions without previous Judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (at art. 4(g)), and deletes: "Slavery and the slave trade in all their forms"

Although it is not explicitly listed in the ICTY Statute (whereas it is formally included in the ICTR Statute), the ICTY Appeals Chamber has consistently affirmed that Common Article 3 is implicitly subsumed within the "laws or customs of war" language of the ICTY Statute.[120] The jurisprudence of the Tribunals, as discussed *infra*, confirms that Common Article 3 encompasses various forms of sexual violence.[121]

The ICTR has contributed little to developing the law relating to serious violations of Common Article 3 and Additional Protocol II. To date, not a single person has been convicted of a war crime by the ICTR, largely because the ICTR has erroneously articulated, interpreted, and applied the war crimes prescriptions. However, in 2001, the ICTR Appeals Chamber rejected the Trial Chambers' formulation and interpretation of the war crime provisions under its Statute, allowing subsequent Appeals Chamber decisions to reverse applicable war crimes acquittals or Trial Chambers to provide for convictions at first instance.[122] Thus, there will presumably be at least marginal development of the war crime provisions regarding internal armed conflict in future ICTR decisions. This development will be especially useful because most contemporary armed conflicts are internal rather than international in character.

4. Crimes Against Humanity (ICTY, Art. 5; ICTR, Art. 3)

The term "crimes against humanity" first appeared in an international instrument in the Nuremberg Charter, when it was included as a means of prosecuting the German Nazi leaders for the gross atrocities committed against certain members of the civilian population, including German citizens, during the Second World War. Although the IMT, IMTFE, CCL10, ICTY, ICTR, and ICC Statutes or Charters have defined the scope of the crime differently, in essence, a crime against humanity consists of an inhumane act (typically a series of inhumane acts such as murder, rape, and torture) committed as part of a widespread or systematic attack that is directed against a civilian population.[123] It

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from Protocol II (at art. 4(2)(f)). It is unclear why slavery was dropped from the language of the ICTR Statute.

120. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, at paras. 87-98.

121. *See, e.g., Čelebići* Trial Chamber Judgement, *supra* note 3; *Furundžija* Trial Chamber Judgement, *infra* note 200; *Kunarac* Trial Chamber Judgement, *supra* note 15. See also some of the original ICTY Indictments charging various forms of sexual violence under the Common Article 3 protections: Karadžić & Mladić, IT-95-5, 25 July 1995, at Count 4 (outrages upon personal dignity); Sikirica, IT-95-8, "Keraterm" of 21 July 1995, at Count 19 (cruel treatment); Miljković, IT-95-9, "Bosanski Samac" of 21 July 1995, at Counts 37, 52 (humiliating and degrading treatment); Jelisić & Češić, IT-95-10, "Brcko" of 21 July 1995, at Count 51 (humiliating and degrading treatment); Delalić, IT-96-21, "Čelebići" of 21 March 1996, at Counts 19, 22 (torture) or alternatively Counts 20, 23 (cruel treatment); Gagovic, IT-96-23, "Foža" of 26 June 1996, at Counts 112 (torture), Counts 13-28 (torture), Count 31 (outrages upon personal dignity), Counts 32-35 (torture), Counts 36-55 (torture), Count 59 (outrages upon personal dignity).

122. Prosecutor v. Akayesu, Judgement, ICTR-96-4-A, 1 June 2001, at paras. 442-45 [hereinafter *Akayesu* Appeals Chamber Judgement].

123. *See, e.g.,* LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2001); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 427 (1993); Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five*

can consist of crimes committed by a state against its own citizens and often has a discriminatory purpose. In practice, persecution and extermination appear to be the most common manifestations of crimes against humanity, and this coupling often results in genocide charges as well. Rape may be a crime against humanity when committed as part of a widespread or systematic attack; sexual violence also regularly forms part of the inhumane acts committed against an enemy group. Rape crimes may also be prosecuted as a crime against humanity under the persecution, torture, enslavement, or inhumane acts provisions.[124]

Although the ICTY Statute requires a nexus to an armed conflict, the Statute simply imposes that element as a jurisdictional requirement, thus proof of an armed conflict is not a constituent element of the crime in other courts.[125] And although the ICTR Statute stipulates that the attack be committed on national, political, ethnic, racial, or religious grounds, the common Appeals Chamber has interpreted this requirement as being necessary to prove only for the persecution charge.[126] Moreover, the ICC Statute appropriately recognizes "gender" as one of the discriminatory grounds for the crime of persecution.[127]

The case law has confirmed that the particular act alleged (for example, rape) does not need to be committed in a widespread or systematic manner—the act need simply form part of a widespread or systematic attack. Thus, it is the attack that must be widespread or systematic, not each persecuting or criminal act forming part of the attack.[128]

The ICTY Appeals Chamber has confirmed that under customary international law, and as applied by the Tribunal, the general (*chapeau*) requirements for crimes against humanity are: "(i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern."[129]

Years Later, 8 TEMP. INT'L & COMP. L.J. 1, 9 (1994). A more lengthy examination of the differing crime against humanity provisions in international documents can be found in ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 344-48.

124. *See, e.g., Kvočka* Trial Chamber Judgement, *supra* note 90, and discussed *infra* in regards to rape, torture, enslavement and persecution as a crime against humanity for sexual violence; *See also* Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, 2 Sept. 1998 [hereinafter *Akayesu* Trial Chamber Judgement] (recognizing forced nudity as inhumane acts constituting a crime against humanity).

125. The ICTY and ICTR have articulated the prerequisite elements for crime against humanity charges under their respective Statutes and the jurisprudence has also interpreted these provisions and applied them to the charges in each case. *See, e.g.*, summary of the ICTY elements in Prosecutor v. Kunarac, Judgement, IT-96-23 & IT-96-23/1, 12 June 2002, at para. 127 [hereinafter *Kunarac* Appeals Chamber Judgement].

126. *Akayesu* Appeals Chamber Judgement, *supra* note 121, at paras. 464-67.

127. ICC Statute, *supra* note 90, at art. 7(h).

128. *See, e.g., Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 419 ("It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.")

129. *Kunarac* Appeals Chamber Judgement, *supra* note 124, at paras. 85, 105.

The Tribunals have interpreted the core legal requirements of crimes against humanity and applied them to the facts of each case, copiously developing the jurisprudence of this crime. Perhaps the most contentious issue was whether "systematic" required the existence of a plan or policy. The ICTY Appeals Chamber has recently answered in the negative, stating that a plan or policy may be indicative of the systematic nature of the crime and thus be "evidentially relevant", but it is not a legal element of the crime.[130]

5. Genocide (ICTY, Art. 4; ICTR, Art. 2)

The ICTY, ICTR, and ICC Statutes have all reproduced the definition of genocide contained in the Genocide Convention.[131] Article II of the Genocide Convention defines genocide as:

> [A]ny one of the following acts, when committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (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.[132]

Genocide is an international crime imposing individual criminal responsibility upon those committing or facilitating the commission of the crime.[133] It is predominately defined by intent. This intent must be to destroy, wholly or partially, a national, ethnic, racial, or religious group, as such, by any act that fits into the aforementioned list.[134] Although genocide is also considered a crime against humanity,[135] the trend has been to separate the crimes.

The process of destruction of an intended target group is not limited to physical extermination.[136] An intent to destroy—wholly or partially, physically or mentally—any protected group can be evidence of genocide. The possible

130. *Id.* at para. 98. Because the five members of the ICTY and ICTR Appeals Chambers share the same pool of seven ICTY/R Appeals Chamber Judges, it is likely that, except for peculiarities in the respective Statutes, the ICTR Appeals Chamber will reach similar conclusions as to the elements of crimes against humanity under the ICTR Statute. Indeed, the *Akayesu* Appeals Chamber Judgement appears to adopt the ICTY Appeal Chamber's formulations of the crime. *Akayesu* Appeals Chamber Judgement, *supra* note 122, at paras. 460-69.

131. In the ICC negotiations in particular, there was fear that if delegates started tinkering with the definition, some delegates might want it more expansive while others would want to make it more restrictive.

132. Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

133. *Id.* at art. 1. Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are all punishable.

134. *Id.* at art. 11. For a superb analysis of the *dolus specialis* of genocide, see WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 217-28 (2000).

135. *See, e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, art. 1(b), 754 U.N.T.S. 73; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW (1999).

136. For discussion of this, see Daphna Shraga & Ralph Zacklin, *The International Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 368 (1994); M. .Cherif Bassiouni, *Genocide and Racial Discrimination, in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 530 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

sub-elements of the crime of genocide are not mutually exclusive, and more than one sub-element committed during the process of destruction can and usually does apply. Sexual violence can fall under each of the sub-elements,[137] although the most common means of using sex crimes as instruments of genocide are: (b), causing serious bodily or mental harm to the group (such as by raping or otherwise violating women);[138] (c), inflicting conditions of life on members of the group to bring about a slow death (such as having HIV/AIDS-infected persons repeatedly rape the victims); and (d) imposing measures intended to prevent births within the group (such as forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child).[139]

Various forms of sexual violence may meet the elements of genocide, even when only a single member of the protected group is harmed.[140] If the intent is to seriously harm (that is, destroy, in whole or in part) a member of the protected group by any of the aforementioned methods, targeted as such because of their membership in the group, that should constitute genocide. Often the destructive act will be one of many linked to a broader pattern of both systematic and intentionally random destruction.[141]

The ICTR has most extensively developed the law on genocide. Each Indictment in the Rwanda Tribunal has charged genocide and prosecution has been largely successful. In contrast, only a small percentage of ICTY cases allege genocide, and thus far, there has been only one successful genocide conviction in the Yugoslav Tribunal. By and large, the ICTR *Akayesu* case and the

137. *See, e.g.*, Martina Vandenberg & Kelly Askin, *The Use of Gender Violence as Instruments of Genocidal Destruction, in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly Askin, Martina Vandenberg, & Deena Hurwitz eds., vol. IV, forthcoming 2003); Kelly D. Askin, *Women and International Humanitarian Law, in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41, 71-76 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

138. *See, e.g.*, KATHRYN QUINA & NANCY L. CARLSON, RAPE, INCEST, & SEXUAL HARASSMENT—A GUIDE FOR HELPING SURVIVORS 86, 143 (1989); P.A. Resick, *The Psychological Impact of Rape,* 8 J. INTERPERSONAL VIOLENCE 223, 223-55 (1993); I. L. Schwartz, *Sexual Violence Against Women: Prevalence, Consequences, Societal Factors, and Preventions,* 7 AM J. PREV. MED. 363-73 (1991) and references cited therein. *See also* Vera Folnegovi-Smalc, *Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and in Bosnia-Herzegovina, in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 174 (Alexandra Stiglmayer ed., 1994).

139. Christine Chinkin, *Rape and Sexual Abuse of Women in International War,* 5 EUR. J. INT'L L. 326, 333 (1994); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace, in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 89-90 (Stephen Shute & Susan Hurley eds., 1993); Catharine MacKinnon, *Rape, Genocide and Women's Human Rights,* 17 HARV. WOMEN'S L.J. 5 (1994); ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 338-39; ANNE TIERNEY GOLDSTEIN, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW 24 (The Center for Reproductive Law and Policy, 1993).

140. HILARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICT 140 (1990); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL 73 (1987); H.H. Jescheck, *International Criminal Law: Its Object and Recent Developments, in* A TREATISE ON INTERNATIONAL CRIMINAL LAW 73 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

141. *See* Prosecutor v. Krstić, Judgement, IT-98-33-T, 2 Aug. 2001 [hereinafter *Krstić* Trial Chamber Judgement].

ICTY *Krstić* case contribute a majority of the Tribunal's jurisprudence on the elements and scope of genocide.[142]

The next section reviews the cases of the ICTY and ICTR that have developed the most significant jurisprudence in relation to gender and sex crimes.

III.
PROSECUTING GENDER-RELATED CRIMES IN THE ICTY AND ICTR

Crimes committed exclusively or disproportionately against women and girls have secured reluctant but nonetheless groundbreaking redress in the Yugoslav and Rwanda Tribunals. This section will review the jurisprudence of the five cases in the Tribunals that have most extensively developed the law on gender-related crimes, namely the *Akayesu, Èelebiœi, Furundžija, Kunarac*, and *Kvoèka* Judgements. Other cases, most notably *Tadić, Musema, Karadžić & Mladić, Milošević, Krajišnik & Plavšić, Nikolić, Cyangugu,* and *Butare*, also include evidence of gender-related crimes and are at varying stages in the judicial proceedings.[143] The prosecution of gender crimes in the Tribunals is typically fraught with inherent difficulties and gratuitous obstacles, and the crimes are usually investigated and indicted only after concerted pressure by women's rights organizations and feminist scholars to prosecute the crimes. Nonetheless the progress made is nothing short of revolutionary.

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142. *See Akayesu* Trial Chamber Judgement, *supra* note 124; *Krstić* Trial Chamber Judgement, *supra* note 141.

143. *See* ICTY/R websites at http://www.un.org/icty and http://www.ictr.org to review these cases. Of particular note, the Karadžić & Mladić Rule 61 Decision mentioned "forced impregnation", the *Tadić* Trial Chamber Judgement discussed instances of rape and male sexual mutilation, and the *Plavšić* and *Butare* cases (ICTY and ICTR respectively) bring charges against female leaders accused of responsibility for crimes against humanity and genocide for various crimes, including sexual violence. Prosecutor v. Karadžić & Mladić, Review of the Indictment Pursuant to Rule 61, IT-95-5-R61 & IT-95-18-R61, 11 July 1996, at para. 64; Prosecutor v. Tadić, Opinion & Judgement, IT-94-1-T, 7 May 1997, at paras. 154, 206, 470, 726-30; Prosecutor v. Krajišnik & Plavšić, Consolidated Amended Indictment, IT-00-39 & 40-PT, 7 Mar. 2002, at paras. 17(b)(c),19(c)(g); Prosecutor v. Nyiramasuhuko & Ntahobali, Amended Indictment, ICTR-97-21-I, 1 Mar. 2001, at paras. 5,18, 6.37, 6.53, 6.56. See discussion of these cases in: Betty Murungi, *Prosecuting Gender Crimes at the International Criminal Tribunal for Rwanda*, AFLA Q. 5 (Apr.-Jun. 2001); Gabrielle Kirk McDonald, *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 COLUMBIA J. TRANSNAT'L L. 1 (2000); Patricia Viseur Sellers, *Rape and Sexual Assault as Violations of International Humanitarian Law, in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Martina Vandenberg, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, 12(3) HUMAN RIGHTS WATCH (2000); Magdalini Karagiannakis, *The Definition of Rape and Its Characterization as an Act of Genocide—A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, 12 LEIDEN J. INT'L L. 1 (1999); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97-123 (1999); Patricia Viseur Sellers, *Emerging Jurisprudence on Crimes of Sexual Violence*, 13(6) AM. U. INT'L L. REV. 1523 (1998); Patricia Viseur Sellers & Kaoru Okuizumi, *International Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. (1997); Kelly Dawn Askin, *The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women, in* 2 INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES AND PROSPECTS (John Carey et al. eds., forthcoming 2003).

A. *The* Akayesu *Judgement: Characterizing Rape as an Instrument of Genocide*

The landmark *Akayesu* Trial Chamber Judgement was handed down by the Rwanda Tribunal on September 2, 1998.[144] The Judgement carries monumental legal significance: It concluded that rape and other forms of sexual violence were used as instruments of genocide, and also the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity. This was the first ever conviction of either genocide or crimes against humanity for sexual violence. The Trial Chamber also articulated the seminal definitions of rape and sexual violence under international law, and recognized forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity.

In this case, Jean-Paul Akayesu, *bourgmestre* (akin to mayor) of Taba commune in Rwanda, was charged in the original Indictment with twelve counts of genocide, crimes against humanity, and war crimes for the murder, extermination, torture, and cruel treatment committed throughout Taba. There were no charges for gender-related crimes, despite the fact that women's and human rights organizations had documented extensive evidence of rape and other forms of sexual violence throughout Rwanda, including Taba.[145]

During the trial, a witness on the stand spontaneously testified about the gang rape of her six-year-old daughter by three Interahamwe soldiers. This was followed by the testimony of another witness, who said that she was a victim of and witness to other rapes in Taba committed by members of the Hutu militia. As a direct result of this evidence, as well as international exhortations to include sexual violence in the charges against Akayesu,[146] the trial was convened so that the Office of the Prosecutor (OTP) could investigate charges of sexual violence and consider amending the indictment to include appropriate charges if evidence of the crimes were found in Taba and individual or superior responsibility for the crimes could be attributed to Akayesu.[147] Also crucial to its inclusion was the presence of Judge Navanethem Pillay of South Africa on the bench, a judge with extensive expertise in international human rights law and gender-related crimes.

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144. *See Akayesu* Trial Chamber Judgement, *supra* note 124.

145. *See, e.g.*, BINAIFER NOWROJEE, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (Human Rights Watch & Fédération Internationale, 1996); *Report of the Mission to Rwanda on the Issue of Violence Against Women in Situations of Armed Conflict, by Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, U.N.* Doc. E/CN.4/1998/54/Add.1 (1998).

146. Dozens of women's rights activists, human rights organizations, academics, and international lawyers faxed letters to the Tribunal urging it not to exclude the gender-related crimes. The NGO Coalition for Women's Human Rights in Conflict Situations also filed an *amicus* in the case on the issue of sexual violence. *See* Prosecutor v. Akayesu, Amicus Brief Respecting the Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Sexual Violence Within the Competence of the ICTR, May 1997 (prepared by Joanna Birenbaum, Lisa Wyndel, Rhonda Copelon & Jennifer Green).

147. *See Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 416.

After an investigation revealed vast evidence of sexual violence committed in Taba by Hutu men against Tutsi women, the prosecution amended the indictment to charge Akayesu with rape and "other inhumane acts" as crimes against humanity and war crimes in Counts 13-15 of the Amended Indictment. The genocide counts also referenced the paragraphs alleging the rape crimes, thus allowing a finding of rape as an instrument of genocide if the evidence led to that conclusion.

The *Akayesu* Trial Chamber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[148] Sexual violence, which is broader than rape, is defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[149] In the Judgement, forced nudity was cited as an example of sexual violence not involving touching. Further, the Trial Chamber emphasized that the amount of coercion required does not need to amount to physical force, as "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion." Notably, the Chamber stressed that coercion may be inherent in armed conflict situations or when military personnel, such as militia, are present.[150]

The Trial Chamber noted that while national jurisdictions have historically defined rape as "non-consensual sexual intercourse," a broader definition was warranted to include "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." Providing an example from the testimony before the Court, the Chamber stipulated that the act of "thrusting a piece of wood into the sexual organs of a woman as she lay dying—constitutes rape in the Tribunal's view."[151]

The Trial Chamber additionally noted that sexual violence fell within the scope of "other inhumane acts" as crimes against humanity, "outrages upon personal dignity" of the war crime provisions of the Statute, and "serious bodily or mental harm" of the genocide prescriptions.[152] Although the rape crimes were not charged as torture in the Amended Indictment, the Trial Chamber analogized aspects of the crimes of rape and torture, noting that rape "is a form of aggression" and the elements of the crime "cannot be captured in a mechanical description of objects and body parts."[153] The Chamber noted that "[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture,

148. *Id.* at para. 688.

149. *Id.*

150. *Id.* The *Akayesu* definition of rape was adopted by the ICTY in the *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 479.

151. *Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 686.

152. *Id.* at para. 688.

153. *Id.* at para. 687.

rape is a violation of personal dignity, and rape in fact constitutes torture" when all of the elements of torture are satisfied.[154]

The Judgement unambiguously recognized that sexual violence causes extensive harm, and it is intentionally used during periods of mass violence to subjugate and devastate a collective enemy group—in this case members of the Tutsi group and their sympathizers. The decision forcefully recognized that, in the genocidal regime carried out by Hutus, rape crimes were perpetrated as "an integral part of the process of destruction."[155] It explained that "[s]exual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself."[156] Thus, the Court emphasized that the injury and suffering inflicted by sexual violence extends beyond the individual to the collective targeted group, in this case, the Tutsis.

There were no allegations that Akayesu himself physically perpetrated rape crimes. The Trial Chamber held that he could be held accountable for the sexual violence because of his role in ordering, instigating, or aiding and abetting the rapes, forced public nudity, and sexual mutilation, thereby facilitating the commission of the crimes.[157] He did this by his presence, omissions, or words of encouragement during or before many of the instances of sexual violence. Ultimately, the Tribunal found that Akayesu incurred criminal responsibility for several crimes, including various forms of sexual violence, committed by Hutu men against Tutsi women and girls in and around the Taba commune. The Trial Chamber determined that "by virtue of his authority," Akayesu's presence and words of encouragement "sent a clear signal of official tolerance" for the acts of sexual violence.[158] As a result, the Tribunal convicted Akayesu of individual responsibility for the sex crimes.

In finding Akayesu guilty of rape as a crime against humanity, the Chamber found that: "a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June, 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack."[159]

As noted above, the Trial Chamber also held that Akayesu was responsible for rape crimes committed within the context of the genocide. Finding that rape crimes "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particu-

154. *Id.* Note that the last requirement, that state action be involved when applying international humanitarian law or international criminal law, as opposed to human rights law, has been rejected by the ICTY in the *Kunarac* case, discussed *infra*.

155. *Id.* at para. 731.

156. *Id.* at para. 732. The Chamber further explained that the "acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process." *Id.* at para. 733.

157. *Id.* at paras. 692-94.

158. *Id.* at para. 693.

159. *Id.* at para. 695.

lar group, targeted as such,"[160] the Chamber concluded that rape was used as an instrument of the genocide in Taba, and that Akayesu's acts and omissions rendered him individually responsible for these crimes. The Trial Chamber reported:

> Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you." Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed.[161]

The Judgement recognized that rape was frequently a prelude to death, but at times, the women were left alive because rape was considered worse than death.

In total, the Trial Chamber convicted Akayesu of nine of the fifteen counts charged against him in the Amended Indictment. He was found guilty of genocide and the crimes against humanity of extermination, murder, torture, rape, and other inhumane acts. For these crimes, the Trial Chamber sentenced him to life imprisonment.[162] The ICTR Appeals Chamber Judgement rendered on June 1, 2001 upheld the Trial Chamber Judgement.[163]

B. The Čelebići *Judgement: Recognizing Sexual Violence as Torture*

Trial Chamber II *quater* of the Yugoslav Tribunal rendered the *Čelebići* Trial Chamber Judgement on November 16, 1998.[164] The most notable gender-related aspects of this case are its implications regarding superior responsibility, its treatment of various forms of sexual violence committed against male detainees, and its development of the law of torture when victims are tortured by means of rape.

In *Čelebići*, the four accused on trial were charged with various war crimes (as grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute; or as violations of the laws or customs of war for violations of Common Article 3 of the Geneva Conventions under Article 3 of the ICTY Statute). The prosecution indicted the accused for the war crimes of unlawful confinement of civilians, willfully causing great suffering, cruel treatment, willful killing, murder, torture, inhuman treatment, and plunder. These crimes were alleged to have occurred when Bosnian Muslims and Bosnian Croats attacked the Konjic municipality in central Bosnia and Herzegovina in May 1992, expelling the Bosnian Serb residents from their homes and confining most of them in Čelebići prison

160. *Id.* at 731.

161. *Id.* at paras. 706-07.

162. Prosecutor v. Akayesu, Sentence, ICTR-96-4-T, 2 October 1998. For an examination of a broader scope of the crimes, *see, e.g.*, ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 271-82 (Human Rights Watch & International Federation of Human Rights, 1999).

163. *See Akayesu* Appeals Chamber Judgement, *supra* note 122.

164. *See Čelebići* Trial Chamber Judgement, *supra* note 3.

camp. The Indictment alleged that detainees in the camp were "killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment."[165]

The accused included Zejnil Delalić, a person with alleged authority over Čelebići camp; Zdravko Muciæ, *de facto* commander of the camp; Hazim Delić, a person who worked in the camp; and Esad Landzo, a guard at the camp. Delalić, Mucić, and Delić were charged not only with individual responsibility, but also with superior or command responsibility for failing to prevent, halt, or punish crimes committed by subordinates purportedly under their authority. Mucić and Delić were also charged with individual responsibility for physically committing certain crimes, including sexual violence. Holding no position of authority, the prosecution charged Landzo solely with individual responsibility for the crimes alleged against him.

Although the sexual nature of certain crimes is not immediately obvious in the charges due to the language used in the indictment, the charges did include various forms of sexual violence brought against three of the accused. More explicitly, the prosecution charged Delić with torture under Article 2 of the Statute as a grave breach of the 1949 Geneva Conventions, and under Article 3 of the Statute as a violation of the laws or customs of war, for the *actus reus* of forcible sexual penetration.[166] He was also charged in the alternative with cruel treatment. According to the allegations, Delić personally raped two victims, including survivor-witness Ms. Ćećez, who "was raped by three different persons [including Delić] in one night and on another occasion she was raped in front of other persons." Another survivor, Witness A, "was subjected to repeated incidents of forcible anal and vaginal intercourse. . . . Hazim Delić raped Witness A during her first interrogation and continued to rape her every few days over a six-week period thereafter."[167] The prosecution charged Delić with individual responsibility for these crimes.

Delalić, Mucić and Delić were charged with superior responsibility for "willfully causing great suffering or serious injury to body or health" as a grave breach and with cruel treatment as a violation of the laws or customs of war, for acts committed by their subordinates, which included subjecting two male detainees to abusive treatment by having a burning fuse cord placed around their genitals.[168] These three accused were also charged with superior responsibility for the grave breach of inhuman treatment and for cruel treatment as a violation of the laws or customs of war when subordinates forced two male detainees to perform fellatio on each other.[169]

In considering the torture charges for the sexual violence, the Trial Chamber emphasized that "in order for rape to be included within the offence of tor-

165. Prosecutor v. Delalić, Indictment, IT-96-21-I, 19 March 1996, para. 2 [hereinafter *Čelebići* Indictment].

166. *Id.* at paras. 18, 19.

167. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 14 (paraphrasing the Indictment.)

168. *Id.* at para. 24 (paraphrasing the Indictment.)

169. *Id.* at para. 26 (paraphrasing the Indictment.)

ture it must meet each of the elements of this offence."[170] The elements of torture for purposes of the war crimes provisions of the ICTY Statute were held by the Trial Chamber to be:

> (i) There must be an act or omission that causes severe pain or suffering, whether physical or mental,
> (ii) which is inflicted intentionally,
> (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
> (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[171]

The Trial Chamber thus adopted the elements of torture contained in the Convention Against Torture,[172] and stipulated that when any form of sexual violence satisfies these elements, it may constitute torture.[173] Interpreting the elements of torture vis-à-vis the rapes, the Chamber stressed:

> The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by the social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.[174]

According to the evidence established at trial, when Ms. Ćećez arrived in the camp, Delić interrogated her. During the course of the interrogation, Delić repeatedly raped Ms. Ćećez as he questioned her as to the whereabouts of her husband. Three days later, Delić subjected her to multiple rapes when she was transferred between buildings in the camp, and he again raped her in the camp two months later.[175] The Trial Chamber held that "the acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape."[176] The Chamber found that the rapes committed by Delić caused severe pain and suffering[177] and they were committed against Ms. Ćećez for the purpose of obtaining information as to the whereabouts of her husband, to punish

170. *Id.* at para. 480.
171. *Id.* at para. 494.
172. Convention Against Torture, *supra* note 21, at art 1.
173. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 496.
174. *Id.* at para. 495.
175. *Id.* at paras. 937-38.
176. *Id.* at para. 940.
177. *Id.* at para. 942.

her for not providing the information, to punish her for the acts of her husband, and to coerce and intimidate her into cooperating.[178]

In addition, the Trial Chamber found that she was raped for discriminatory purposes, concluding that discrimination on the basis of sex was another purpose behind the torture: "the violence suffered by Ms. Ćećez in the form of rape, was inflicted upon her by Delić because she is a woman . . . [and] this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture."[179] This acknowledges that females are often tortured in ways different than males, and singled out for discriminatory treatment because of their sex or gender. Here, the accused tortured the victim by means of rape because she was a female of an opposing group; this constitutes discriminatory treatment under the Torture Convention.

The Trial Chamber also emphasized that Delić used sexual violence as an instrument of terror and subordination, since he committed the rapes with an aim of "intimidat[ing] not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."[180] Hence, the Trial Chamber held that Delić had repeatedly raped Witness A for the purpose of intimidating, coercing, and punishing her, and that these rapes caused severe mental and physical pain and suffering. The Chamber found Delić guilty of torture for the *actus reus* of forcible sexual penetration.[181]

The Trial Chamber considered the offense of "wilfully causing great suffering or serious injury to body or health," a grave breach of the Geneva Conventions, and stated that the crime constitutes an act or omission that is intentional, being an act which, judged objectively, is "deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence."[182]

In the Judgement, the Tribunal found Mucić guilty of the grave breach of "wilfully causing great suffering" when subordinates under his authority tied a burning fuse cord around the genitals of a victim.[183]

When considering the crime of inhuman treatment, which is a grave breach of the Geneva Conventions, the Trial Chamber surveyed the term's usage in the Commentary to the Geneva Conventions, human rights instruments, and jurisprudence of human rights bodies. It defined inhuman treatment as "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[184] It postulated that this intentional mistreatment is inconsistent with the fundamental principle of humanity,

178. *Id.* at para. 941.
179. *Id.*
180. *Id.*
181. *Id.* at paras. 475-96, 965-65.
182. *Id.* at para. 511. The purposive requirements of torture are discussed *infra.*
183. *Id.* at paras. 1038-40.
184. *Id.* at para. 543.

and inhuman treatment "forms the umbrella" covering all other 'grave breaches' listed in the Geneva Conventions.[185]

The Trial Chamber also considered the crime of cruel treatment as a violation of Common Article 3 to the Geneva Conventions, and concluded that it shared an identical definition with inhuman treatment. As such, it carried the "equivalent meaning and therefore the same residual function for the purposes of common article 3 . . . as inhuman treatment does in relation to grave breaches."[186]

The Tribunal also convicted Mucić of inhuman treatment and cruel treatment for failing his command responsibility when subordinates under his authority forced two brothers to publicly perform fellatio on each other. Significantly, the Trial Chamber noted that the forced fellatio "could constitute rape for which liability could have been found if pleaded in the appropriate manner."[187] Thus, if the forced fellatio had been pleaded as rape, the Trial Chamber would have convicted of rape instead of the more obscure crimes of inhuman and cruel treatment.

The Trial Chamber examined the scope of criminal responsibility for military commanders or other persons having superior authority and explained that holding a superior criminally responsible for unlawful conduct of subordinates was a "well-established norm" of international customary and conventional law.[188] It identified the essential elements of command or superior responsibility, which involves the failure to act when there is a legal duty to do so, as follows:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[189]

The Trial Chamber concluded that persons in positions of authority, whether civilian or within military structures, may incur criminal liability under the doctrine of superior responsibility on the basis of "their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[190] To be held criminally accountable, the superior, whether civilian or military, must have "effective control" over subordinates committing the crime, "in the sense of having the material ability to prevent and punish the commission" of the crimes.[191]

185. *Id.* at para. 543. Inhuman treatment would cover all offences found to constitute torture or willfully causing great suffering. *Id.* at para. 544.

186. *Id.* at para. 552. Thus torture under Common Article 3 is included within the concept of cruel treatment and acts not satisfying the purposive requirements of torture would constitute cruel treatment. *Id.*

187. *Id.* at para. 1066.

188. *Id.* at para. 333.

189. *Id.* at para. 346.

190. *Id.* at para. 354.

191. *Id.* at para. 378.

The Chamber may not presume knowledge, but it can and often does infer knowledge. Hence, without direct evidence (a paper trail, a tacit admission, or eyewitness testimony, for example) that superiors knew of crimes committed by subordinates, the prosecution will typically attempt to establish knowledge through circumstantial evidence.[192] Knowledge can be inferred in a number of ways, including by considering the number, type, or scope of illegal acts; the length of time; the logistics, number, type, or rank of troops or officers involved; the geographical location or widespread occurrence of the illegal acts; the location of the commander; the "tactical tempo of operations"; and the *modus operandi* of similar acts.[193]

The Trial Chamber considered that inquiry notice was the appropriate standard in determining whether a superior had "reason to know" of crimes committed by subordinates, such that information must have been available which would put a superior on notice about possible criminal activity by subordinates. It clarified that the "information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes."[194] Indeed, inquiry notice is satisfied if the information "indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed" by subordinates.[195]

The Trial Chamber was careful to stress that "law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers." This means that the measures required but not forthcoming had to have been "within his material possibility."[196] Moreover, lack of formal legal power authorizing the measures to prevent or repress the crimes does not automatically preclude holding a superior criminally responsible for crimes committed by subordinates.[197]

Superior responsibility for crimes committed by subordinates—crimes which the superior had a duty to prevent, halt, or punish, but failed to take necessary and reasonable steps to do so—is not limited to war crimes and can be incurred for other crimes, including crimes against humanity and genocide. Superior responsibility may be used to hold military and civilian leaders accountable for crimes of sexual violence committed by subordinates that the superior negligently failed to prevent or punish. The ICTY Appeals Chamber Judgement rendered on February 20, 2001,[198] upheld the findings of the 452-page *Ćelebići* Trial Chamber Judgement.

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192. *Id.* at para. 386.

193. *Id.*

194. *Id.* at para. 393.

195. *Id.* The *Čelebići* Appeals Chamber expounded upon this standard, giving an example of inquiry notice, stating that a superior who "has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge." Prosecutor v. Delalić, Judgement, IT-96-21-A, 20 Feb. 2001, at para. 238 [hereinafter *Čelebići* Appeals Chamber Judgement].

196. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 395.

197. *Id.*

198. *Čelebići* Appeals Chamber Judgement, *supra* note 195.

The precedent from this case can be used, *inter alia*, to hold superiors criminally liable for failing to adequately train, monitor, supervise, control, and punish subordinates who commit rape crimes.[199] There can be no illusions that women and girls are not at high risk of sexual violence during war, mass violence, and occupation. The danger of sexual violence increases when women and girls are separated from their families and held in detention facilities guarded by armed men of an opposing side, a situation that renders them exceptionally vulnerable to exploitation and abuse.

C. *The* Furundžija *Judgement: The Rape of a Single Victim is a Serious Violation of International Humanitarian Law*

The Yugoslav Tribunal rendered the *Furundžija* Trial Chamber Judgement on December 10, 1998.[200] The most significant gender aspects of this case are developments in the law of torture by means of sexual violence and the Tribunal's rejection of the notion that female Judges with gender advocacy backgrounds are inherently biased against men accused of rape crimes.

During the armed conflict in central Bosnia-Herzegovina, a civilian woman of Bosnian Muslim origin (Witness A) was arrested and taken to the headquarters of the Jokers, a special military police unit of the Croatian Defense Council (HVO) whose members had "a 'terrifying' reputation."[201] At the headquarters, Furundžija (the only accused on trial because he was the only indictee within the custody of the Tribunal) verbally interrogated Witness A while another, Accused B, physically assaulted her. Furundžija and Accused B were both subcommanders of the Jokers.

Her interrogators forced Witness A to stand nude before them and a group of laughing soldiers. During the initial phase of the interrogation, Accused B repeatedly ran a knife up the victim-witness's inner thigh and threatened to stick it inside her and cut her sexual organs if she failed to cooperate.[202] Over the course of the day, Accused B proceeded to rape Witness A several times and in multiple ways (orally, vaginally, and anally), often in the presence of Furundžija and others. The prosecution charged Furundžija in the Indictment with two counts of violations of the laws or customs of war: torture and "outrages upon personal dignity, including rape."[203] The accused also interrogated and beat Witness D, a Bosnian Croat male member of the HVO who was suspected of assisting Witness A and her sons, in the same room where Witness A was being

199. This is especially so when combined with the jurisprudence of the *Kvočka* Trial Chamber Judgement, *supra* note 90.

200. Prosecutor v. Furundžija, Judgement, IT-95-17/1-T, 10 Dec. 1998 [hereinafter *Furundžija* Trial Chamber Judgement].

201. *Id.* at para. 72.

202. *Id.* at para. 82.

203. *See* Prosecutor v. Furundžija, Indictment, Amended-Redacted, IT-95-17/1-PT, 2 June 1998, in which Counts 1-11 and 15-25 against additional accused are redacted. Furundžija was charged under Article 3 of the ICTY Statute with Count 13, Violation of the Laws or Customs of War (torture), and Count 14, Violation of the Laws or Customs of War (outrages upon personal dignity). Count 12 was withdrawn. Torture and outrages upon personal dignity are prohibited by Common Article 3 to the 1949 Geneva Conventions, and thus fall under Article 3 of the Statute.

raped and otherwise abused.[204] Furundžija was present during part of the sexual violence, and his role in verbally interrogating the witness during the infliction of the violence, as well as his words, acts, and omissions, encouraged and facilitated the crimes.

After surveying trends in national laws and other jurisprudence, the *Furundžija* Trial Chamber held that the "objective elements" of rape in international law consist of the following:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.[205]

The Chamber found that the elements of rape in this case were met "when Accused B penetrated Witness A's mouth, vagina and anus with his penis;" the rape was attributable to the accused because the Trial Chamber had also found that these crimes were committed as part of the interrogation process in which Furundžija participated.[206] Although consent was not raised in this case, the Trial Chamber stressed that "any form of captivity vitiates consent."[207]

The Trial Chamber noted increased efforts by international bodies to redress "the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law."[208] It further noted that when the requisite elements are met, rape might also constitute a crime against humanity, a grave breach of the Geneva Conventions, a violation of the laws or customs of war, and an act of genocide.[209]

In determining the appropriate definition of torture to utilize in the case, the Trial Chamber adopted the definition of torture found in the Torture Convention, which imposes a "state actor" requirement. Noting that a large number of persons are typically involved in the torture process, the Chamber stressed that many people take part in torture by performing different functions and it emphasized that each of these roles, even the relatively minor ones, renders one liable for torture.[210] More precisely, the Trial Chamber stated that the tendency in torture is to divide the process and distribute the tasks among many in order to:

> "compartmentalize" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation

204. *Furundžija* Trial Chamber Judgement, *supra* note 200, at paras. 124-30.
205. *Id.* at para. 185.
206. *Id.* at para. 270.
207. *Id.* at para. 271.
208. *Id.* at para. 163.
209. *Id.* at para. 172.
210. *Id.* at para. 254.

> known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.[211]

Indeed, the Chamber noted that international law "renders all the aforementioned persons equally accountable," and different levels and forms of participation should simply be reflected in sentencing.[212] The Trial Chamber emphasized that the different roles played by Furundžija and Accused B complemented the torture process:

> Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. . . .The interrogation by the accused and the abuse by Accused B were parallel to each other. . . . There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.[213]

The Trial Chamber expanded the list of prohibited purposes behind the Torture Convention's definition of torture to include humiliation, stating that "among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity."[214] Here, the Trial Chamber found that Witness A was raped during the course of her interrogation in an effort to "degrade and humiliate her."[215] The Chamber concluded that the verbal interrogation by Furundžija, which was "an integral part of the torture,"[216] as well as the physical perpetration by Accused B, "became one process," and these acts caused severe physical and mental suffering to the victim.[217] For these crimes, the Chamber found Furundžija guilty of individual responsibility for the sexual violence as a co-perpetrator of torture and as an aider and abettor of outrages upon personal dignity including rape.[218]

To be a perpetrator or co-perpetrator of torture, an accused must "participate in an integral part of the torture and partake of the purpose behind the torture." To be an aider or abettor of torture, there must be some assistance "which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."[219]

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211. *Id.* at para. 253.

212. *Id.* at paras. 254, 257.

213. *Id.* at paras. 124, 130.

214. *Id.* at para. 162.

215. *Id.* at para. 124, 130.

216. *Id.* at para. 267(i).

217. *Id.* at para. 264.

218. *Id.* at paras. 269, 275. In distinguishing a co-perpetrator from an aider or abettor, the Trial Chamber concluded that one who participates in torture and "partakes of the purpose behind torture" is a perpetrator, whereas one who does not share the intent but "gives some sort of assistance and support with the knowledge" that torture is being inflicted is an aider or abettor. *Id.* at para. 252. *See also id.* at paras. 243, 245, 249, 257. The assistance must not only be knowing, it must also "have a substantial effect on the commission of the crime." *Id.* at paras. 234-35.

219. *Id.* at para. 257.

Significantly, the Trial Chamber also found that being forced to witness rape formed part of the torture of Witness D, who was interrogated and beaten while Witness A was being raped in his presence: "The physical attacks on Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering."[220] It could have also found that having her rape witnessed by either the soldiers or Witness D was an aggravating factor to the torture to which Witness A was intentionally subjected.[221]

The Trial Chamber analyzed the "outrages upon personal dignity including rape" charge and considered that Witness A "suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity." Although Furundžija did not physically perpetrate the violence inflicted upon Witness A, nonetheless "his presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him."[222] For these crimes, the Chamber sentenced Furundžija to ten years of imprisonment for the torture conviction and eight years imprisonment for the outrages upon personal dignity conviction, which were to run concurrently instead of consecutively.[223]

During the trial, which lasted a total of eleven trial days extended over a period of five months, several troubling issues arose. A primary concern centered on the disclosure of statements made to a rape counseling center and the weight given to a victim's testimony vis-à-vis her credibility when suffering from post traumatic stress disorder (PTSD) or rape trauma syndrome (RTS).[224]

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220. *Id.* at para. 267(ii). Regretably, the Trial Chamber did not explain or provide support for its apparent conclusion that the accused committed a war crime against Witness D, who was a member of the same side as the perpetrators.

221. See *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 149: "The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped."

222. *Furundžija* Trial Chamber Judgement, *supra* note 198, at para. 273.

223. In imposing concurrent sentencing, the Trial Chamber reasoned:

> Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture for the purpose of aggravating the sentence imposed under Count 13 [torture]. On the other hand, in assessing the sentence imposed under Count 14 [outrages upon personal dignity including rape], the Trial Chamber has [already] considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore, the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture.

Furundžija Trial Chamber Judgement, *supra* note 200, at para. 295.

224. Most of the concerns were raised in two *amicus* briefs submitted to the ICTY by Notre Dame Law School and a group of international human rights lawyers. *See* Prosecutor v. Furundžija, Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted on behalf of the Center for Civil and Human Rights, Notre Dame Law School, Nov. 6, 1998 (prepared by Kelly Askin, Sharelle Aitchison, and Teresa Phelps); Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of July 16, 1998 Requesting that the Tribunal Reconsider Its Decision Having Regard for the Rights of Witness "A" to Equality, Privacy and Security of the Person, and to Representation by Counsel, Nov. 4, 1998 (prepared by Working Group on Engendering the Rwandan Criminal Tribunal, International Women's Human Rights Law Clinic, & the Center for Constitutional Rights.).

Ultimately, the Trial Chamber emphasized that no evidence suggests that witnesses suffering extreme trauma cannot give accurate information or provide wholly reliable testimony.[225] It did not address whether a patient-client privilege exists in international law, which would make medical or psychological records or statements given during a counseling session outside the scope of compellable evidence.

The Trial Chamber decision was upheld by the ICTY Appeals Chamber Judgement rendered on July 21, 2000.[226] On appeal, however, a key dispute arose from an allegation by the Defence that the presiding Judge in the case, Florence Mumba, should be disqualified for giving at least the appearance of bias.[227] Essentially, the allegations stemmed from the fact that, prior to her election as a Judge at the ICTY, Mumba had served as a representative of Zambia on the United Nations Commission on the Status of Women (CSW), during which the Commission rigorously condemned wartime rape and urged its prosecution and punishment. The Defence further implied that that the feminist views held by Judge Mumba made her predisposed to promote a common feminist agenda.

The Appeals Chamber noted that Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal addresses the issue of impartiality and provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.[228]

The Appeals Chamber reviewed domestic case law regarding the appropriate standard in determining judicial bias, and concluded that a general rule exists requiring Judges to be free not only from bias, but also from the appearance of bias.[229] Consequently, the Appeals Chamber adopted the following principles to direct it in interpreting and applying ICTY Rule 15(A):

(A) A Judge is not impartial if it is shown that actual bias exists.
(B) There is an unacceptable appearance of bias if:
  (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
  (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[230]

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225. *Furundžija* Trial Chamber Judgement, *supra* note 200, at para. 109.

226. Prosecutor v. Furundžija, Judgement, IT-95-17/1-A, 21 Jul. 2000 [hereinafter *Furundžija* Appeals Chamber Judgement].

227. *Id.* at para. 164 (fourth ground of appeal).

228. *Id.* at para. 191 (quoting ICTY R.P. & EVID. 15(A)).

229. *Id.* at para. 189.

230. *Id.* As to b(ii), the Appeals Chamber adopted the language of the 1997 Canadian Supreme Court in RDS v. The Queen, which states that "'the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'" *Id.* at para. 190.

The Appeals Chamber ultimately determined that there was "no basis" to sustain the allegations that Judge Mumba's position and role as a member of the CSW created even the appearance of bias.[231] Indeed, the Appeals Chamber concluded that, even if Judge Mumba shared the goals and objectives of the CSW to promote and protect the human rights of women, "she could still sit on a case and impartially decide upon issues affecting women."[232] Hence, to support and share the view that rape is a horrible crime, and those responsible for it should be prosecuted, is a just position and cannot inherently constitute grounds for disqualification.[233]

The Appeals Chamber also noted that Article 13(1) of the ICTY Statute requires that "due account" be taken of the human rights, international law, and criminal law experience of the Judges in composing the Chambers of the Tribunal. It considered that Judge Mumba's experience in international human rights and gender issues that she gained as a member of the CSW was relevant in her election to the Tribunal, and it reasoned that a Judge should not be disqualified "because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. . . . It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias."[234] The Appeals Chamber determined that, unless there is evidence to the contrary, Judges should be entitled to a presumption of impartiality.[235]

Another challenge to the Trial Chamber Judgement on appeal was that the evidence of sexual assault adduced at trial was of conduct that was insufficient to rise to the level of torture. In robustly affirming that torture had been committed, however, the Appeals Chamber found it "inconceivable" that an argument could be made that sexual violence was not serious enough to amount to torture.[236]

Essentially, this case involved multiple rapes committed against one woman during the conflict. Prosecuting this case set an important precedent in confirming that sexual violence committed against a single victim is a serious violation of international law deserving of prosecution in an international criminal tribunal.[237]

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231. *Id.* at para. 199.

232. *Id.* at para. 200.

233. *Id.* at para. 202.

234. *Id.* at paras. 204-05.

235. *Id.* at paras. 196-97. This challenge was raised only after the Trial Chamber had rendered a guilty verdict against the accused. Because Judge Mumba's qualifications, including her prior membership on the CSW, were public and easily accessible, the Trial Chamber found that it could conclude that the Defense had waived its right to complain and thus dismiss this ground of appeal on that basis. Nevertheless it decided to consider the merits of the case "given its general importance." *Id.* at paras. 173-74.

236. *Id.* at paras. 113-14.

237. Because of the historical neglect of rape crimes, this prosecution set an important precedent in prosecuting rape against a single woman and not solely in conjunction with other crimes. For a more detailed discussion on the significance of this case, as well as the treatment by the Trial Chamber of the credibility of the testimony of a witness alleged to be suffering from post traumatic stress disorder or rape trauma syndrome, see Kelly D. Askin, *The International War Crimes Trial of*

D. *The* Kunarac et al. *Judgement: Developing the Law on Sexual Slavery*

Trial Chamber II of the Yugoslav Tribunal rendered the historic *Kunarac* Judgement on February 22, 2001.[238] In a groundbreaking case, the Tribunal convicted an accused of rape and enslavement as crimes against humanity for conduct constituting sexual slavery, when victims were held in facilities and repeatedly raped over a period of days, weeks, or months. This Judgement renders the first rape as a crime against humanity conviction in the Yugoslav Tribunal and the first ever conviction for enslavement in conjunction with rape. It made extensive holdings regarding indicia of enslavement, and it further clarified the elements of rape and torture under international law.[239]

Each accused was charged with and convicted of various forms of gender-related crimes, including rape, torture, enslavement, and outrages upon personal dignity. The original indictment itself was groundbreaking, in that it centered on eight accused who were each charged with various forms of sexual violence and the allegations focused exclusively on sex crimes committed in Foča municipality.[240] The trial was held against three of the accused who were in the custody of the Tribunal, namely Dragoljub Kunarac, Radomir Kovać, and Zoran Vuković. During the period covered in the Amended Indictment, Kunarac was the leader of a special reconnaissance unit of the Bosnian Serb Army and Kovać and Vuković were members of a Bosnian Serb military unit in Foča.[241]

According to the Amended Indictment, Serb military forces took over the municipality of Foča in the spring of 1992, whereupon the military gathered the people of the town together and then separated the Muslim and Croatian men from the women and children, with the two groups taken to separate detention facilities. The military forces held the women and children collectively in gymnasiums and schools. In these facilities, the forces systematically raped, gang raped, and publicly raped many of the women and young girls; others were routinely taken out of the facilities to be raped and then returned; and yet others were permanently removed from the facilities to be held elsewhere for sexual access whenever their captors demanded it.[242]

Anto Furundžija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes, 12 LEIDEN J. INT'L L. (1999).

238. *Kunarac* Trial Chamber Judgement, *supra* note 15.

239. *See, e.g.*, Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & Vukovic on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2001); Kelly D. Askin, *The* Kunarac *Case of Sexual Slavery: Rape and Enslavement as Crimes Against Humanity, in* 5 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS (André Klip & Göran Sluiter eds., forthcoming 2003).

240. Prosecutor v. Gagovic, Indictment, IT-96-23, 26 June 1996.

241. *Kunarac* Trial Chamber Judgement, *supra* note 15, at paras. 49, 51, 52.

242. Prosecutor v. Kunarac, Amended Indictment, IT-96-23-T, 1 Dec. 1999 & IT-96-23/1-T, 3 Mar. 2000. Note that the terms of the ICTY Statute, *supra* note 93, do not explicitly list sexual slavery as a specific crime. Article 5 of the Statute, covering crimes against humanity, lists rape and enslavement as two of the acts justiciable as crimes against humanity in the Tribunal. Consequently, the crime of holding women and girls for sexual servitude was charged and prosecuted under the provisions of the ICTY Statute granting the tribunal jurisdiction over rape and enslavement as crimes against humanity.

The Trial Chamber elaborated upon the appropriate elements of rape under international law. While stating that it agreed that the elements of rape articulated in *Furundžija* constitute the *actus reus* of the crime of rape under international law,[243] it found that paragraph (ii) of the *Furundžija* classification of the elements was more narrow than required by international law, and should be interpreted to include consent: "In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim."[244] The Trial Chamber emphasized that while force, threat of force or coercion are relevant, these factors are not exhaustive and the emphasis must be placed on violations of sexual autonomy because "the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*."[245]

The Chamber held that sexual autonomy is violated "wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant."[246] Factors such as force, threat, or taking advantage of a vulnerable person provide evidence as to whether consent is voluntary.[247] Noting that common law systems typically define rape by the absence of the victim's free will or genuine consent,[248] the Trial Chamber identified three broad categories of factors to determine when sexual activity should be classified as rape:

(i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
(ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
(iii) the sexual activity occurs without the consent of the victim.[249]

The Trial Chamber stressed that it is important to recognize a victim's vulnerability or deception when he or she is unable to refuse sex due to such things as "an incapacity of an enduring or qualitative nature (e.g., mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (e.g., being subjected to psychological pressure or otherwise in a state of inability to resist)".[250] Furthermore, the key effect of factors such as surprise, fraud or mis-

243. Again, the objective elements of rape were articulated in *Furundžija* as consisting of:
(i) the sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.
Furundžija Trial Chamber Judgement, *supra* note 200, at para. 185 (emphasis added).
244. *Id.* at para. 438 (emphasis in original).
245. *Id.* at para. 440 (emphasis in original).
246. *Id.* at para. 457.
247. *Id.* at para. 458.
248. *Id.* at para. 453.
249. *Id.* at para. 442 (emphasis in original).
250. *Id.* at para. 452.

representation is that the victim is unable to offer an "informed or reasoned refusal. In all of these different circumstances, the victim's will was overcome, or her ability to freely refuse the sexual acts was temporarily or more permanently negated."[251] These factors focus on violations of sexual autonomy, which should be the standard for determining when sexual activity constitutes rape.

Rendering its findings as to the elements of rape under international law, the Trial Chamber held that the *actus reus* of the crime is "constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."[252] In this context, consent must be given voluntarily "as a result of the victim's free will, assessed in the context of the surrounding circumstances."[253] The *mens rea* is satisfied by demonstrating an intent to effectuate the sexual penetration and the knowledge that it occurs without the consent of the victim.[254]

The Trial Chamber also interpreted the effect of Rule 96 of the Rules of Procedure and Evidence of the Tribunal, governing evidence in cases of sexual assault. Rule 96 provides:

> In cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
> (iv) prior sexual conduct of the victim shall not be admitted in evidence.[255]

Interpreting sub-element (ii) of Rule 96 in a manner consistent with the element of rape promulgated above, the Trial Chamber stated that it:

> understands the reference to consent as a "defence" in Rule 96 as an indication of the understanding of the judges who adopted the rule of those matters which would be considered to *negate* any apparent consent. It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear", any apparent consent which might be expressed by the victim is not freely given and the second limb of the Trial Chamber's definition would be satisfied. The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference

251. *Id.*
252. *Id.* at para. 460.
253. *Id.*
254. *Id.*
255. *See, e.g.*, Rule 96 of the Rules of Procedure and Evidence of the ICTY, Evidence in Cases of Sexual Assault, IT32/Rev. 21, 12 July 2001.

> to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.[256]

Although all of the victims in this case were in captivity when the crimes were committed against them, the Tribunal nonetheless considered consent in one instance, with the accused Kunarac effectively circumventing Rule 96 by asserting mistake of fact—he said he thought she consented. The evidence discloses that one witness took an active part in initiating sexual activity with Kunarac after being threatened that if she did not seduce and sexually please him, she would suffer severe consequences. Kunarac claimed that because of her actions in initiating the sex, he thought the act was consensual. The Trial Chamber rejected the notion that she consented to sex or that he could have reasonably believed she consented, stating unequivocally:

> The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of[f] the trousers of the accused and kissing him all over the body before having vaginal intercourse with him. . . . The Trial Chamber, however, accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B.'s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by "Gaga" if she did not do so.[257]

The Trial Chamber rejected Kunarac's claim that he did not know that D.B. only initiated sex with him because she feared for her life, finding it wholly unrealistic that Kunarac could have been confused by D.B.'s actions, particularly in light of the ongoing war and her detention by hostile forces.[258]

Kunarac was also found to have raped and tortured several other women and girls, selecting them for abuse because they were Muslim. The Trial Chamber stated: "The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should 'enjoy being fucked by a Serb.'"[259] It stipulated that discrimination need not be the sole purpose the crime is committed.[260] Thus, the Trial Chamber concluded that discriminating against the women and girls was part of the reason they were singled out for the rape but it need not be the exclusive reason. Pronouncing upon the grave impact of the crime, the Trial Chamber stressed that "[r]ape is one of the worst sufferings a human being can inflict upon another."[261] Kunarac was held to be individually responsible for the crimes as a result of his participation as a perpetrator, instigator, and as an aider or abettor of the sexual violence.[262]

256. *Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 464 (emphasis in original).
257. *Id.* at paras. 644-45.
258. *Id.* at para. 646.
259. *Id. at* para. 654.
260. *Id.*
261. *Id.* at para. 655.
262. *Id.* at para. 656 (stating, "By raping D.B. himself and bringing her and FWS-75 to Ulica Osmana Đikića no 16, the latter at least twice, to be raped by other men, the accused Dragoljub

The prosecution also charged Vuković with rape and torture for certain instances of sexual violence committed against women and girls in Foča. In contesting allegations of sexual torture, Vuković argued that even if it were proved that he had committed rape, he "would have done so out of a sexual urge, not out of hatred" and thus claimed that he did not commit the rape for a prohibited purpose necessary for establishing torture.[263] However, the Trial Chamber explained that "all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim."[264] The Trial Chamber stressed that torture can be committed for any number of reasons, and one of the prohibited purposes need merely be part of the motivation behind the act, not necessarily even the principal motivation: "There is no requirement under international customary law that the conduct must be *solely* perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose."[265] The Tribunal subsequently found Vuković guilty of torture as a war crime and a crime against humanity for the sexual torture he inflicted upon his victims.

The prosecution charged the accused Kovać with "outrages upon personal dignity" for sexual violence committed against women and girls he held in enslavement conditions. An outrage upon personal dignity is an act that is "animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim."[266] The *Kunarac* Trial Chamber emphasized that the suffering need not be long lasting:

> So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting." In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity."[267]

In convicting Kovać of outrages upon personal dignity for instances in which women and girls were made to dance nude on a table, together or individually, while Kovać and occasionally others watched them for entertainment, the Trial Chamber stated:

> [Kovać] certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three women

Kunarac thus committed the crimes of torture and rape as a principal perpetrator, and he aided and abetted the other soldiers in their role as principal perpetrators by bringing the two women to Ulica Osmana Đikića no 16.")

263. *Id.* at para. 816.

264. *Id.*

265. *Id.* (emphasis in original).

266. Prosecutor v. Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999, at para. 56 [hereinafter *Aleksovski* Trial Chamber Judgement]. The *Aleksovski* Trial Chamber made extensive findings with regard to this offense. *See, e.g., id.* at paras. 54-57.

267. *Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 501.

> involved, even more so because of their young age. The Trial Chamber is satisfied that Kovać must have been aware of that fact, but he nevertheless ordered them to gratify him by dancing naked for him. The Statute does not require that the perpetrator must intend to humiliate his victim, that is that he perpetrated the act for that very reason. It is sufficient that he knew that his act or omission could have that effect.[268]

Thus, whether the accused forced these young girls to dance nude for his own gratification or for their sexual degradation, the Tribunal can hold an accused responsible for the war crime of outrages upon personal dignity if the effect was serious humiliation. Notably, the Chamber recognized that serious humiliation is a clearly foreseeable consequence of the forced nudity. As demonstrated in the *Akayesu* Judgement, forced nudity is not limited to "outrages upon personal dignity" or even war crime charges.

As mentioned above, one of the groundbreaking aspects of the *Kunarac* Judgement is in its elaboration on the crime of enslavement, particularly in conjunction with gender-related crimes. The Trial Chamber made extensive findings related to enslavement, articulated indicia of enslavement present in the case, and found two of the accused guilty of rape and enslavement as crimes against humanity for acts essentially amounting to sexual slavery. Noting that international law, including the Slavery Convention, has consistently defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," the Trial Chamber held that the *actus reus* of the crime of enslavement is "the exercise of any or all of the powers attaching to the right of ownership over a person." The *mens rea* is the intentional exercise of such powers.[269]

The Tribunal found that indicia of enslavement can include sub-elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; the accruing of some gain to the perpetrator; absence of consent or free will; exploitation; "the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship"; sex, prostitution, trafficking in persons, assertion of exclusivity, subjection to cruel treatment and abuse, and control of sexuality.[270] The Tribunal may also consider duration as a factor when ascertaining whether someone has been enslaved. Further, while acquisition or disposal of a person for monetary or other gain is not a requirement for enslavement, such acts are "prime example[s]" of exercising the right of ownership over a person.[271]

Most of the victims in this case were enslaved for weeks or months, during which time the accused or others systematically and repeatedly raped them during all or part of the time they were held in captivity. In some instances, the accused gave the victims keys to the house where they were held; at other times those enslaved occasionally found the door to the apartment where they were

268. *Id.* at paras. 773-74.
269. *Id.* at para. 540.
270. *Id.* at para. 542.
271. *Id.* at paras. 542-43.

kept left open. The Trial Chamber deemed the absence of physical barriers irrelevant in light of the psychological or logistical barriers present. The Judgement stated, as to the accused Kunarac's culpability for enslavement:

> [T]he witnesses were not free to go where they wanted to, even if, as FWS-191 admitted, they were given the keys to the house at some point. Referring to the factual findings with regard to the general background, the Trial Chamber accepts that the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub Kunarac and DP 6, even if they had attempted to leave the house.[272]

In fact, giving the captives keys to lock the door to keep out other potential rapists demonstrated ownership rights over the women, with the perpetrators holding the women and girls for their exclusive use and abuse.

The Trial Chamber reached a similar conclusion as to the enslavement status of the women and girls held in Kovać's apartment:

> [T]he girls could not and did not leave the apartment without one of the men accompanying them. When the men were away, they would be locked inside the apartment with no way to get out. Only when the men were there would the door of the apartment be left open. Notwithstanding the fact that the door may have been open while the men were there, the Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured.[273]

The Judgement forcefully concluded that neither physical restraint nor detention is a required element of enslavement. The Judgement implicitly accepted fear of retribution if they escaped and were recaptured as a reason that the women were psychologically prevented from escaping from the facilities. Further, they were unable to leave while the conflict was still raging and hostile military forces were present in the area.

In convicting Kunarac of both rape and enslavement as crimes against humanity, the Trial Chamber held that he had held women and girls against their will, treated them as his personal property, and forced them to provide sexual and domestic services at any time:

> FWS-191 was raped by Dragoljub Kunarac and [ ] FWS-186 was raped by DP 6, continuously and constantly whilst they were kept in the house in Trnovače. Kunarac in fact asserted his exclusivity over FWS-191 by forbidding any other soldier to rape her. The Trial Chamber is satisfied that Kunarac was aware of the fact that DP 6 constantly and continuously raped FWS-186 during this period, as he himself did to FWS-191. . . .

The Trial Chamber is satisfied that FWS-191 and FWS-186 were denied any control over their lives by Dragoljub Kunarac and DP 6 during their stay there. They had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house in Trnovaèe or to escape their assailants. They were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for 100 Deutschmark if he so wished. On another occasion, Kunarac tried to rape FWS-191 while in his

272. *Id.* at para. 740.
273. *Id.* at para. 750.

hospital bed, in front of other soldiers. The two women were treated as the personal property of Kunarac and DP 6. The Trial Chamber is satisfied that Kunarac established these living conditions for the victims in concert with DP 6. Both men personally committed the act of enslavement. By assisting in setting up the conditions at the house, Kunarac also aided and abetted DP 6 with respect to his enslavement of FWS-186.[274]

The accused Kovać eventually sold at least two of the girls, and one of these, a young girl of 12 at the time she was enslaved and repeatedly raped, has never been seen or heard from since she was sold to a passing soldier for a box of cleaning powder. One of the girls was sexually enslaved for approximately seven days, while another was held for several months. Some of the more traditional forms of slavery were also discernible in this case:

> Radomir Kovać detained FWS-75 and A.B. for about a week, and FWS-87 and A.S. for about four months in his apartment, by locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments.
>
> The Trial Chamber finds that Radomir Kovać's conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his *de facto* power of ownership as it pleased him. Kovać disposed of them in the same manner. For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property.[275]

The Trial Chamber found that free will or consent is impossible or irrelevant when certain conditions are present, such as "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions."[276]

The Judgement took care to emphasize that control over a person's sexual autonomy, or obliging a person to provide sexual services, may be indicia of enslavement, but such indicia are not elements of the crime. The facts of the case demonstrate that the enslavement and rape were inseparably linked, and the accused enslaved the women and girls as a means to effectuate continuous rape. Since a primary, but not necessarily exclusive, motivation behind the enslavement was to hold the women and girls for sexual access at will and with ease, the crime would most appropriately be characterized as sexual slavery.[277] Regrettably, the term "sexual slavery" was never used in the Judgement.

The Appeals Chamber Judgement of June 12, 2002 upheld and reinforced the Trial Chamber Judgement's holdings concerning rape, torture, and enslave-

274. *Id.* at paras. 741-42.

275. *Id.* at paras. 780-81.

276. *Id.* at para. 542. This finding was made in regards to enslavement, although it is widely considered that one can never consent to crimes such as slavery and torture.

277. For a recent explanation of why sexual slavery is the appropriate legal characterization for this activity, and in particular is preferred over "enforced prostitution", *see generally* Women's International War Crimes Tribunal, *supra* note 47, at paras. 147-52.

ment.[278] Indeed, the Appeals Chamber rejected the assertion that resistance, force, or threat of force are elements of rape, as such factors are simply evidence of non-consent[279] and it found that not only may rape constitute torture, but also that rape is an act that "establish[es] *per se* the suffering of those upon whom they were inflicted."[280]

E. The Kvoèka *Judgement: Rape as Persecution in the Context of a Joint Criminal Enterprise*

Trial Chamber I of the Yugoslav Tribunal rendered the *Kvoèka* Judgement on November 2, 2001.[281] The prosecution charged only one of the five accused in the case, Radić, with physically committing sex crimes. However, rape crimes were charged against all accused because sexual violence was one of a number of acts that formed the persecution charge. The Trial Chamber made significant findings concerning individual responsibility for rape as part of persecution and rendered important holdings with regard to torture for threats of sexual violence. It also articulated standards of liability for any foreseeable, consequential, or incidental rape crimes when committed during the course of a joint criminal enterprise.

The *Kvoèka* case concerned five accused who worked in or regularly visited Omarska prison camp. Bosnian Serbs in Prijedor established Omarska camp in May 1992, purportedly in order to suppress an uprising of Bosnian Muslims and Bosnian Croats in the region. Over three thousand men and approximately 36 women were detained in Omarska camp during its some three months of operation. Mistreatment and inhumane conditions pervaded the camp, where crimes such as murder, torture, rape, and persecution were rampant. In Counts 1-3 of the Amended Indictment, the prosecution jointly charged all five accused with persecution and inhumane acts as crimes against humanity and with outrages upon personal dignity as a war crime. The persecution count alleged that the accused persecuted non-Serbs detained in Omarska camp through several means, namely: murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions.[282] In addition, Counts 14-17 charged one of the accused, Mlađjo Radič, a guard shift leader in the camp, with rape, torture, and outrages upon personal dignity for the sexual violence he allegedly committed personally against women detained in Omarska prison camp.[283]

278. *Kunarac* Appeals Chamber Judgement, *supra* note 125.

279. *Id.* at paras. 128-29.

280. *Id.* at para. 150.

281. *Kvočka* Trial Chamber Judgement, *supra* note 90.

282. Prosecutor v. Kvočka, Amended Indictment, IT-98-30/1-I, 21 August 2000, at para. 25 [hereinafter *Kvočka* Indictment].

283. *Id.* at para. 42. The charges were: Count 14, torture as a crime against humanity; Count 15, rape as a crime against humanity; Count 16, torture as a violation of the laws or customs of war; and Count 17, outrages upon personal dignity as a violation of the laws or customs of war. *Id.*

The Trial Chamber found that "female detainees were subjected to various forms of sexual violence" in the camp.[284] The Chamber pointed out that sexual violence covers a broad range of acts and includes such crimes as rape, molestation, sexual slavery, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, and forced sterilization.[285]

Building upon the development of the common purpose doctrine/joint criminal enterprise theory contained in the *Tadić* Appeals Chamber Judgement, and its holding that such a theory of responsibility is implicitly included within Article 7(1) (individual responsibility) of the Statute of the Tribunal,[286] the *Kvočka* Trial Chamber specified that a joint criminal enterprise may exist

> whenever two or more people participate in a common criminal endeavor. This criminal endeavor can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants. Within a joint criminal enterprise there may be other subsidiary criminal enterprises. . . . Within some subsidiaries of the larger criminal enterprise, the criminal purpose may be more particularized: one subset may be established for purposes of forced labor, another for purposes of systematic rape for forced impregnation, another for purposes of extermination, etc.[287]

Recounting sordid atrocities that were pervasive throughout the camp, the Trial Chamber ultimately concluded that Omarska camp operated as a joint criminal enterprise established to persecute non-Serbs contained therein.[288] The Tribunal did not convict three of the accused for physically perpetrating crimes, mistreating detainees, or having any role in the establishment of the camp or significant influence over abusive policies in the camp. However, they indisputably knew that assorted horrific crimes were everyday occurrences and that the camp was used to gather, persecute, and eliminate non-Serbs.[289] Therefore, when the accused continued to show up for work everyday in Omarska camp

284. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 108.

285. *Id.* at para. 180 & n.343.

286. *Tadić* Appeals Chamber Judgement, *supra* note 111, at paras. 185-229. The *Krstić* Trial Chamber further held that this theory of responsibility need not necessarily be explicitly pled in the indictment. *Krstić* Trial Chamber Judgement, *supra* note 141, at para. 602.

287. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 307.

288. *Id.* at para. 319 (finding that it had "an enormous amount of evidence on which to conclude beyond a reasonable doubt that Omarska camp functioned as a joint criminal enterprise. The crimes committed in Omarska were not atrocities committed in the heat of battle; they consisted of a broad mixture of serious crimes committed intentionally, maliciously, selectively, and in some instances sadistically against the non-Serbs detained in the camp.").

289. The Trial Chamber found that in addition to other indicia of the joint criminal enterprise,

> [k]nowledge of the abuses could also be gained through ordinary senses. Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be *seen* by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of detainees, as well as by observing the cramped facilities or the bloodstained walls. Evidence of abuses could be *heard* from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and from the gunshots heard everywhere in the camp. Evidence of the abusive conditions in the camp could also be *smelled* as a result of the deteriorating corpses, the urine and feces soiling the detainees clothes, the broken and overflowing toilets, the dysentery af-

despite being aware of the criminal activities committed in the camp, and their efforts contributed significantly to the continued and effective functioning of the camp, which facilitated the commission of the crimes and allowed them to continue with ease, they incurred criminal responsibility for participating in the criminal enterprise.[290]

Additionally, there was no evidence admitted at trial that indicated most of the accused knew about the rapes or other forms of sexual violence committed in Omarska camp. However, the Trial Chamber found that by knowingly working in the camp where criminal activity was rampant, the participants assumed the risk of incurring criminal responsibility for all foreseeable crimes, including rape crimes, committed therein: "[A]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise . . . can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise."[291] Holding that sexual violence in the camp was patently foreseeable and virtually inevitable under the circumstances, the Trial Chamber reasoned:

> In Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation.[292]

Participants in a joint criminal enterprise, whether aiders and abettors or coperpetrators, may thus be held liable for any natural or foreseeable crimes committed while they participate in the criminal enterprise.[293]

Implicit in the Judgement is that such detention, whether in a large facility where many women are formally detained or in a house where a small group or

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> flicting the detainees, and the inability of detainees to wash or bathe for weeks or months.

Id., at para. 324.

290. *Id.* at paras. 408, 464, 500, 566. Their individual degree of participation was reflected in sentencing. Although all were convicted of persecution as a crime against humanity, the three men who worked in the camp for a relatively short period of time or on occasion tried to assist certain detainees were given five- to seven-year prison sentences; the two men who physically participated in and sometimes instigated atrocities were given twenty- to twenty-five-year sentences.

291. *Id.* at para. 327.

292. *Id.*

293. *Id.* at para. 327. A similar holding was rendered in the *Krstić* case. Although the Trial Chamber was not convinced that many crimes, including rape, committed against refugees at Potoèari were "an agreed upon objective among the members of the joint criminal enterprise," nonetheless, the crimes were "natural and foreseeable consequences of the ethnic cleansing campaign." *Krstić* Trial Chamber Judgement, *supra* note 141, at para. 616. Indeed, not only were the crimes of murder, rape, beatings, and abuses foreseeable, the circumstances essentially made the crimes virtually "inevitable" due to the "lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of U.N. soldiers to provide protection." *Id.* Thus, the accused was held responsible for the "incidental" rapes committed during the persecution of non-Serbs at Potočari.

even one woman is unlawfully kept, may constitute a criminal enterprise if individuals knowingly participate with others in criminal activity.[294] Indeed, the *Kvočka* Trial Chamber specified that extra measures may be needed to protect women from rape crimes in such situations: "[I]f a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes."[295] By now, with extensive evidence of wartime rape broadcast through various media and reported in daily news, virtually everyone has notice that women held by male guards are in grave danger of being subjected to sexual violence, and this is particularly true during periods of hostility or mass violence. This holding has important implications for prosecuting crimes committed against women and girls held in detention camps or other facilities. The decision can be interpreted as imposing a burden on those detaining females to ensure that adequate protections are devised to prevent sexual abuse, and to monitor the facilities to guarantee compliance with the preventative measures.

The Trial Chamber also recognized that persecution takes many forms and is not limited to physical violence: "Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide, humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution."[296]

The Trial Chamber then ruled on the rape and torture charges alleged against Radić. Allegations for sexual violence committed by Radić ranged from groping or blatant threats and attempts, to outright rape. In concluding that he committed sexual violence against some of the women in the camp, the Chamber recalled the definition of sexual violence promulgated in *Akayesu* as "any act of a sexual nature, which is committed on a person under circumstances which are coercive,"[297] and found that "the sexual intimidations, harassment, and assaults committed by Radić . . . clearly fall within this definition, and thus finds that Radić committed sexual violence against these survivors."[298] The Chamber also found that Radić physically perpetrated rape against women detained in the camp.[299] One alleged rape victim, however, was not listed in either the Indictment or the attached Schedules that listed alleged victims. The Trial Chamber

294. *Kvočka* Trial Chamber Judgement, *supra* note 90, at paras. 266, 306.

295. *Id.* at para. 318.

296. *Id.* at para. 190.

297. *Id.* at para. 559 (quoting the definition put forth in the *Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 688).

298. *Id.* at para. 559.

299. *Id.* at para. 559. The credibility of Witness K, who was found to have been raped by Radić, was challenged by the Defence, primarily because when she was interviewed by a journalist shortly after the crimes were committed, she did not mention the rape crimes. However, the Trial Chamber stated that "the fact that Witness K did not mention this rape incident in 1993 to a journalist is irrelevant, particularly in light of the sexual and intensely personal nature of the crime." *Id.* at para. 552.

held that in fairness to the accused, "new charges cannot be brought against the accused in mid-trial without adequate notice."[300] Thus, the testimony of this particular witness formed part of the court record, but was not considered in determinations of Radić's guilt. Significantly, however, the Chamber noted that the testimony, which was found credible, could be used to "assist in establishing a consistent pattern of conduct."[301]

Determining that the rape and other forms of sexual violence constituted torture, the Trial Chamber stated that "the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp, and that they were committed solely against women, making the crimes discriminatory on multiple levels."[302] It also stressed that Radić intentionally raped and attempted to rape, and that these acts in and of themselves "manifest his intent to inflict severe pain and suffering," amounting to torture.[303] In finding that the accused intentionally inflicted severe pain and suffering on these women by subjecting them to groping, harassment, and threats of rape, the Trial Chamber concluded that these acts too satisfied the requirements of torture:

> [T]he Trial Chamber takes into consideration the extraordinary vulnerability of the victims and the fact that they were held imprisoned in a facility in which violence against detainees was the rule, not the exception. The detainees knew that Radić held a position of authority in the camp, that he could roam the camp at will, and order their presence before him at any time. The women also knew or suspected that other women were being raped or otherwise subjected to sexual violence in the camp. The fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radić. Under these circumstances, the Trial Chamber finds that the threat of rape or other forms of sexual violence undoubtedly caused severe pain and suffering . . . and thus, the elements of torture are also satisfied in relation to these survivors.[304]

Ultimately, however, although the Trial Chamber concluded that Radić committed rape and torture as a crime against humanity, the Chamber held that "due to lack of clarity on this issue," the persecution conviction already "cover[s] the rape crimes for which Radić is separately charged." This was because the Amended Indictment did not specifically identify these crimes as differing from the rape crimes alleged in the persecution charges (which alleged persecution for physical, mental, and sexual violence and mistreatment).[305] Consequently, the rape and torture as crimes against humanity counts were "dismissed" as being subsumed within the persecution as a crime against humanity conviction.[306] Clearly, the dismissal is not an acquittal of the crimes. The Tribunal thus convicted Radić of sexual violence under the persecution charge, and held that the persecution conviction subsumed the separate rape charges because

300. *Id.* at para. 556.

301. *Id.* Rule 93 of the ICTY Rules of Procedure and Evidence allows the Tribunal to consider evidence of "a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute [which] may be admissible in the interests of justice."

302. *Id.* at para. 560.

303. *Id.*

304. *Id.* at para. 561.

305. *Kvočka* Indictment, *supra* note 282, at para. 25.

306. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 573.

the prosecution did not identify the rapes separately indicted as being different crimes from those charged in the persecution count. The torture charges for sexual violence brought as war crimes were not subsumed within the persecution as a crime against humanity convictions, and thus Radić was convicted for rape crimes for the war crime of torture.

The *Kvočka* case has considerable implications for securing criminal responsibility for sex and gender crimes committed either during a joint criminal enterprise or as part of a persecution scheme. This is especially important given the indictment trend in ICTY cases to indict leaders and other accused under the joint criminal enterprise theory, and to use persecution as a catch-all category that covers a broad range of the crimes allegedly committed (murder, torture, rape, deportation, and destruction of homes or religious facilities), without indicting each crime separately.[307]

In each of the above cases, a female judge was a member of the Trial Chamber hearing the case,[308] and occasionally it was her skillful intervention, expertise in women's issues, or judicial competence that facilitated the judicial redress process and impacted the development of gender crimes. There is also some indication that survivor-witnesses of sex crimes are less reluctant to give testimony to the Court when female jurists are present. There is little doubt that the presence of qualified female judges, prosecutors, investigators, translators, defense attorneys, and facilitators (for example., in the Victim and Witnesses Unit) has improved the record in affording redress for gender-related crimes.

IV.
CONCLUSION—SEXUAL VIOLENCE AS A *JUS COGENS* NORM

Ten years ago, because there had been so little attention to wartime rape, there was debate as to whether rape was even a war crime. Since that time, the Tribunals have developed immensely the jurisprudence of war crimes, crimes against humanity, and genocide.[309] The extraordinary progress made in the Tribunals on redressing gender-related crimes is largely the result of extremely hard work by scholars, activists, and practitioners inside and outside the Tribunals who have fought long, difficult battles to ensure that gender and sex crimes are properly investigated, indicted, and prosecuted. Sex crimes are undoubtedly some of the most difficult to investigate and prosecute. Because there is reluctance from all sides, the tendency is to ignore gender and sex based crimes. The crimes are intensely personal, the injuries often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity, and grave injustice.

307. *See, e.g.*, Prosecutor v. Milošević, Second Amended Indictment "Kosovo" IT-02-54, 29 Oct. 2001; Krajisnic & Plavšić, Consolidated Amended Indictment, IT-00-39 & 40, 7 Mar. 2002.

308. See *supra* note 40 for a discussion of women participating in decision-making positions in the ICTY/R and in other international law or justice initiatives.

309. *See, e.g.*, David Tolbert, *The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7 (Fall 2002).

We must confront sex crimes and find ways to understand and prevent them. We must also emphasize deconstructing the harmful stereotypes and practices that have resulted in the endemic marginalization of women and a systemic indifference to the crimes committed against them. Only when we accept that victims of sexual violence should not bear the shame and stigma that society traditionally imposes on them, and when we acknowledge that rape is a crime of serious sexual, mental, and physical violence that deserves redress will we truly be able to tackle the underlying causes of sex crimes. For when we reverse the stigmas and the stereotypes associated with sex crimes, we take away much of the power held by the perpetrators of these crimes. When we place the shame on the perpetrators of sex crimes instead of on the victims, recognize perpetrators as weak and cowardly, typically men with weapons preying on civilians in far more vulnerable positions, and formulate rape as a despicable crime that brings dishonor to all men, then we can also take away at least some of its potency and thus its use as a weapon.[310]

The gender jurisprudence of the ICTY and ICTR will help in the struggle to ensure that gender crimes in other places, such as Afghanistan, Burma, Bangladesh, Guatemala, Congo, Chechnya, and Cambodia, are prosecuted and punished.[311] The Serious Crimes Unit in East Timor, the Special Court in Sierra Leone, and the International Criminal Court join other international, regional, mixed, and local accountability initiatives to resoundingly demonstrate that justice has turned a corner and impunity is no longer the norm.[312] It was evidence of gender-related crimes before the ICTY and ICTR, indefatigable efforts by individuals and organizations working alongside or under the auspices of the Women's Caucus for Gender Justice in the ICC, and the participation of gender-sensitive delegates that secured the inclusion of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and other crimes of sexual violence within the war crimes and crimes against humanity provisions of the ICC Statute. The unequivocal inclusion of a broad range of

310. *See generally* Askin, *Comfort Women: Shifting Shame and Silence from Victim to Victimizer*, *supra* note 48.

311. *See, e.g.*, JOANNE CSETE & JULIANE KIPPENBERG, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO (Human Rights Watch, 2002); CHEN REIS ET AL., WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE (Physicians for Human Rights, 2002); Martina Vandenberg & Kelly Askin, *Chechnya: Another Battleground for the Perpetration of Gender Based Crimes*, 2(3) HUM. RTS. REV. 140 (2001); Jan Perlin, *The Guatemala Historical Clarification Commission Finds Genocide*, 6(2) I.L.S.A. J. INT'L & COMP. L 389-413 (2000); Kevin Sullivan, *Kabul's Lost Women: Many Abducted by Taliban Still Missing*, WASH. POST, Dec. 19, 2001, at A1; Sultana Kamal, *The 1971 Genocide in Bangladesh and Crimes Committed Against Women*, *in* COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS 268 (Indai Lourdes Sajor ed., 1998); *License to Rape: The Burmese Military Regime's Ongoing War in Shan State* (Shan Human Rights Foundation & Shan Women's Action Network, 2002), *available at* http://www.earthrights.org/news/shanrape.html.

312. ICC Statute, *supra* note 90, at arts. 7, 8; Statute of the Special Court for Sierra Leone, *pursuant to* S.C. Res. 1315 (2000) of 14 August 2000, at arts. 2, 3, &5, *available at* http://www.sc-sl.org/; On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/Reg/2000/15, of 6 June 2000, Sec. 1.3, 5, 6, & 9, available at www.un.org/peace/etimor/UNTAETN.htm. *See also* Kadić v. Karadzić, 70 F.3d 232 (2d Cir. 1995), *reprinted in* 34 I.L.M. 1592 (1995) for an example of redress for gender crimes in domestic courts.

sex crimes within the jurisdiction of the ICC, which have largely been reproduced in the statutes for the Sierra Leone and East Timor courts, indicates a new global awareness of the dangers of continuing impunity for gender and sex crimes.[313]

The explosive development of gender-related crimes in international law within the last ten years reflects the international community's denouncement of the crimes and the commitment to redress them. The inclusion and enumeration of several forms of sexual violence in the ICC Statute acknowledges that these are crimes of the gravest concern to the international community as a whole, and their inclusion in the ICTY/R Statutes situates them amongst the crimes regarded as constituting a threat to international peace and security. Further, the large and ever increasing number of human rights treaties, declarations or reports, conference or committee documents, U.N. resolutions and decisions by human rights bodies promulgated since the 1990s that condemn, protect against, prohibit, or outright criminalize gender-related violence reflects the commitment of the international community to afford accountability for these crimes, irrespective of the presence of an armed conflict.[314]

313. *See generally*, Eve La Haye, *Article 8(2)(b)(xxii), in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 814 (Roy S. Lee ed., 2001); Donald Piragoff, *Evidence in Cases of Sexual Violence, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *id.*, at 369; William R. Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES RULES OF PROCEDURE AND EVIDENCE, *ibid.* at 705; Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 UC DAVIS J. INT'L L & POL'Y 197 (2001); HILARY CHARLESWORTH & CHRISTINE CHINKIN: THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 MCGILL L. J. 217 (2000); Dorean Koenig & Kelly Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women, in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3-29 (Kelly D. Askin & Dorean M. Koenig eds., 2000); Kelly Dawn Askin, *Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 47-63 (Dinah Shelton ed., 2000); Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65-85 (1999); Cate Steins, *Gender Issues, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357 (Roy S. Lee ed., 1999); Kelly Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 CRIM. L. FORUM 33-59 (1999). For more information on the Women's Caucus for Gender Justice, see http://www.icc women.org.

314. *See, e.g.*, Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 25; *Contemporary Forms of Slavery*, Prevention of Discrimination and Protection of Minorities Sub-Comm. Res. 1992/3, U.N. Doc. E/CN.4/Sub.2/1992/L.11 (1992); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess. 85th plen. mtg., U.N. Doc. A/ RES/48/104 (1994); *Vienna Declaration and Programme of Action, adopted* by the World Conference on Human Rights in.Vienna, U.N. Doc. A/CONF.157/ 23 (1993); *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 & A/CONF.177/20/Add.1 (1995); Committee on Elimination of Discrimination against Women, Gen. Recommendation 19, Sess. 11, U.N. Doc. A/47/38 (1992); S.C. Res. 798, U.N. SCOR, 47th Sess., 3150th mtg. At 32, U.N. Doc. S/798/1992 (1992) (strongly condemning reports of massive, organized and systematic detention and rape" in Yugoslav conflict); S.C. Res. 820, U.N. SCOR 48th Sess., 3200th mtg. At 7-10, U.N. Doc. S/820/1993 (1993) (condemning detention and rape of women and affirming individual responsibility for those responsible for committing or ordering such acts); G.A. Res. 49/205, U.N. GAOR, Sess. 49, U.N. Doc. A/RES/49/205 (23 Dec. 1994) ("Appalled at the continuing and substantiated reports of widespread rape and abuse of wo-

As noted above, genocide, slavery, torture, war crimes, and crimes against humanity are violations of *jus cogens,* subject to universal jurisdiction.[315] Many forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes.[316] However, there is now a strong indication that rape crimes may be subject to universal jurisdiction in its own right. The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing sexual violence as war crimes, crimes against humanity, and instruments of genocide, the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument), the increasing attention given to gender violence in international treaties, U.N. documents, and statements by the Secretary-General, the new efforts to redress sexual violence in internationalized/hybrid courts and by truth and reconciliation commissions, the recent recognition of gender crimes by regional human rights bodies, and the increasingly successful claims brought in domestic court to adjudicate gender crimes all provide compelling evidence that crimes of sexual violence are now considered amongst the most serious international crimes. This in turn supports an assertion that sexual violence, at the very least rape and sexual slavery, has risen to the level of a *jus cogens* norm. Such an attribution provides increased means of protecting women and girls, bolsters efforts in enforcing violations of the laws, and challenges traditional stereotypes of gender crimes being less grave or important. It has taken over twenty-one centuries to acknowledge sex crimes as one of the most serious types of crimes committable, but it appears that this recognition has finally dawned.

men and children in the areas of armed conflict in the former Yugoslavia"); G.A. Res. 48/143, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/143 (20 Dec. 1993) (discussing rape and abuse of women in the Yugoslav conflict); *Rape and Abuse of Women in the Territory of the Former Yugoslavia,* Hum. Rts. Comm. Res. 1993/L.3, U.N. Doc. E/CN.4/1993/L.3 (1993) (condemning sexual violence of women during Yugoslav conflict).

315. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 HUM. RTS. Q. 63 (1993); Jonathan I. Charney, *Universal International Law,* 87 AM. J. INT'L L. 529, 541 (1993); Lauri Hannikainen, *Implementation of International Humanitarian Law in Finnish Law, supra* note 31; JALIL KASTO, *Jus Cogens* And Humanitarian Law (1994).

316. ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 241-42.