Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia

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Recommended Citation
Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, 9 Berkeley Women's L.J. 77 (1994)
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The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia

Kathleen M. Pratt† and Laurel E. Fletcher‡

I. INTRODUCTION

It would be an admission of incapacity, in contradiction of every self-evident reality, that [humanity] . . . should be unable to maintain a tribunal holding inviolable the law of humanity, and, by doing so, preserve the human race itself.²

The effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the fur-
The atrocities perpetrated against women in the former Yugoslavia—rape, mass and systematic rape, and other forms of gender-based violence—have outraged the world and have generated an international outcry for accountability and effective redress. The lessons to be drawn from this response are apparent. Rape and other forms of gender-based violence, despite being historically overlooked and often unredressed in times of peace and armed fighting around the world, can no longer be viewed or treated simply as unfortunate examples of an unavoidable dark side of conflict. Rather, rape and gender-based violence contravene fundamental principles of humanitarian law and violate the most basic, non-derogable human rights guaranteed in times of conflict or peace—namely, the right to dignity, the right to bodily integrity, and the right to be free from torture or other cruel, inhuman, or degrading treatment. As a consequence, the international community must seek full accountability for gender-specific offenses in the former Yugoslavia.

Ensuring international criminal accountability for the atrocities committed against women in connection with the conflict in the former Yugo-

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4 For the purposes of this Article, "gender-based violence" includes, but is not limited to rape, forced impregnation and forced maternity. Gender-based violence encompasses physical violations directed at women on account of their gender. Rape, forced impregnation and forced maternity constitute gender-based violations in that: (a) the physical consequences of the violence are ones which only women endure (e.g., only women can be impregnated as a result of rape, and only women can be forced to carry to term a pregnancy resulting from rape); (b) women's social status makes them targets of these acts; and (c) there are gender-specific injuries which result from these acts, due to the social status of women (e.g., stigmatization, blame for the violation, loss of social status, and survivors' fear of reprisal).
5 This "dark side of conflict" myth involves some combination of the following assumptions: that rape of women by combatants is an individualized, uncontrollable event; that women are the "spoils" of war; and/or that women's bodies will inevitably and invariably serve as another battleground through which the political and military objectives of a country or political faction will be played out.
7 While criminal accountability is a necessary step toward ensuring a just peace and respect for the rule of law in the republics of the former Yugoslavia and elsewhere, it is only one of several necessary steps. In addition to criminal accountability, those responsible for these atrocities should also be required to make reparation to the victims and survivors of the abuses. See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, paras. 8, 19, U.N. Doc. A/40/881, Supp. No. 53, at 213 (1985).

GENDER-BASED VIOLENCE IN THE FORMER YUGOSLAVIA

slavia will not be easy. This is so for many reasons, two of which this Article addresses. First, the Statute of the Tribunal for the former Yugoslavia explicitly recognizes gender-specific offenses only in the provision granting the Tribunal jurisdiction to prosecute “crimes against humanity.” Rape and other forms of gender-based violence are not “crimes against humanity” unless they are mass and systematic. Thus, rapes and other forms of gender-based violence that do not fall within this category of violation but which nonetheless come within other substantive crimes provided for by the Statute may remain unrecognized as international crimes, and persons responsible for them will not be held accountable absent prosecutions under these other provisions. Second, unique difficulties for investigation and prosecution are presented by the nature of gender-specific offenses and the circumstances confronting survivors of such offenses in the former Yugoslavia.

If left unsanctioned, the conduct of the parties to the conflict—the most egregious of which has been the Serbian policy and practice of “ethnic cleansing”—will continue to undermine and make a mockery of established principles which require all forces to abide by the minimum standards mandated by humanitarian law and which require states to respect and protect fundamental human rights in all circumstances. Without effective and full prosecutions for gender-specific violations, future efforts to rebuild civil societies in the region will be thwarted and the international community’s ability to enforce the rule of law in the world community will be seriously compromised. Thus, every necessary step must be taken to ensure prosecution and punishment of all persons responsible for these atrocities.

Below, Section II provides a brief overview of the historical invisibility of rape and other gender-based violence in international humanitarian and human rights discourse. Section III describes the factual basis for prosecutions of rape and other forms of gender-based violence in the context of the former Yugoslavia. Finally, Section IV examines relevant provisions of the Statute of the Tribunal which, under conventional and customary international law, provide the Tribunal with jurisdiction to prosecute rape and other forms of gender-based violence as international crimes. This section reviews the types of rapes and forms of gender-based violence captured by each statutorily defined substantive crime and explains why gender-specific

the body created by the Statute to prosecute war crimes. See U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1993) (establishing the Tribunal and adopting unchanged the Statute proposed by the Secretary-General). Article 24(3) of the Statute states that “[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”

8 As one scholar has pointed out, “If law is unavailable to punish widespread brutality . . . what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct.” Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2542 (1991).
offenses must be recognized and prosecuted under all of these relevant provisions.

II. HISTORICAL INVISIBILITY OF GENDER-SPECIFIC VIOLATIONS

Targeting women for gender-specific violence is not unique to the armed conflict in the former Yugoslavia. The use of rape and other forms of gender-based violence as instruments of war has been widespread and pervasive throughout history. One need not dig into the distant past to find evidence of this fact.

In many historical instances, rape "has been given license, either as an encouragement for soldiers or as an instrument of policy." The Nazi and Japanese practices of rape and forced prostitution on a large scale are egregious examples of such policies. During the first month of the occupation of Nanking in December 1937, approximately 20,000 rapes occurred within that city; and in 1943, a large number of civilian women were raped in Italy by occupying forces. More recent examples can be found in the mass rape of women in Bangladesh, the widespread use of rape by government troops as a means of punishing women accused of supporting the insurgents in Kashmir, the extensive use of rape and other forms of gender-based violence by The Shining Path and by governmental agents in the conflict in Peru, and rape of women in Kuwait under Iraqi occupation.

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10 Moreover, peacetime rapes and other forms of gender-based violence—even where not perpetrated by government agents—often go woefully unredressed. See, e.g., Middle East Watch, Punishing the Victim: Rape and Mistreatment of Asian Maids in Kuwait (1992); Americas Watch, Criminal Injustice: Violence Against Women in Brazil (1991); Majority Staff of the Senate Judiciary Comm., 102d Cong., 2d Sess., Violence Against Women: A Week in the Life of America (1992).


13 Michael Walzer, Just and Unjust Wars 113-37, 343 (1977).


Despite the global pervasiveness of rape and gender-based violence, gender-specific violations of humanitarian and human rights law have not been accorded the same attention as other violations either in prosecutions for serious violations of international law\textsuperscript{18} or in reports by U.N. entities charged with investigating and reporting on human rights violations.\textsuperscript{19} Indeed, in the context of the former Yugoslavia, reports of mass and systematic rape began emerging as early as August of 1992.\textsuperscript{20} Nonetheless, reports by the U.N. Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia did not mention gender-specific violations until November 1992 and then only briefly.\textsuperscript{21}

The historical invisibility of violations of the rights of women has not persisted in the context of the former Yugoslavia largely because of international press attention to the mass rapes and because of the actions of local, non-governmental, international, and women's organizations investigating these violations.\textsuperscript{22} Similarly, the historical silence with respect to con-

\textsuperscript{18} Rape was neither explicitly mentioned in the Charter of the Nuremberg Tribunal nor prosecuted in Nuremberg. See Meron, Rape, supra note 10, at 425-26. While rape was considered a war crime by the International Military Tribunal for the Far East ("IMT") (see 2 THE TOKYO JUDGEMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 963, 971-73, 988-89 (B.V.A. Roling & C.F. Ruter, eds., 1977)); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, TIAS No. 1589, reprinted in 4 Bevans 20), gender-specific violations were not extensively prosecuted as war crimes. See JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 259 (1979) (IMT found some Japanese military and civilian officials guilty of war crimes (including rape) because they failed to ensure that their subordinates complied with international law); Maj. William H. Parks, Command Responsibility for War Crimes, 62 MIL. L. REV. 1, 69-73 (1973) (Adm. Toyoda charged with war crimes for tolerating various abuses, including rape, but ultimately acquitted); see also PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 179-80 (1979) (Netherlands court found some Japanese guilty of war crimes based on their responsibility for forced prostitution).

\textsuperscript{19} See INTERNATIONAL HUMAN RIGHTS LAW GROUP, WOMEN IN THE LAW PROJECT, TOKEN GESTURES: WOMEN'S HUMAN RIGHTS AND U.N. REPORTING, 1 U.N. SPECIAL RAPPORTEUR ON TORMURE (1993).

\textsuperscript{20} See Roy Gutman, Bosnia Rape Horror, NEWSDAY, Aug. 9, 1992, at 5; Roy Gutman, Mass Rape, NEWSDAY, Aug. 23, 1992, at 5; Roy Gutman, Victims Recount Nights of Terror at Makeshift Bordello, NEWSDAY, Aug. 23, 1992, at 37.

\textsuperscript{21} Report on the Situation of Human Rights, at 12, U.N. Doc. S/24809 (1992) ("rape is deliberately practiced as yet another method of expressing contempt and hatred for the ethnic group which the unfortunate victims are made to symbolize.").

\textsuperscript{22} The fact that these gender-specific violations raised such international press attention—where other similar, equally pervasive and brutal gender-specific violations have not—raises at least three distinct and disturbing issues. One issue is the cultural adjunctive role that women play and the manner in which this is reinforced by the media. Reports of the rapes in the former Yugoslavia focused on their mass and systematic nature, which was part of a campaign of genocide aimed at destroying the Bosnian Muslims. Thus these rapes became visible specifically in relation to the impact they had on the greater community of all Bosnian Muslims rather than only on Bosnian Muslim women. Put another way, the pain caused by these violations was highlighted and therefore deemed relevant because it was understood primarily as involving injury to the Bosnian Muslim community and culture. This perpetuates the adjunctive role of women by implying that if the rapes had been understood primarily as injuring the women upon whom they were perpetrated, they would not have seemed as egregious. A second issue is that of race-coding violence against women. The "ethnicity" of the Bosnian Muslim women who have been targeted for this violence (i.e., Slavic, European women) rendered the violations automatically more visible to the international community than similar violations perpetrated on women in non-white, non-European or North American cultures have been. A third issue is that of socio-economic, or class-coding, violence against women. The description of the relative level of socio-economic development of the former Yugoslavia (e.g., relatively advanced, "Westernized," and known to the world...
demning gender-specific violations has been broken by various U.N. reports and resolutions which explicitly recognize the gravity of rape and other gender-based violence committed in the conflict in the former Yugoslavia.\textsuperscript{23} Nonetheless, whether rape and other forms of gender-based violence will be treated as the egregious and serious criminal offenses that they are by being effectively prosecuted under the Statute of the Tribunal still remains to be seen and will depend in part on how the Statute of the Tribunal is applied with respect to gender-specific violations.

III. FACTUAL BACKGROUND

A. The Parties: Serbia, Montenegro, Croatia, and Slovenia\textsuperscript{24}

On June 25, 1991, the Republic of Croatia and the Republic of Slovenia unilaterally declared their independence and withdrew from Yugoslavia. Yugoslav National Army forces ("JNA")\textsuperscript{25} were sent to both republics where fierce fighting ensued. After an agreement was signed in Brioni on July 7, 1991, JNA forces withdrew from the Republic of Slovenia. At that same time, further JNA reinforcement units were sent to Croatia to buttress the Croatian Serb militias that had attempted to establish autonomous zones and had resisted Croatian authority. The fighting among the Croatian army, on the one hand, and Croatian Serb paramilitaries and JNA forces, on the other, spread to parts of Croatia bordering Bosnia-Herzegovina ("Bosnia"). Croatian Serb paramilitaries and JNA units eventually gained control of almost a third of Croatian territory. On September 7, 1991, a European Community-sponsored peace conference opened for the purpose of mediating the conflict in Croatia. By this time, Yugoslavia's federal institutions had broken down almost completely.

In January and February 1992 the United Nations successfully negotiated a cease-fire in Croatia and by resolution ordered the stationing of a peacekeeping force there. On April 27, 1992, Belgrade created a new Yugoslav state which was composed solely of the republics of Serbia and Montenegro. The independence of Croatia and Slovenia was internation-
ally acknowledged on May 22, 1992, when they were each granted membership in the United Nations.  

1. Bosnia-Herzegovina

As of 1991, the diverse population in this republic consisted primarily of Slavic Muslims (43.7%), Serbs (31.3%), and Croats (17.3%). Each of these ethnic groups was distributed fairly evenly throughout Bosnia (although several areas were dominated by a particular group), and each group was proportionately represented in Bosnia’s parliament and in its seven-member presidency. Following Croatia’s and Slovenia’s proclaimed independence in June 1991, Muslim and Croatian members of the Bosnian parliament took the first steps toward seceding from the former Yugoslavia by declaring Bosnia’s sovereignty in October 1991. The Bosnian Muslims and Bosnian Croats continued to press for independence, although the Bosnian president indicated in December 1991 that he would support a Yugoslavia comprised of loosely confederated republics.

In late 1992, Muslim and Croatian members of the Bosnian parliament voted to hold a referendum to decide whether Bosnia would become independent. Bosnian Serb parliament members renounced the legitimacy of the referendum. Nonetheless, in late February and early March 1992, the referendum was held. Of the 63.4% of eligible voters who participated in the referendum, 99.4% voted for independence. The president of the seven-member Bosnian presidency, Alija Izetbegovic, then officially declared independence and requested international recognition. Bosnia was internationally recognized as an independent nation on April 7, 1992.

At the time of the referendum, violence among the three groups had escalated. The Bosnian Serbs took measures to enforce their previously

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26 See AMNESTY INTERNATIONAL REPORT, supra note 24, at 5.
27 The Serbian Democratic Party, which favored Bosnia’s remaining in Yugoslavia, opposed Bosnian independence efforts and reacted to the bid for independence by forming the “Serbian Republic of Bosnia-Herzegovina” in January 1992. The Bosnian Serbs declared that the “republic” would become an official state if Bosnia became independent. The new Serbian state was to be a close ally of Serbia and would possibly be annexed to Yugoslavia and portions of Serbian-controlled Croatia. The Bosnian Serbs claimed certain regions within Bosnia in which they were the ethnic majority. They proclaimed Sarajevo as the intended capital of the “Serbian Republic of Bosnia-Herzegovina.” At the same time, the Bosnian Serbs rejected representation by the Bosnian president and foreign minister. During this period, Serbia began an economic blockade of Bosnia. Trade between Serbia and Bosnia ceased. See AMNESTY INTERNATIONAL REPORT, supra note 24, at 5-8.
28 The referendum was necessary to fulfill a condition imposed by the European Community as a prerequisite to its official recognition of Bosnia as an autonomous state. See AMNESTY INTERNATIONAL REPORT, supra note 24, at 6-7.
29 The day before the referendum was to be held, the leader of the Bosnian Serbs, Radovan Karadzic, stated that the referendum did not exist for the Serbs. Because Bosnian Serb politicians refused to participate in the referendum’s administration, some local polling stations did not open, and Bosnian Serbs boycotted the election. AMNESTY INTERNATIONAL REPORT, supra note 24, at 7.
30 AMNESTY INTERNATIONAL REPORT, supra note 24, at 8.
declared "Serbian Republic of Bosnia-Herzegovina," including, for instance, taking control of certain police departments. On April 7, 1992, Bosnian Serbs declared their independence from Bosnia, and self-identified Bosnian Serb officials in the Bosnian government resigned. Soon thereafter, JNA troops, mobilized Serbian reservists, and Serbian irregulars took control of vast portions of Bosnian territory. By this time, Bosnia was mired in fierce fighting. Over the next few months the violence escalated to such a degree that the Bosnian government formally declared itself in a state of war on June 20, 1992.

B. Casualties, Atrocities, and Abuses

Since the 1992 inception of the war in Bosnia, acts of incomprehensible brutality have been carried out on a massive scale. As of April 1993, estimates range from 20,000 civilians killed to more than 137,000 killed or missing. By all accounts, the human toll has been staggering. While grave violations of humanitarian and human rights law have been committed by all sides to the conflict, Serb military and paramilitary forces—as the principal aggressors—have been widely acknowledged to be responsible for the overwhelming number of documented violations.

In the areas under their control, Bosnian Serb forces, both military and paramilitary, have committed these abuses in furtherance of their program of "ethnic cleansing"—the summary execution, rape, detention, forcible displacement, deportation and ghettoization of non-Serbs, including civilians. Bosnian Serb leaders use the cynical euphemism of "ethnic cleansing" to describe their campaign to establish homogeneous Serbian control over geographic areas by using violence and intimidation to remove all non-Serb residents. Pursuant to this policy, Bosnian Serb forces have operated detention camps in which Muslims, as well as Croats, have been tortured,

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31 Id. at 7-8.
33 See U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 806 (1994) [hereinafter COUNTRY REPORT 1993] (approximately 200,000 Bosnians have died as a result of the conflict); see also Charles Lane, Last Rites for Bosnia, NEWSWEEK, May 10, 1993, at 30; Phil McCombs, At the Bosnia Crossroads, WASH. POST, May 5, 1993, at B8 (Bosnian Foreign Minister estimating 200,000 Bosnian civilians killed).
34 By October of 1993, there were more than 800,000 Bosnian refugees located outside of Bosnia and more than 1.2 million displaced Bosnians within Bosnia. COUNTRY REPORT 1993, supra note 33, at 806. The continued fighting, recurrent obstacles to delivery of humanitarian assistance, and scarcity of food has further darkened Bosnians’ prospects for survival.
37 WATCH REPORT II, supra note 24; COUNTRY REPORT 1993, supra note 33.
38 The term "ethnic cleansing" is misleading and technically a misnomer in the sense that Croats, Bosnian Muslims, and Serbs all share a Slavic “ethnicity” and are divided more by religious and national identity. See generally MISHA GLERNY, THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR (1992).
mutilated, starved, and killed.\textsuperscript{39} Bosnian Serb forces have also torched homes and confiscated property of non-Serbs and have carried out summary executions of Muslims and Croats.\textsuperscript{40} Victims of “ethnic cleansing” number in the hundreds of thousands.\textsuperscript{41}

Muslim and Croatian forces in Bosnia have summarily executed both civilians and \textit{hors de combat} and have subjected detainees to severe mistreatment.\textsuperscript{42} Bosnian Muslim and Croatian military, paramilitary, and police forces, as well as civilians, have also looted and destroyed villages, including cultural monuments.\textsuperscript{43} While most of these abuses have been directed against Serbian victims, fierce fighting has periodically erupted between Croatian and Bosnian Muslim forces, at times involving savage violations.

In April 1993 brutal violence erupted between Bosnian Muslims and Croats in Central Bosnia.\textsuperscript{44} As early as May of 1993, a report of the U.N. Special Rapporteur on the Former Yugoslavia, Tadeusz Mazowiecki, blamed Croatian forces for “a deliberate and systematic policy of ethnic cleansing” against Bosnian Muslims in the central Bosnian region of Vitez and in the southern Bosnian town of Mostar.\textsuperscript{45}

C. Gender-Specific Atrocities

In the fall of 1992, reports began emerging of rape being used as a weapon of war on a massive scale.\textsuperscript{46} While all sides to the conflict in Bosnia have committed rapes, Bosnian Serb forces have used rape and other forms of gender-based violence on the largest scale, principally against Bosnian Muslim women.\textsuperscript{47} Available evidence suggests that rape has been used to humiliate women as direct targets and to humiliate their communities, thereby inducing members of local non-Serb populations to leave their homes.\textsuperscript{48} Frequently, rapes have been committed in front of others—often

\textsuperscript{39} \textit{WATCH REPORT II, supra note 24}, at 30-188, 191-227, 237-270, 382-393; \textit{COUNTRY REPORT 1993, supra note 33.}
\textsuperscript{40} \textit{WATCH REPORT II, supra note 24; COUNTRY REPORT 1993, supra note 33.}
\textsuperscript{41} \textit{WATCH REPORT II, supra note 24; COUNTRY REPORT 1993, supra note 33.}
\textsuperscript{42} \textit{WATCH REPORT II, supra note 24, at 228-35, 271-92, 297-381.}
\textsuperscript{43} \textit{WATCH REPORT II, supra note 24; COUNTRY REPORT 1993, supra note 33.}
\textsuperscript{45} \textit{See Rod Nordland & Charles Lane, 'Kill All the Muslims': While the World Focuses on Serb Atrocities, the Croats Get Away with Murder, NEWSWEEK}, June 7, 1993, at 28; \textit{COUNTRY REPORT 1993, supra note 33.}
\textsuperscript{46} \textit{See supra notes 20-21.}
\textsuperscript{47} Jeri Laber, \textit{Bosnia: Questions of Rape}, \textit{N.Y. REV. OF BOOKS}, Mar. 25, 1993, at 4. Although the reported cases of rape typically involve female victims—ranging from young children to elderly women—there is evidence that Serb forces have also subjected Muslim men to various forms of sexual assault, sometimes forcing male detainees to perform acts of sexual violence and genital mutilation on each other. \textit{See WATCH REPORT II, supra note 24, at 23, 186; AMNESTY INTERNATIONAL REPORT, supra note 24, at 5.}
\textsuperscript{48} \textit{See WATCH REPORT II, supra note 24, at 21.}
in front of neighbors or close relatives, such as parents and children.\textsuperscript{49} Many rapes have occurred in villages where the rape survivors lived; often this happens during the initial attack when the Bosnian Serbs are first bringing the village under their control.\textsuperscript{50} A team of medical experts that investigated allegations of rape at the request of the U.N. Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia cites the following pattern in Vukovar, Croatia to illustrate this strategy:

Serb paramilitary units would enter a village. Several women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. Several days later, Yugoslav Popular Army . . . officers would arrive at the village offering permission to the non-Serb population to leave the village. Those male villagers who had wanted to stay then decided to leave with their women and children in order to protect them from being raped . . . .\textsuperscript{51}

Rapes have also occurred in places of detention, or “concentration camps”; yet other violence has taken place in detention areas dedicated to the rape and sexual abuse of women—often called “bordello camps.”\textsuperscript{52}

Reports indicate that some rape survivors have also been subjected to forced pregnancy and forced maternity.\textsuperscript{53} Typically, these accounts indicate that rape survivors who became pregnant were deliberately detained by their Bosnian Serb captors beyond the time when they could obtain a legal abortion. Numerous accounts of rapes indicate that Bosnian Serb perpetrators have taunted their victims with words to the effect, “Now you’ll have a Serb baby.”\textsuperscript{54}

Reported accounts also make clear that rapes have been condoned by commanding officers, and some reports indicate that commanders have at times even ordered soldiers to commit rapes.\textsuperscript{55} A number of testimonials of rape survivors identify commanders as among the perpetrators.\textsuperscript{56}

Although most reported rapes have been attributed to Bosnian Serb forces, rapes have been committed by Bosnian Muslim and Croatian forces against Serbian women.\textsuperscript{57} There have also been reports alleging acts of

\textsuperscript{49} Id.; see also Medical Mission Report, supra note 23.

\textsuperscript{50} Amnesty International, Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces 4-5 (1993) [hereinafter Amnesty International Report 1993]; see also Watch Report II, supra note 24, at 21-22.

\textsuperscript{51} Medical Mission Report, supra note 23, at para. 48(a).

\textsuperscript{52} Amnesty International Report 1993, supra note 50, at 9-12; see also Gutman, Victims Recount Nights of Terror at Makeshift Bordello, supra note 21.


\textsuperscript{54} See, e.g., Medical Mission Report, supra note 23, para. 41.

\textsuperscript{55} See Roy Gutman, Rape Camps: Evidence Serb Leaders in Bosnia OK’d Attacks, Newsday, Apr. 19, 1993, at 7.

\textsuperscript{56} Id.

\textsuperscript{57} See Laber, supra note 47, at 4; see also Watch Report II, supra note 24, at 21.
sexual violence, such as crude circumcisions, committed by Bosnian Muslims against Serbian men.58

In December 1992, the U.N. Security Council unanimously condemned the mass and systematic rape of Muslim women in Bosnia. The U.N. High Commissioner for Refugees has confirmed that systematic rape and the commission of gender-based violence against women in Bosnia is a component of the Bosnian Serbs' campaign of "ethnic cleansing."59 Numerous other observers have concurred in the view that rape and gender-based violence in Bosnia are used deliberately as a strategic weapon in the Bosnian Serbs' program of aggression against Bosnian Muslims.60 The U.S. Department of State has described "[m]assive systematic rape, committed by Bosnian Serb military units and prison guards . . . used as an extension of 'ethnic cleansing' to terrify the population."61 On January 6, 1993, members of the U.S. Congress introduced a resolution condemning the mass rapes occurring in Bosnia and calling for the establishment of rape and forced impregnation as war crimes and crimes against humanity.62

IV. RAPE AS AN INTERNATIONAL CRIME: APPLICABLE LAW

In February 1993 the U.N. Security Council acted63 to enforce the international community's duty to punish those responsible for grave violations of physical integrity by authorizing the creation of an International

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60 See Roy Gutman, Mass Rape at Makeshift Bordello, supra note 20; Nightline: Rape as a Weapon of War Against Bosnian Muslims (ABC television broadcast, Jan. 14, 1993) (transcript on file with authors); Linda Grant, Rape Babies: What do we know? THE INDEPENDENT, Jan. 10, 1993, at 20 (investigators from the World Council of Churches report that they were convinced that there is a policy of systematic rape and that rape is being used as a weapon of war); Stephanie Nebehay, EC Group Says 20,000 Muslim Women Raped by Serbs, REUTERS, Jan. 8, 1993; Russell Watson, A Pattern of Rape, NEWSWEEK, Jan. 4, 1993, at 33; Roy Gutman, Rape by Order, NEWSWAG, Aug. 23, 1992, at 7.
61 COUNTRY REPORT 1992, supra note 36, at 8. In November 1992 the Special Rapporteur to the Former Yugoslavia recognized in his report that "rape is deliberately practiced as yet another method of expressing contempt and hatred for the ethnic group which the unfortunate victims are made to symbolize." REPORT ON THE SITUATION OF HUMAN RIGHTS, supra note 21, at 12. While cautious, Amnesty International stated:

Whether rape has been explicitly singled out by political and military leaders as a weapon against their opponents remains open to question. What is clear is that so far effective measures have rarely, if ever, been taken against such abuses, and that in practice local political and military officers must have had knowledge of, and generally condoned, the rape and sexual abuse of women . . . .

AMNESTY INTERNATIONAL REPORT 1993, supra note 50, at 1.
Tribunal to prosecute the crimes committed in the Former Yugoslavia.\textsuperscript{64} At the request of the Security Council, the Secretary-General presented the Security Council on May 3, 1993, with a report setting forth specific proposals regarding the operation of the Tribunal, including a proposed statute for the Tribunal.\textsuperscript{65} On May 25, 1993, the Security Council established the Tribunal, adopting unanimously and without change the Statute proposed by the Secretary-General.\textsuperscript{66}

While undeniably an important symbol of the international community’s unanimous condemnation of the gross abuses which have been committed in the former Yugoslavia, the Tribunal will be no more than an empty symbol with respect to enforcement of the rights of women unless certain shortcomings of the Statute are addressed, and unless prosecutions for gender-specific violations occur. Set forth below is a discussion of the Statute’s shortcomings and an examination of how conventional and customary international law principles authorize prosecutions for rape and other forms of gender-based violence under several Articles of the Statute.

A. The Statute’s Shortcomings with Respect to Rape and Other Forms of Gender-Based Violence

As set forth in the Statute, the Tribunal has jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”\textsuperscript{67} The Statute then delineates in Articles 2-5 certain categories of violations over which the Tribunal has jurisdiction.

One of the most significant shortcomings of the Statute is that rape is explicitly identified as a crime only in one of these categories—the definition of Crimes Against Humanity (Article 5). It is not explicitly mentioned in any of the remaining Articles: Article 2 (Grave Breaches); Article 3 (Violations of the Laws and Customs of War); or Article 4 (Genocide). Nonetheless, each of these other Articles implicitly authorizes prosecutions for rape and other gender-specific violations.

It is critical that this implicit authority be made explicit. As were the Charter and judgments of the Nuremberg and Tokyo Tribunals, the Tribunal’s Statute and judgments will be deemed authoritative statements of international legal principles. The Tribunal will influence the substantive definitions of rape and other forms of gender-based violence in rules promulgated for the Tribunal\textsuperscript{68} and by confirming indictments for gender-

\textsuperscript{65} See Secretary-General’s Report, supra note 7.
\textsuperscript{67} Statute of the Tribunal, supra note 7, at art. 1.
\textsuperscript{68} Article 15 of the Statute for the Tribunal mandates that the Tribunal’s Judges “adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and
specific offenses under each of the relevant Articles of the Statute. More importantly, by rendering judgments on prosecutions under these Articles, the Tribunal will establish precedent for how rape and other forms of gender-based violence are perceived and treated under international law. If gender-specific offenses are only recognized and prosecuted where they are "mass and systematic" or as constituent elements of other offenses, (e.g., genocide), violations of women's human rights will continue to be perceived and treated as important only where they impact on a community-based right—and therefore under-prosecuted where they "simply" impinge on a woman's fundamental right to dignity, to bodily integrity, and to be free from torture or other inhuman treatment.

As set forth below, Articles 2-5 of the Statute address the distinct categories of offenses recognized as crimes under international law. The Tribunal clearly has jurisdiction over prosecutions for rape or other forms of gender-based violence that fall under each of these Articles. However, unless explicitly recognized and prosecuted as such, those rapes that fall within the definitions of "grave breaches," "war crimes," and "genocidal acts" are in danger of being overlooked and unaddressed. Compelling examples of this danger are clear:

- Acts of rape, forced impregnation, or forced maternity that are not mass and systematic do not constitute "crimes against humanity" prosecutable under Article 5 of the Statute.
- Acts of rape, forced impregnation, or forced maternity that are not perpetrated with the requisite intent to destroy, in whole or in part, an ethnic or appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” Secretary-General's Report, supra note 7, at 42.

Although not specifically required to do so by Article 15, the Judges of the Tribunal will likely include definitions of substantive offenses in the rules they promulgate for the Tribunal. See Draft Rules of Procedure and Evidence by the Judges of the War Crimes Tribunal (1994) (on file with authors); see also Memorandum for the DoD General Counsel (June 25, 1993) (on file with authors); U.S. DEPARTMENT OF STATE, RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE FORMER YUGOSLAVIA (1993) (on file with authors).

69 Under Article 19(1) of the Statute of the Tribunal, a Judge of the Tribunal must either confirm or dismiss all indictments submitted by the Prosecutor for the Tribunal. Secretary-General's Report, supra note 7, at 43. If the Judge determines that the Prosecutor has not established a prima facie case for the crime or crimes with which the accused is charged under the Statute, the Judge must dismiss the indictment. Id. at art. 18(4).

70 To provide full recognition and integration of women's rights into the international humanitarian and human rights legal discourse, all persons responsible for gender-based violence in the former Yugoslavia must be held accountable, and a clear message must be sent that violations of the rights of women will no longer be overlooked, marginalized, or simply subsumed as constituent elements of other offenses.

71 What threshold must be crossed for acts of rape and other forms of gender-based violence to be deemed "mass and systematic" will likely be a heavily contested issue. Similarly, even if acts of rape and other forms of gender-based violence are deemed mass and systematic, establishing who may be properly held accountable for them raises difficult issues involving proof of chain of command. Thus, unless prosecuted under Article 2 or Article 3, individuals responsible for non-"mass and systematic" acts of rape or other forms of gender-based violence—including those responsible via a chain of command—could escape punishment for their criminal conduct.
religious group as such, would not constitute genocidal acts prosecutable under Article 4 of the Statute.72

- Acts of rape, forced impregnation, or forced maternity perpetrated against women of the same state as that of their perpetrator (for example, Bosnian Serb against Bosnian Muslim, or Bosnian Croat against Bosnian Muslim) could potentially be deemed not to constitute "grave breaches" under Article 2.

- Acts of rape, forced impregnation, or forced maternity committed or sanctioned by individuals who are not "state actors" (for example, those committed or sanctioned by non-recognized dissident civilian officials and/or paramilitary groups) may not constitute "grave breaches" under Article 2 of the Statute.73

Women in the former Yugoslavia have been subjected to various criminal acts on account of their gender. The Statute provides an avenue for accountability for many of these violations. Thus, to achieve full recognition of women's human rights and to hold accountable all persons responsible for such acts, prosecutions for gender-specific violations must occur where the evidence establishes a prima facie case under any and all of the four substantive articles of the Statute.

B. Interpretation of the Statute Under Customary and Conventional International Law

Interpreted under customary and conventional international law principles, the Statute of the Tribunal clearly provides authority to prosecute rape and other forms of gender-based violence. The Statute confers upon the Tribunal jurisdiction over serious violations of two interconnected bodies of international law:74 (1) international humanitarian law; and (2) international human rights law.75

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72 Proving the requisite intent to hold individuals liable for genocidal acts will undoubtedly be difficult. This is particularly true given the anticipated claim that acts of rape and other forms of gender-based violence were committed not with the intent to "destroy" the group, but "merely" for the purpose of inducing the victims, primary witnesses, and others in that group to abandon certain villages or areas and move to other ones. Whether or not such an argument is ultimately successful (which in many instances it should not be), these same obstacles are not encountered in prosecutions under the other Articles.

73 The perpetrator of "war crimes" need not be a soldier, and need not be an agent of a formally recognized "state." Rather, both civilian and military persons may be held liable for "war crimes," as long as the violation of customary or conventional humanitarian law is committed by a person affiliated with one side of the conflict against a person affiliated with the other side. See Meron, Rape, supra note 10, at 424, 426 nn.14 & 19.

74 Both the Secretary-General's Report and the Statute of the Tribunal use the term "humanitarian law" to describe those violations over which the Tribunal has jurisdiction; neither specifically mentions human rights law. However, it is apparent from the commentary contained in the Secretary-General's Report and from the language of the Statute itself that the Tribunal's jurisdiction encompasses all serious violations of customary international law—including those which arise from customary human rights law. See, e.g., Secretary-General's Report, supra note 7, at 9; Secretary-General's Report, supra note 7, at Art. 4.

75 Humanitarian law and human rights law each consist of conventional (e.g. treaty-based) and customary law. Because the Tribunal does not have jurisdiction over the violations of conventional
The core of humanitarian law is comprised of the Hague Regulations and the four Geneva Conventions, as well as Protocols I and II thereto. The applicable body of international humanitarian law varies significantly depending on whether the conflict is classified as noninternational or international in nature. The conflict in the former Yugoslavia

human rights law, the parties' treaty-based international human rights obligations are not examined at length herein.

76 Humanitarian law in its broadest sense regulates the conduct of armed conflict. Unlike human rights law, humanitarian law comes into effect only during times of armed conflict.

77 The Hague Convention of 1907 stated that the parties to the Convention "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 law of humanity, and from the dictates of public conscience." Hague Convention (IV), Oct. 18, 1907, Annexed Regs., Preamble, 36 Stat. 2277, TS No. 539, reprinted in HOUSE COMMITTEE ON FOREIGN AFFAIRS, HUMAN RIGHTS DOCUMENTS 292 (1983).

The Hague Conventions were recognized as part of customary international law by the Military Tribunal at Nuremberg. See Quincey Wright, The Law of the Nuremberg Trial, 41 AM. J. INT'L L. 38, 59-60 (1947).


has been both implicitly and explicitly recognized as international in nature.\textsuperscript{81} Moreover, all parties to the conflict have expressly agreed to abide by \textit{all} provisions of the Geneva Conventions and the additional Protocols.\textsuperscript{82} Therefore, the higher standards governing international armed conflicts should apply to the conduct of all parties.\textsuperscript{83}

Irrespective of the nature of the conflict, customary international law provides certain minimum standards to which all parties will be held. Common Article 3 to the Geneva Conventions\textsuperscript{84} sets forth the minimum rights and protections guaranteed under customary international law to civilians in times of armed conflict.\textsuperscript{85} Common Article 3 provides, in pertinent part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities \textit{... shall in all circumstances be treated humanely}, without any adverse distinction founded

\begin{quote}
I.C.J. 14 (holding that a state could be held “legally responsible” for the acts of international armed dissidents if the state had “effective control of the operations in the course of which the alleged violations were committed”). In the case of Serbian and Croatian support of Bosnian Serbs and Bosnian Croats, respectively, the patron state is providing a large share of munitions, manpower, and strategic support to the dissident faction. At a minimum, under these circumstances, the patron states knowingly encourage (if not participate in) any resulting violations of humanitarian and human rights, and should be held accountable for such violations under international law.
\end{quote}


\textsuperscript{83} \textit{See Goldman, supra} note 80, at 539, 540-41 n.4, 545; \textit{see also} Hans-Peter Gasser, \textit{Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon}, 33 Am. U. L. Rev. 145 (1983).

\textsuperscript{84} \textit{See Geneva Conventions, supra} note 78.

\textsuperscript{85} The International Court of Justice has held that Common Article 3 of the Geneva Conventions indisputably constitutes customary international law, binding on all parties to a conflict. \textit{See International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders} 114 (1986).
on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(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; . . .

Common Article 3 thus presents the very minimum standards of treatment which all parties to an armed conflict must afford to persons who are not or are no longer actively participating in the hostilities.

In addition to customary humanitarian law, conventional humanitarian law may bind the parties in one of three ways: (1) a state party to the conflict may have specifically ratified a convention; (2) any party may have separately agreed to abide by a particular instrument or instruments; or (3) parties may be bound by those principles of customary international law applicable to the type of armed conflict at issue (for example, international or internal).

While not all parties to the conflict in the former Yugoslavia have ratified the Geneva Conventions and the additional Protocols, all

86 Geneva Conventions, supra note 78, at art. 3 (emphasis added).
87 In addition, the minimum protections afforded by Common Article 3 may be supplemented by certain provisions of Protocol II in conflicts not of an international nature and by certain provisions of Protocol I in conflicts of an international nature. See Goldman, supra note 80.

For Protocol II to apply, organized armed groups must exercise control over territory, and the following objective criteria must be present: (1) a responsible command system; (2) ability to carry out operations; (3) ability to implement sustained operations; and (4) ability to implement the Protocol. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1352:4463-70 (1987).

Article 4 of Protocol II establishes that persons who are not or are no longer taking part in hostilities are entitled to "respect for their person" by the parties to the conflict and specifically denotes which rights and guarantees are deemed fundamental and non-derogable in any circumstances. Importantly, Protocol II expands the protections under Common Article 3, by clarifying unequivocally that the fundamental guarantees include a right to personal integrity and to be free from rape. See Protocol II, supra note 79, at art. 4(2)(e).

Similarly, in conflicts of an international nature, certain provisions of Protocol I supplement the Fourth Geneva Convention. Article 75 of Protocol I, which protects those who may otherwise not be considered "protected persons," expresses norms which are considered so basic as to be declaratory of customary international law. Article 75 closely resembles Common Article 3, differing importantly in the addition of language which explicitly prohibits enforced prostitution and any forms of indecent assault as outrages upon personal dignity. Id. at art. 75(2)(b).

88 Customary international law often incorporates or reflects specific provisions of treaties or covenants which have, through widespread recognition, acceptance, and practice, become part of the body of customary international law and are binding on signatories and non-signatories alike. Thus, where certain principles enshrined in Protocol II have become customary international law, a dissident armed group fighting an internal civil war will be bound by treaty provisions that it otherwise could not ratify due to its legal status as a non-state.

89 Former Yugoslavia ratified all the Geneva Conventions, as well as Protocol I and Protocol II. Serbia has consistently maintained that it, along with Montenegro, is the successor state to the Former Yugoslavia. Until late September 1992, Serbia and Montenegro were recognized by the United Nations as successors to the former Yugoslavia. See Yehuda Z. Blum, UN Membership of the "New" Yugoslavia: Continuity or Break?, 86 AM. J. INT'L. L. 830, 833 (1992). On September 19, 1992, the U.N. Security Council considered that "the State formerly known as the Socialist
parties to the conflict have expressly agreed to abide by all provisions of these instruments. Thus, the primary body of humanitarian law is applicable to the parties' conduct and to the interpretation of the Statute's substantive provisions.

Unlike humanitarian law, which generally applies only to situations of armed conflict, human rights law is applicable in times of armed conflict and peace. Provisions in some human rights instruments permit states to suspend various human rights obligations in times of "public emergency" when certain conditions are met; however, certain rights are considered "non-derogable" and therefore apply irrespective of whether there is a state of "public emergency." Moreover, some of these non-derogable rights have become part of customary international law and are thus guaranteed.

Federal Republic of Yugoslavia has ceased to exist" and that the new Yugoslavia (Serbia and Montenegro) "cannot continue automatically the [UN] membership" of Former Yugoslavia. The Security Council further recommended that new Yugoslavia "should apply for membership in the United Nations and shall not participate in the work of the General Assembly." Id., (citing U.N. Security Council Res. 777 (1992). On September 22, 1992, the General Assembly endorsed this recommendation by a vote of 127 to 6). Id. (citing G.A. Res. 47/1 (1992)). Importantly, Yugoslavia was one of the six countries voting against this resolution. Thus, Serbia has given every indication that it considers itself the successor state to the Former Yugoslavia, even with respect to its international obligations vis-a-vis the United Nations and its instruments.

While an analysis and application of the international law of state succession is beyond the scope of this article, basic principles of estoppel—at a very minimum—should preclude Serbia from denying the treaty-based obligations of the former Yugoslavia under the pertinent international humanitarian and human rights instruments it had ratified. For all purposes herein, it is therefore assumed that Serbia is bound by all such treaty-based obligations of the former Yugoslavia.

90 See supra note 82 (citing agreements to be bound by all the Geneva Conventions and Protocols). Moreover, the Secretary-General's Report recognizes that the principles recognized in the Geneva Conventions will be binding on all parties to an international armed conflict, because they embody fundamental principles of customary international law. See Secretary-General's Report, supra note 7, at para. 37. Thus, irrespective of whether a state is a party to them, the principles of the Geneva Conventions will govern the role of all parties to such conflicts.


92 See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) ("Article 4: 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation . . . ."); see also Orentlicher, supra note 8 (armed conflict that meets the prescribed conditions may constitute a "public emergency" justifying derogation); David Weissbrodt, The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict, 21 Vand. J. Transnat'l L. 313, 335 (1988).

regardless of whether a state is a signatory to specific human rights instruments.94

1. Gender-Specific Violations as “Grave Breaches”

Article 2 of the Statute gives the Tribunal jurisdiction over “grave breaches of the Geneva Conventions of 1949.” This Article provides, in pertinent part:

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 . . . ;
(c) wilfully causing great suffering or serious injury to body or health; 95

This Article tracks the language of the Geneva Conventions, and was explicitly intended to reflect the fact that the Geneva Conventions “provide the core of customary law applicable to international armed conflicts,” and in particular that the “grave breach” provisions of the Conventions are customary international law.96

Article 147 of the Fourth Geneva Convention prescribes acts which constitute “grave breaches.”97 Article 147 states:

Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health . . . 98

Rape and other forms of gender-based violence should be interpreted under the Statute to constitute acts of “torture or inhuman treatment” and acts of “wilfully causing great suffering or serious injury to body or health.” The authoritative entity for interpretation of the Geneva Conventions, the International Committee of the Red Cross, has long recognized that at a minimum, the grave breach of “inhuman treatment” should be interpreted in the context of Article 27 of the Fourth Geneva Convention, which explicitly prohibits rape.99 Article 27 provides: “Women shall be especially pro-

94 See, e.g., Restatement, supra note 6, at § 702; see also Theodor Meron, The Hierarchy of Human Rights, 80 AM.INT’L L. 1 (1986).
95 Secretary-General’s Report, supra note 7, at art. 2.
96 See Secretary-General’s Report, supra note 7.
97 The content of Article 147 is common to all four Geneva Conventions. See First Geneva Convention, supra note 78, at art. 50; Second Geneva Convention, supra note 78, at art. 51; and Third Geneva Convention, supra note 78, at art. 130.
98 Fourth Geneva Convention, supra note 78, at art. 147 (emphasis added).
99 See Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 598 (Oscar M. Uhler & Henri Coursier eds., 1958); see also Aide Memoir, supra note 81, at para. 2 (“grave breaches”
ected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault." In addition, Article 76(1) of Protocol I, which applies to international armed conflict, provides support for the proposition that rape and other forms of gender-based violence constitute "grave breaches" under customary international law. Article 76(1) 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."

Moreover, international law has begun recognizing that custodial rape or rape in circumstances where a government is liable under the law of state responsibility violates the prohibitions against torture or inhuman treatment contained in other international treaties or conventions. Rape and other forms of gender-based violence, when committed against "protected persons," clearly constitute violations of the "grave breach" provisions of the Geneva Conventions and may properly be prosecuted under Article 2 of the Statute.

Because all parties to the conflict in Bosnia (including the Bosnian government, Bosnian Croats, and Bosnian Serbs) have expressly agreed to be bound by all provisions of the Geneva Conventions and additional Protocols I and II, the conflict should be treated as international in nature. Accordingly, the grave breach provision of the Statute should apply to punish acts typified as such in these instruments, as well as to punish serious violations of Common Article 3 (including rape and other forms of gender-based violence), without regard to the state affiliation of the perpetrator or victim. Article 2 of the Statute would therefore apply even where the perpetrator is technically a citizen of the same state as the victim (for example, Bosnian Serb perpetrator and Bosnian Muslim victim), and thus where

100 See Fourth Geneva Convention, supra note 78, at art. 27.
101 See Protocol I, supra note 79, at art. 76(1).
103 Article 4 of the Fourth Geneva Convention defines "protected persons" as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva Convention, supra note 78, at art. 4. The "protected persons" language of Article 4 is commonly interpreted as limiting "grave breaches" under Article 147 to acts committed by agents of one state against citizens of another state. See Meron, Rape, supra note 10; No JUSTICE, No PEACE, supra note 1, at 5-6.
104 Such acts would include violations of Article 147 of the Fourth Geneva Convention. See Geneva Conventions, supra note 78.
105 See Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 AM. J. Int'l L. 78, 82 (1994); No JUSTICE, No PEACE, supra note 1, at 5-6. At least one author has argued that the interpretation of Article 147 as applicable only to violations against "protected persons" is too restrictive—irrespective of the circumstances to which it is being applied. See Jordan Paust, Applicability of International Criminal Laws to Events in the Former Yugoslavia, 9 AM. U. J. Int'l L. & Pol'y (forthcoming 1994).
the criminal act would not technically be one committed against a "protected person." This argument is supported by the text of Common Article 3 which invites parties to a conflict to "endeavor to bring into force... all or part of the other provisions of the present Convention." By virtue of the parties' agreement to abide by the Geneva Conventions and additional Protocols, the grave breach provisions of the Geneva Conventions should apply with equal force to inter-Bosnian offenses.

Even if the conflict were deemed non-international in nature, rape and other forms of gender-based violence indisputably constitute serious violations of the non-derogable minimum protections set forth in Common Article 3 to the Geneva Conventions as supplemented by Article 4(2)(e) of Protocol II. It is indeed arguable that, given that the purpose of Common Article 3 is to protect human life and dignity, such acts should be regarded as international crimes under customary international law irrespective of the nature of the conflict, thereby subjecting the perpetrators to prosecution under various articles of the Statute.

2. Gender-Specific Violations as "War Crimes"

If, for some reason, the grave breach provision of the Statute is deemed not to include grave violations of the minimum protections contained in Common Article 3 (for example, serious violations against persons of the same state as their perpetrators in a conflict deemed not of an international nature), these violations would still be subject to the Tribunal's jurisdiction as violations of the laws and customs of war, or war crimes.

Article 3 of the Statute, which gives the Tribunal jurisdiction over violations of the laws or customs of war, sets forth a non-exhaustive list of "war crimes" prosecutable under the Statute.\footnote{[106] Secretary-General's Report, supra note 7. Article 3 states: 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.} In explaining the scope of this Article, the Secretary-General referred to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War and the regulations annexed
thereto,\textsuperscript{107} the Charter of the Nuremberg Tribunal,\textsuperscript{108} and the Geneva Conventions.\textsuperscript{109}

Under international law every violation of the conventional or customary law of war—when committed by persons “belonging” to one party to the conflict against persons or property of another side—is a war crime.\textsuperscript{110} As acts which constitute cruel treatment, torture, humiliating and degrading treatment, and outrages upon personal dignity, rape and other forms of gender-based violence committed against persons “affiliated” with an enemy “side” violate the most minimum protections afforded under customary international law to persons not taking part in the hostilities. Article 3 of the Statute establishes a broad prohibition against rape and other forms of gender-based violence and authorizes prosecutions for these acts. Thus, this Article will be instrumental in prosecuting individual acts of rape or acts of rape that do not meet the more restrictive requirements of the “grave breach article,” the “genocidal acts article,” or the “crimes against humanity article.” These forms of rape and gender-based violence which otherwise might be unrecognized should be explicitly prosecuted as war crimes under Article 3 of the Statute.

3. Gender-Specific Violations as Genocidal Acts

Article 4 of the Statute provides the Tribunal jurisdiction over acts of genocide. Article 4 states:

\textsuperscript{107}Convention Respecting the Laws and Customs of War on Land, 1907, 36 Stat. 2277, 1 BEVANS 631. One scholar has noted that Article 46 of the Hague regulations, which mandates respect for “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice,” can be considered to cover rape, although it has seldom in practice been so interpreted. See Meron, Rape, supra note 10, at 425 n.12. Grounding prosecutions for rape and other forms of gender-based violence as war crimes in this authority may perpetuate at least two problematic assumptions: (1) that women’s human rights are derived solely from women’s culturally adjunctive role in the family as wives, mothers, sisters, and daughters; and (2) that rape is a condemnable violation principally—if not exclusively—because it injures the honor and rights of the family, rather than those of the woman herself.

\textsuperscript{108}Charter of the International Military Tribunal, reprinted in 82 U.N.T.S. 284. The Charter of the International Military Tribunal defined war crimes as:

\textit{War Crimes:} namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by necessity. (emphasis added). Rape and other forms of gender-based violence indisputably qualify as “ill-treatment” of civilians.

\textsuperscript{109}Secretary-General’s Report, supra note 7, at 11. The Secretary-General noted that the 1907 Hague Conventions have become part of customary international law (\textit{id.} at para. 41), and that this Article encompasses the rules of customary international law, as interpreted and applied by the Nuremberg Tribunal. Id. at para. 44. As indicated by the elastic “but not limited to” language in this Article, Article 3 is clearly intended to ensure that all violations of the laws and customs of war—both conventional and customary—are included within the Tribunal’s jurisdiction. See O’Brien, supra note 63, at 646.

\textsuperscript{110}See Meron, Rape, supra note 10, at 426 n.19.
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.

   The Secretary-General's Report explicitly recognizes that the Genocide Convention\textsuperscript{111} embodies customary international law, and that genocide, "whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished."\textsuperscript{112} Rape, forced impregnation, and forced maternity, when "committed with the intent to destroy, in whole or in part, a national, ethnical racial or religious group, as such," clearly should be construed as causing serious bodily or mental harm to members of the group\textsuperscript{113} and therefore constitute and should be explicitly prosecuted as genocidal acts prohibited under Article 4 of the Statute.

4. Gender-Specific Violations as "Crimes Against Humanity"

   Article 5 of the Statute gives the Tribunal jurisdiction to prosecute crimes against humanity committed in the former Yugoslavia. Article 5 and the Commentary pertaining to it set forth in the Secretary-General's Report provide the most explicit recognition of gender-specific crimes. Article 5 states: "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

\begin{itemize}
\item[\textsuperscript{112}] Secretary-General's Report, supra note 7, at 12, para. 45.
\item[\textsuperscript{113}] Statute of the Tribunal, supra note 7, at art. 4(2)(b). Moreover, depending on the factual circumstances, rape, forced impregnation, and forced maternity could be interpreted also to violate the prohibition against deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part (art. 4(2)(c)) or to violate the prohibition against imposing measures intended to prevent births within a group (art. 4(2)(d)).
\end{itemize}
any civilian population: . . . (f) torture; (g) rape; . . . [and] (i) other inhu-
mane acts."

The commentary for this Article in the Secretary-General’s Report
contains strong statements about gender-specific violations:

Crimes against humanity refer to inhumane acts of a very serious nature, such
as wilful killing, torture or rape . . . . In the conflict in the territory of the
former Yugoslavia, such inhumane acts have taken the form of so-called
“ethnic cleansing” and widespread and systematic rape and other forms of
sexual assault, including enforced prostitution.\(^\text{114}\)

As defined under customary international law, and under the plain lan-
guage of the Statute, “Crimes Against Humanity” clearly include rape com-
mitted on a mass or systematic scale.\(^\text{115}\) Forced impregnation, forced
maternity, and enforced prostitution, where committed on a mass or system-
atic scale, should similarly be recognized and prosecuted as crimes against
humanity.\(^\text{116}\)

C. Potential Impediments to Prosecutions

Even if indictments for rape and other forms of gender-based violence
are confirmed under any of the four pertinent Articles of the Statute, prose-
cutions for rape and other forms of gender-based violence will pose unique
and difficult challenges that effectively must be addressed.\(^\text{117}\)

Survivors of rape and gender-based violence are overwhelmingly
reluctant to talk about their experiences; this is in large part because of the
stigma associated with rape in Bosnian, Croatian, and Serbian communi-
ties—a stigma experienced by women worldwide. The trauma associated
with the rape—compounded by the fact that the trauma is often ongoing
with survivors displaced from their homes, separated from their families
and communities, and facing uncertain and difficult futures—is an even
more important factor behind some rape survivors’ reticence to speak of

\(^{114}\) Secretary-General’s Report, supra note 7, at 13.
\(^{115}\) As defined in the Charter of the Military Tribunal, supra note 12, and in Control Council Law No.
10, reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 778, 909 (Leon Friedman ed.,
1972), and as interpreted in the Judgment of the Nuremberg Tribunal, see Opinion and Judgment
of the International Military Tribunal at Nuremberg, reprinted in 41 AM. J. INT’L L. 172 (1947),
“crimes against humanity” consisted of inhumane acts on the same level of severity as murder and
torture, committed on a mass scale against civilians, particularly when carried out as part of a
pattern of persecution or discrimination. See Orentlicher, Settling Accounts, supra note 8, at
2587-88.

\(^{116}\) The Secretary-General’s Report recognizes that these forms of gender-based violence constitute
inhumane acts of a very serious nature, on the same level of severity as wilful killing, torture, and
rape. See Secretary-General’s Report, supra note 7, at 13.

\(^{117}\) Such challenges are in addition to the obvious political, financial, and logistical difficulties which
any prosecutions will pose. See M. Cherif Bassiouni, Considerations on the Establishment
of an Ad Hoc War Crimes Tribunal for the Former Yugoslavia, Report to the Euro-
pean Parliamentary Assembly 8-10 (1993) (on file with authors).
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their ordeal.\textsuperscript{118} This may have profound implications for efforts to document and ultimately prosecute these offenses.\textsuperscript{119}

Further, many rape survivors are reluctant to speak of their ordeal because they fear retaliation from their families, their communities, or from their perpetrators.\textsuperscript{120} These well-founded fears of retaliation would be heightened significantly in the context of providing testimony publicly before the Tribunal. Similarly, the trauma attendant to speaking about rape could be seriously magnified by a witness being subjected to lengthy and adversarial cross-examination.

This does not mean, of course, that documentation and investigation of such violations should cease, that efforts to obtain indictments for rape and other gender-based violence should be abandoned, or that the international community should stop pressing for prosecutions for rape and other gender-specific offenses. Rather, the challenge is twofold: (1) for those who are investigating and documenting gender-specific abuses\textsuperscript{121} to do so in a therapeutically appropriate manner, that is one in which survivors’ psychological and emotional well-being, as well as their confidentiality and privacy concerns, are respected and ensured;\textsuperscript{122} and (2) for the judges of the Tribunal to establish rules of evidence and procedure which, consistent with the due process rights of the accused, provide effective protection to women who provide testimony.\textsuperscript{123} Such protection is critical to ensure women’s fullest

\begin{itemize}
\item \textsuperscript{118} For many persons suffering from recent trauma, the first stage of their emotional recovery may be termed "survival mode." In the view of a U.N. psychiatric social worker based in Croatia (now home to some 700,000 refugees from Bosnia), during this initial phase, silence may be an integral part of some rape survivors’ ability to cope or function. No JUSTICE, No PEACE, supra note 1, at 13-14.
\item \textsuperscript{119} See generally No JUSTICE, No PEACE, supra note 1.
\item \textsuperscript{120} No JUSTICE, No PEACE, supra note 1, at 14. "Some husbands reportedly have assaulted their wives after learning they had been raped, and Serb rapists have threatened to retaliate against the relatives of rape survivors if the women recount their ordeals." Id. Moreover, the authors have repeatedly received credible accounts of women being ostracized by their communities once they divulged that they had been raped. In some instances, such ostracization was fueled by others in the community fearing that they, too, would be identified as "rape victims" through association and shared community with the survivor who spoke out.
\item \textsuperscript{121} Such persons would include: individuals and organizations in the former Yugoslavia who are investigating humanitarian and human rights law violations; members of fact-finding delegations sent by non-governmental organizations; those gathering evidence on behalf of the Commission of Experts, the entity charged by the U.N. Security Council with responsibility for investigating war crimes in the former Yugoslavia; the Prosecutor for the Tribunal; the Special Rapporteur for the former Yugoslavia; and any other individual or organization which attempts to gather information about or evidence of atrocities.
\item \textsuperscript{122} See No JUSTICE, No PEACE, supra note 1, at 16-17.
\item \textsuperscript{123} For comprehensive examinations of such effective protections, see, e.g., Bassiouni, supra note 117; M. CHEL A. BASSIOUNI, OBSERVATIONS ON THE REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF THE SECURITY COUNCIL RESOLUTION 808 (1993): AN AD HOC WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA (1993) (on file with authors); Amnesty International, Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia (1993); Amnesty International, From Nuremberg to the Balkans: Seeking Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia (1993); No JUSTICE, No PEACE, supra note 1; Section of International Law and Practice American Bar Association, Report on the International Tribunal to Adjudicate War Crimes Committed in Former Yugoslavia (1993); Helsinki Watch, Procedural and Evidentiary Issues for the
participation in the process of achieving accountability for the atrocities committed against them.

V. CONCLUSION

The tragedy in the former Yugoslavia has the potential to undermine all that the world community has collectively worked toward to advance and promote human rights, humanitarian law, and respect for the rule of law. In the context of the former Yugoslavia and the world, rape and other forms of gender-based violence must be recognized unequivocally as egregious violations of the fundamental and non-derogable rights to bodily integrity, dignity, and physical and psychological well-being. The Statute of the Tribunal promises accountability and redress for all such egregious violations. Charges brought before the Tribunal thus have the potential, by characterizing the acts of rape and other forms of gender-based violence and the injuries that result therefrom as international crimes, to capture the full meaning of the harm these violations cause. By embarking on the quest to provide accountability for these crimes, the work of the Tribunal will aid the important process of healing the wounds of the survivors and their communities. The Tribunal’s promise must not be broken, and the opportunity for precedent that the Tribunal presents must not be wasted.

For humanitarian and human rights law to promote and protect the fundamental rights of all individuals and for each member state of the United Nations to comply with its obligations as a member of the world community, the time for justice must be now; concrete action must be taken to ensure recognition of and accountability for the atrocities committed against women in the former Yugoslavia. Only with justice for all will true justice for any be achieved.