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BEWARE AGGRESSORS: IN TIMES OF CONFLICT, THE EYES OF THE WORLD ARE UPON YOU

Rachel M. Wittman

I. INTRODUCTION

A. Historical Significance of Sexual Violence

Slaves suffered from continuous, brutal, sexual exploitation during the United States slavery period.¹ White men raped slave-women primarily as a weapon of terror to reinforce white domination.² White men raped and impregnated black women with the hope of producing female children.³ When the female children reached age 11 or 12, the white men sold the girls to a 'fancy house' where girls of mixed race were sold into prostitution.⁴ As the law stated the impossibility of raping one's own property, the rape of female slaves was not punishable by law in the United States.⁵

The United States is not alone in allowing widespread and acute problems of sexual violence. The law of war has prohibited rape for centuries and national military codes punished violators; however, rapists escaped prosecution in many cases where nations allowed rape as encouragement for soldiers.⁶ Over the last half century, the international community has increasingly succeeded in prosecuting rapists and instigators of sexual violence.⁷ This article focuses on the use of rape as a non-sexual, violent tool⁸

1. See Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 42 (1999) (stating "[f]emale slaves suffered horribly from constant and brutal sexual exploitation . . . Few black women reached the age of seventeen without having been molested by a white man").

2. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 8 n.29 (citing ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS*, 7-8 (Vintage Books 1983)).

3. See Carter, *supra* note 1, at 42.

4. See *id.*

5. See *id.* at 42 n.17 (citing SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN & RAPE*, 7 (1976)).

6. See Theodor Meron, *Rape As A Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993) (stating that "[r]ape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)").

7. See *infra* Sections II-IV.

8. See Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 93 n.27 (1999) (recognizing importance of viewing rape as violence instead of as sexual act and noting danger of that view and stressing that rape should not be classified with other physical assaults because it has unique impacts on victim (citing Morrison Torrey, *Feminist Legal*

in an international context.

Section II of this article examines the development of various historical international war tribunals and their roles in prosecuting sexually violent crimes. Sections III and IV focus attention on the creation of current international tribunals, specifically, those in the former Yugoslavia and Rwanda. Section IV also includes a discussion of *Akayesu*, a landmark 1998 case, in which the International Criminal Tribunal for Rwanda (ICTR) treated rape and sexual violence as grounds for a genocide conviction. Section V traces the ripple effect that *Akayesu* has had on current sexual violence and genocide cases pending before both tribunals. Section VI compares the statutes of the two existing tribunals with the statute of the prospective International Criminal Court (ICC).⁹ By comparing the former Yugoslavian and Rwandan tribunal statutes and the ICC statute, Section VII forecasts the manner in which the ICC will tackle rape, sexual violence and genocide charges.

B. Background Definitions

This article examines the legal treatment of rape as an international war crime. War crimes consist of violations against the conventional or customary law of war,¹⁰ committed by one party to the conflict against those on the other side.¹¹ Conventional law derives from treaties, conventions, covenants and other written agreements.¹² Customary international law derives from the law of the nations, or the law accepted in the usage of the nations.¹³ Over the years, rape prosecutions have progressively occurred more and more often under both conventional and customary law.

Scholarship on Rape: A Maturing Look at One Form of Violence Against Women, 2 WM. & MARY J. WOMEN & L. 35, 44 (1995)).

9. See U.N. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. No. A/CONF. 183/9, (adopted July 17, 1998) reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC STATUTE]. The statute will remain open for signature until December 31, 2000. Sixty countries must ratify the ICC statute before it will come into force. See ICC STATUTE, art. 126. As of January 21, 2000, 93 countries have signed and 6 have ratified the treaty (Fiji, Ghana, Italy, San Marino, Senegal and Trinidad & Tobago). Updated information on the status of signature and ratification of the statute is available at <<http://www.un.org/law/icc/statute/status.htm>>.

10. See Meron, *supra* note 6, at 426 n.19 (defining "war crimes"). See also LOUIS HENKIN, HUMAN RIGHTS 73 (1999) (referring to Article 6 of the International Military Tribunal for Nuremberg).

11. See *id.*

12. See Jennifer Green, *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 n.52 (1994) (defining conventional law).

13. See *id.*

II. EVOLUTION OF WAR TRIBUNALS – WORLD WAR II

A. International Community Decided to Prosecute War Crimes

One can best understand the significance of the past ten years of international war crimes prosecutions after reviewing a brief historical survey of international law. Traditionally, each country held the responsibility of internally prosecuting its own war criminals.¹⁴ Until World War II, individual countries prosecuted their own war criminals, and the rest of the world could not assess whether war criminals received any punishment at all.¹⁵ Since the end of the war, the international community has increasingly focused on international human rights.¹⁶

The International Military Tribunals first contributed to the development of international humanitarian law.¹⁷ The Nuremberg and Tokyo tribunals, created in the aftermath of World War II, first acknowledged that crimes exist which shock the conscience of humankind and should invoke international jurisdiction.¹⁸ The Tribunals provided a forum for the international community to hold individuals accountable for war crimes.¹⁹

B. Concept of “Crimes Against Humanity” Emerged

The particularly significant concept of “crimes against humanity” emerged

14. See Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 8 (1999) (explaining that sovereignty traditionally only held States accountable to international community. Now, with globalization “we may be able to create a new set of ‘responsibles,’ of ‘persons’ responsible for human rights violations under international law”).

15. See *id.* at 3-4 (stating “[u]ntil 1945, sovereignty, political independence and territorial impermeability meant that how a state treated its own inhabitants was not a subject of international concern”).

16. See *id.* (stating that “[s]ince 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics and of international law”).

17. See Stephens, *supra* note 8, at 87 (defining international humanitarian law as “the international law of human rights that is applicable in situations of international armed conflict and . . . in some situations of internal armed conflict”).

18. See Richard Goldstone (Justice), *Law, War, and Human Rights International Court and the Legacy of Nuremberg*, 12 *CONN. J. INT’L L.* 227, 228 (1996) (referring to Nuremberg and Tokyo tribunals and stating “[i]t was the first time that international law recognized that there could be crimes which, because they shocked the conscience of humankind to such a degree, have an international effect, and therefore cannot be confined to national borders but must invoke international jurisdiction”). Justice Goldstone prosecuted in the International Criminal Tribunal for the former Yugoslavia (ICTY).

19. See Henkin, *supra* note 14, at 9-10 (stating that “international law and international bodies could not intervene in internal wars; they could not intervene to address atrocities, even genocide, inside a state’s territory. We have made a little progress in bringing the laws of international war to internal wars, but it came hard and it is hardly complete”); *id.* at 11 (explaining “[w]hen sovereign states are helpless or unwilling, we need international bodies, such as the tribunals in Yugoslavia or Rwanda, such as the proposed International Criminal Court, happening around us”).

in Germany.²⁰ For the Nuremberg Tribunal, “crimes against humanity” included crimes committed by officials against people within their *own* country.²¹ The Tribunal thus refused to require an international conflict to find it had jurisdiction. Despite the Tribunal’s advances, the Nuremberg Tribunal did not list rape as a crime against humanity.²²

Notably, the four occupying powers in Germany²³ created a charter to allow their own courts to prosecute war criminals.²⁴ In the German charter, Control Council Law No. 10,²⁵ “crimes against humanity” specifically included rape as grounds for prosecution, for the first time ever in an international conflict.²⁶ Unfortunately though, the Nuremberg Tribunal itself did not focus on rape or sexual crimes.²⁷

Contemporary statutes and treaties have failed to clearly define “crimes against humanity”²⁸ and the statutes differ as to which crimes the phrase proscribes.²⁹ The general, international understanding of “crimes against humanity” includes murder, extermination and rape, among others,³⁰ committed as part of a *widespread* or *systematic* attack against a civilian population.³¹

20. See Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, art. 6(c), 59 Stat. 1544, *reprinted* in 39 AM. J. INT’L L. 257, 260 (1945) [hereinafter Annex].

21. See Henkin, *supra* note 14, at 611 (stating “[t]o the extent that crimes against humanity included conduct by Germans against other Germans within Germany, they represented a radical innovation in international law”).

22. See Annex, *supra* note 20, at 260.

23. See *id.* at 257 (describing four occupying powers as “Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of the Soviet Socialist Republics”).

24. See Meron, *supra* note 6, at 426 (stating “another seed for future normative development was sown in Control Council Law No. 10”).

25. See *id.* (citing *Control Council for Germany*, OFFICIAL GAZETTE, Jan. 31, 1946, at 50, *reprinted* in Naval War College, Documents of Prisoners of War 304 (International Law Studies vol. 60, Howard S. Levie ed., 1979)).

26. See *id.* (stating Control Council Law No. 10 “expanded the list of crimes against humanity found in the Nuremberg Charter to include rape”).

27. See *id.* at 425-26 (explaining that “[r]ape was neither mentioned in the Nuremberg Charter nor prosecuted in Nuremberg as a war crime under customary international law”).

28. The phrase “crimes against humanity” might have entered human rights vocabulary from a letter, about Belgium’s actions in the Congo, written to U.S. Secretary of State Blaine dated Sept. 15, 1890. Henkin, *supra* note 14, at 73 (citing ADAM HOCHSCHILD, KING LEOPOLD’S GHOST, 112, 317 n.112 (1998)).

29. See Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslavia and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97 n.5 (1999) (stating “[a] crime against humanity has never been defined in a treaty, and various statutes define it differently”).

30. See *id.* (explaining that “others” include enslavement, deportation, imprisonment, torture, persecution on political, racial or religious grounds or other inhumane acts).

31. See *id.*

C. *Tokyo's Role in Noting the Occurrence of Rape During War*

During World War II, Japanese soldiers reportedly raped nearly 200,000 women.³² Acting under its enabling statute,³³ the Tokyo Tribunal considered rape as a war crime³⁴ and found military and civilian officials guilty of war crimes including rape.³⁵ However, even with extensive evidence of its occurrence, the Tokyo trials did not focus sufficient attention on the atrocities of rape.³⁶ Nearly fifty years later, with a new era,³⁷ and the creation of Tribunals in the former Yugoslavia and Rwanda, sexual crimes are finally being prosecuted on an international scale.³⁸

III. THE FORMER YUGOSLAVIA

A. *Background Information About the Conflict in the Former Yugoslavia – Recognition of Atrocities in “Ethnic Cleansing”*

An inter-ethnic and inter-religious war in the former Yugoslavia occurred between 1991 and 1995.³⁹ Nearly instantaneous media coverage greatly

32. See Stephens, *supra* note 8, at 88 n.6 (citing 1 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 389 (B.V.A. Roling & C.F. Ruter eds., 1977) (stating “[t]he Japanese Army inflicted massive atrocities after the conquest of Nanking in December 1937, including approximately 20,000 rapes during the first month of occupation”)); *id.* n.7 (stating “approximately 200,000 women were kidnapped by the Japanese during World War II, held in sexual slavery and raped repeatedly by Japanese soldiers”).

33. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, Jan. 19, 1946, amended Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20, 1946 WL 6674 (TIA).

34. See Meron, *supra* note 6, at 426 n.14 (citing 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 965, 971-972, 988-89 (B.V.A. Roling & C.F. Ruter eds., 1977)).

35. See *id.* (citing JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 259 (1971)).

36. See C.P.M. Cleiren & M.E.M. Tijssen, *A Critical Study of the International Tribunal for the Former Yugoslavia Substantive and Procedural Issues: Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 CRIM. L.F. 471, 481 (1994) (stating that “international lawyers have paid scant attention to rape and other types of sexual assault committed in armed conflict, leaving arrest and prosecution to the criminal justice system of the country in which such offenses allegedly have been committed. As a result, very few prosecutions have been undertaken—because the legal systems of states engaged in armed conflict generally function erratically, at best, or because the victorious party often grants amnesty to agents of the defeated state”).

37. In the past decade, violence against women has received much attention. See e.g., *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/RES/48/104 (1994) reprinted in 33 I.L.M. 1049 (1994) (declaring that violence against women violates international law, including private violence as well as government violence within prohibitions). See also, *Preliminary Report on Violence Against Women, its Cause and Consequences*, U.N. SCOR, Hum. Rts. Comm., 50th Sess., Agenda Item 11(a), U.N. Doc. E/CN.4/1995/42 (1994) (report by Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, analyzing the problem).

38. See *infra* Sections II-IV.

39. See Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U.L. REV. 1139, 1164 (1998) (writing that “[b]etween 1991 and 1995 an inter-ethnic, inter-religious war devastated the country that had been known as Yugoslavia”).

increased public awareness of the war based-atrocities occurring in the former Yugoslavia and documented these events.⁴⁰

During the conflict, widespread, systematic⁴¹ violence, consisting of rape and sexual assault, reached unprecedented levels.⁴² According to Tadeusz Mazowiecki, the special rapporteur appointed by the United Nations (UN) Commission on Human Rights, both sides of the conflict used rape to humiliate, shame, degrade and terrify each other as an entire ethnic group.⁴³ Rape and other forms of sexual violence evolved into "weapons of war."⁴⁴ As explained below, soldiers impregnated women through rape as a method of "ethnic cleansing,"⁴⁵ especially in patriarchal societies where children inherit the cultural identity of their father.⁴⁶ The women gave birth to children of another ethnicity and the rape itself made the women undesirable within their own culture.⁴⁷

In particular, Serbian soldiers raped Bosnian Muslim women in attempts to destroy the society's culture through ethnic cleansing.⁴⁸ In order to accomplish their goal of ethnic cleansing, the Serbs created camps for the purpose of raping Bosnian Muslim women in hopes of impregnating them.⁴⁹ The pregnant women would remain imprisoned until abortion no longer

40. See Meron, *supra* note 6, at 424 (claiming "[t]here is nothing new in atrocities or starvation. What is new is the role of the media. Instant reporting from the field has resulted in rapid sensitization of public opinion, greatly reducing the time lapse between the perpetration of such tragedies and responses to them").

41. See Cleiren, *supra* note 36, at 502 (explaining that "'systematic' refers to a pattern of abuse of which rape is one element; in other words, rape is used as a tool of war, given its potential to cause great distress to victim, her family, and her community").

42. See Franke, *supra* note 39, at 1164 (stating "rape and sexual assault have always been a part of war, but what happened in Bosnia and Herzegovina to Muslim and Croatian women seems unprecedented in the history of war crimes").

43. See Meron, *supra* note 6, at 425 n.6 (citing *Report on The Situation of Human Rights in the Territory of the former Yugoslavia*, U.N. Doc. A/48/92-S/25341, Annex, at 20, 57 (1993) (report by Tadeusz Mazowiecki, U.N. Special Rapporteur appointed by the UN. Hum. Rts. Comm., analyzing the problem)).

44. See Stephens, *supra* note 8, at 87.

45. See *infra* Section III.A. (discussing ethnic cleansing).

46. See Askin, *supra* note 29, at 123 (stating that "[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group").

47. See Stephens, *supra* note 8, at 100-01 (stating "rape is often designed to destroy a woman's fertility, preventing future births, either by rendering her undesirable in the eyes of her society, by inflicting physical damage, or by forced impregnation by the rapist").

48. See Slavenka Drakulic, *Rape After Rape After Rape*, N.Y. TIMES, Dec. 13, 1992, §4, at 17.

49. See Roy Gutman, *Rape Camps Evidence Serb Leaders in Bosnia Ok'd Attacks*, NEWSDAY, April 19, 1993, at 2. See also Green, *supra* note 12, at 193 (defining forced impregnation as one that results "from an assault or series of assaults perpetrated with the intent that she become pregnant").

existed as an option.⁵⁰ On the other side, Muslim and Croat soldiers committed similar sex-based atrocities.⁵¹

For example, Serb forces attacked the small, predominantly Muslim town of Foca in June 1992.⁵² For two months, the Serb forces ran the town as a rape camp⁵³ holding 50 women and about 24 men.⁵⁴ Reports and testimony from the people imprisoned in these camps state that top Serb military officials gave orders to “cleanse” Foca of all non-Serbs.⁵⁵ One woman reported being raped up to six different times in the same night.⁵⁶

In another area, officials identified seventeen rape camps where witnesses reported that soldiers raped more than one hundred women nightly.⁵⁷ At the end of 1992, the Bosnian government claimed that Serbian forces had raped 14,000 Muslim women as part of their “ethnic cleansing” campaign.⁵⁸

B. *The UN Response to Violence in the Former Yugoslavia – Formation of the International Tribunal of the Former Yugoslavia*

When the violent atrocities in the former Yugoslavia received international attention, all eyes turned to the UN to intervene. In response, the UN Security Council,⁵⁹ acting under Chapter VII of the UN Charter,⁶⁰ took the

50. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 49th Sess. para. 248, U.N. Doc. S/1994/674 (1994). See also Green, *supra* note 12, at 193 n.85 (stating that “intentional detention of a pregnant women until she was beyond the time limit in which local law or practice permitted abortion would also constitute evidence of violation”).

51. See Charles Trueheart, *Two Bosnian Muslims, Croat Convicted of Atrocities Against Serbs*, WASH. POST, Nov. 17, 1998, at A34 (claiming “of the 78 suspects indicted by the tribunal, the majority are Bosnian Serbs, and most of the . . . victims . . . were Croats and Muslims. Yet most of the indicted who have surrendered or been arrested are Muslims or Croats”).

52. See Gutman, *supra* note 49.

53. Soldiers kept women in rape camps in Japan as well. In Japan, they kept “comfort women” to “service” their soldiers. T.R. Reid, *Japan to Apologize to “Comfort Women”*, WASH. POST, July 13, 1995, at A18.

54. See Gutman, *supra* note 49.

55. See *id.* (reporting that Serb official told Muslims to leave Foca for concentration camp “or else the last Muslim seed will be destroyed in Foca”).

56. See *id.*

57. Maggie O’Kane, *Bosnia Crisis: Forgotten Women of Serb Rape Camps*, *Maggie O’Kane Reports from Zenica on the Systematic Violation of Thousands of Muslims as a Method of “Ethnic Cleansing.”* THE GUARDIAN, Dec. 19, 1992, Foreign Page.

58. See *id.* (estimating 2,000 of the women were aged between 7 and 18; 8,000 between 18 and 35; 3,000 between 35 and 50; and 1,000 over 50).

59. The creation of the ICTY was only one of several aspects of the Security Council’s response. Specifically, the Secretary General called for attention to “the sensitivities of victims of rape and sexual assault” and special protections such as in camera proceedings and anonymity. *Secretary General’s Report on Aspects of Establishing an International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR, 48th Sess., para 48, U.N. Doc. 25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter *Secretary General’s Report 1993*].

60. See SC Res. 808 (Feb. 22, 1993); SC Res. 827 (May 25, 1993).

unprecedented step of creating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY).⁶¹ The ICTY's power includes prosecuting people for serious human rights violations⁶² such as a) grave breaches of the Geneva Conventions of 1949,⁶³ b) violations of the laws or customs of war,⁶⁴ c) crimes against humanity,⁶⁵ and d) genocide.⁶⁶

C. Significance of the ICTY

The formation of the ICTY signifies many changes in the international community which this section will cover. First, the Tribunal holds *individual* perpetrators *and* their superiors accountable for each of their actions. Second, the Tribunal recognizes rape as a war crime. While the ICTY first prosecuted rape as a form of torture, the prosecutions eventually moved into other areas of international law including crimes against humanity and genocide. Third, the jurisdiction of the Tribunal extends to government officials, not just lower level military persons and civilians.

The ICTY stresses individual criminal responsibility for both the individual perpetrators *and* their superiors.⁶⁷ Article 7(1) of the ICTY Statute places individual criminal responsibility on persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of crimes within the competence of the Tribunal.⁶⁸

Not only does the Tribunal's authority extend to the superior's actions, but also to the *inaction* of the superior. Where a subordinate commits a crime, the Tribunal will hold the perpetrator's superior personally criminally responsible "if [the superior] knew or had reason to know that the subordinate was about

61. See *Secretary General's Report* 1993, *supra* note 59.

62. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., Annex, art. 1, at 36, U.N. Doc S25704 (1993), reprinted in 32 LL.M. 1159, 1192 (1993) [hereinafter ICTY Statute]. See also *ICTY At A Glance* (visited March 20, 2000) <<http://www.un.org/icty>>. Many ICTY documents listed below can be found at that site.

63. See ICTY Statute, *supra* note 62, at art. 2.

64. See *id.* at art. 3.

65. See *id.* at art. 5.

66. See *id.* at art. 4.

67. See *Indictments Against Meakic & Others and Tadic & Other*, Case Nos. IT-95-4, IT-94-1-T (ICTY Feb. 13, 1995), reprinted in 34 LL.M. 1011, 1017 (1995) (charging Meakic and others in their capacity as superiors) [hereinafter Meakic and Tadic Indictments].

68. See ICTY Statute, *supra* note 62, at art. 7(1).

to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."⁶⁹

The ICTY approaches sexual violence as an *actus reus* of torture, crimes against humanity and genocide.⁷⁰ In cases before the ICTY, the prosecutor must demonstrate the way in which criminals use sex as a tool in committing war crimes based on race, ethnicity and religion.⁷¹

Finally, the ICTY's jurisdiction extends to all levels of government officials. Under Article 7(2) of the ICTY Statute, "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."⁷² Article 7(2) plays a particularly important role with regard to prosecuting sexual assault crimes as part of the policy of ethnic cleansing in the former Yugoslavia.⁷³

Prosecuting war criminals aggressively warns military and civilians alike that the international community is watching even in times of internal conflicts. Further, the Tribunal makes it impossible for a rapist to escape conviction by claiming that he was merely following orders. Finally, government officials can no longer claim immunity to prosecution from their own country or the international community.

D. *ICTY's Jurisdiction and Actions in Prosecuting Rape and Sexually Violent Crimes*

As stated earlier, the Tribunal has jurisdiction over cases involving a) grave breaches of the Geneva Conventions of 1949,⁷⁴ b) violations of the laws or customs of war,⁷⁵ c) crimes against humanity⁷⁶ and d) genocide.⁷⁷ When the ICTY prosecutors use evidence of rape in proving other crimes, they must establish additional elements.

69. See *id.* at art. 7(3).

70. See Franke, *supra* note 39, at 1142-43.

71. See *Prosecutor v. Karadzic and Mladic*, Case Nos. IT-95-5, IT-05-18 (ICTY July 11, 1996) [hereinafter *Karadzic and Mladic Opinions*].

72. See ICTY Statute, *supra* note 62, at art. 7(2).

73. This provision had particular importance in the *Meakic and Tadic* Indictments because the ICTY convicted Tadic even though he was a low level officer, as reported in the *Tadic Judgment* (visited March 20, 2000) <http://www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm#_Toc387417255> ¶¶ 190, 191.

74. See ICTY Statute, *supra* note 62, at art. 2.

75. See *id.* at art. 3.

76. See *id.* at art. 5.

77. See *id.* at art. 4.

Each category of violation has its own set of additional elements. For example, rape and other sexually violent crimes do not explicitly fall within the plain meaning of the category of "grave breaches of the Geneva Conventions of 1949."⁷⁸ The category does include such actions as *torture* or inhuman treatment and willfully causing great suffering or serious injury to body or health.⁷⁹ Even if torture included rape, torture itself, at the time of the ICTY's creation, usually amounted to an international human rights violation *only when inflicted by a public official or under color of state law*.⁸⁰ However, the UN Special Rapporteur on Torture, and others, argue that rape, or other forms of sexual assault in detention, constitute torture, regardless of the rank of the perpetrator.⁸¹

The category of "violations of the laws or customs of war," under Article 3 of the ICTY Statute, includes offenses such as employment of weapons calculated to cause unnecessary suffering and devastation. To bring a charge under Article 3, the prosecutor must show that the defendants used force not justified by military necessity.⁸²

Although Article 3 does not specifically include rape, a prosecutor could charge a defendant with rape under the article anyway. Rape and other gender specific crimes violate the prohibition against "torture and other cruel, inhuman or degrading treatment or punishment" specified in both the International Covenant on Civil and Political Rights⁸³ as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁸⁴ As a party to both U.N. treaties, Yugoslavia bound its officials to act accordingly. The United States Department of State declared rape a war crime, under customary international war crimes law, and a grave breach of certain provisions of the Fourth Geneva Convention.⁸⁵ These UN treaties may permit the ICTY to prosecute rape and other forms of

78. *See id.* at art. 2.

79. *See id.* at art. 2(b),(c).

80. *See* RHONDA COPELON, *INTIMATE TERROR: UNDERSTANDING DOMESTIC VIOLENCE AS TORTURE, HUMAN RIGHTS OF WOMEN* 116 (Rebecca Cook ed., 1994).

81. *Statement of the United Nations Special Rapporteur on Torture to the UN Commission on Human Rights, E/CN.4/1992/SR.21* (Summary Record for the 21st meeting, February-March 1992). *See also* International Committee of the Red Cross (ICRC) *Aide-Memoire* (Dec. 3, 1992) (asserting that grave breach of "wilfully causing great suffering or serious injury to body or health" (Article 147 of the Fourth Geneva Convention) covers rape).

82. *See* ICTY Statute, *supra* note 62, at art. 3(a),(c).

83. *See International Covenant on Civil and Political Rights*, art. 7, 999 U.N.T.S. 171 (Dec. 19, 1966), reprinted in 6 I.L.M. 368 (1967).

84. *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (Dec. 10, 1984).

85. *See* Meron, *supra* note 6, at 428 n.22 (citing *Department of the Army Law of War Manual* ¶499 (stating that any violation of the Geneva Conventions is war crime)).

sexual assault as war crimes within the scope of Article 3 of the ICTY Statute.⁸⁶

Article 5 of the ICTY Statute explicitly allows for prosecution of sexual crimes, specifically rape, as a crime against humanity.⁸⁷ The explicit mention of rape as a mode of committing a crime against humanity is the first time that rape “has been so characterized in an instrument of this stature.”⁸⁸ The ICTY interprets rape broadly to include forcible sexual penetration,⁸⁹ indecent assault,⁹⁰ enforced prostitution,⁹¹ and forced maternity.⁹² In proving crimes against humanity, the prosecutor must show that the defendant acted as part of a widespread, systematic attack directed against a civilian population.⁹³

Although not explicitly stated, the “genocide” category has several provisions pertaining to sexual offenses. Namely, Article 4 of the ICTY Statute specifies that genocide includes: causing serious bodily or mental harm to members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.⁹⁴ Thus, as war leaders use rape to impregnate women in order to destroy a race, the rape itself falls within the definition of genocide.

The high threshold requirement of proving criminal intent to destroy a population complicates the prosecution and conviction of genocide.⁹⁵ The standard requires prosecutors to prove intent to destroy a national, ethnic,

86. See Cleiren, *supra* note 36, at 494.

87. See ICTY Statute, *supra* note 62, at art. 5(g) (stating “[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict. . . (g) rape”). See *supra* notes 28-31 and accompanying text (explaining significance of crimes against humanity).

88. See Cleiren, *supra* note 36, at 506 (noting “[t]he enumeration of rape as one of the modes of committing a crime against humanity in Article 5 represents a watershed in the history of international law: this is the first time that rape has been so characterized in an instrument of this stature”).

89. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T (ICTY July 16, 1998), reprinted in 38 I.L.M. 317, 354 (explaining “[t]he stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration”).

90. See Prosecutor v. Delalic, Case No. IT-96-21 (ICTY Mar. 21, 1996), available at *In the Trial Chamber* (visited Feb. 29, 2000) < <http://www.un.org/icty/celebici/trialc2/jugement/main.htm> > at ¶ 476 (referring to terms of Article 27 of Fourth Geneva Convention which specifically prohibits rape, any form of indecent assault and enforced prostitution of women). See also *id.* at ¶ 1285 (finding Delalic not guilty of all charges).

91. See *id.* at ¶ 476 (prohibiting rape, any form of indecent assault and enforced prostitution of women).

92. See Franke, *supra* note 39, at 1174 (citing Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 45, 51 (1997)).

93. See Meakic and Tadic Indictments, *supra* note 67, at 1016 (stating “[i]n each paragraph charging crimes against humanity, a crime recognised by Article 5 of the Statute of the Tribunal, the alleged acts or omissions were part of a widespread or large-scale or systematic attack directed against a civilian population, specifically the Muslim and Croat population of the Prijedor district”).

94. ICTY Statute, *supra* note 62, at art. 4(2)(b),(c) and (d).

95. See Green, *supra* note 12, at 193 n.85 (discussing necessary criminal intent).

racial or religious group.⁹⁶ Further, in using rape as the basis of a genocide conviction, the prosecutor must prove criminal intent that the rape will result in pregnancy.⁹⁷ Prosecutors can gather evidence regarding the criminal intent either directly or indirectly.⁹⁸ Direct evidence includes such acts as forcible removal of a woman's IUD or contraceptive implant, or other destruction of her means of birth control.⁹⁹ Indirect actions like keeping the woman imprisoned until she passed the time limit to legally have an abortion, or forcing a pregnancy test after a rape also establish criminal intent.¹⁰⁰

Due to the difficulty in meeting these high evidentiary burdens, the ICTY has not yet successfully prosecuted a charge of genocide based on rape. However, the evolution of the ICTY's prosecutions of rape and sexual assault cases laid the groundwork for rape-based genocide convictions in Rwanda.¹⁰¹ A look at case law shows the evolution of ICTY's prosecutions of rape and sexual assault cases.

E. Sexual Violence Case Law under the ICTY

In 1995, the ICTY separately charged two Serbian officials, Zeljko Meakic and Dusan Tadic, for atrocities committed from May to December 1992, in Omarska Prison Camp.¹⁰² Both men allegedly imprisoned men and women, whom they tortured, raped, sexually assaulted and/or humiliated.¹⁰³ Both men, and another named in the indictments, committed offenses too numerous and atrocious to be enumerated in detail here. A brief example shows that the abuse shocks the human conscience and fits the definition of a war crime.

Tadic and his subordinates beat a male prisoner named Harambasic and then ordered two male prisoners, "G" and "H," to lick his buttocks and genitals and then to bite his testicles.¹⁰⁴ As explained by the Tribunal:

96. See Richard Norton-Taylor, *Bosnian Serb Killer Cleared of Genocide*, THE GUARDIAN, October 20, 1999, available at 1999 WL 25739086 (stating Tribunal ruled defendant's crimes did not constitute intent to destroy national, ethnic, racial or religious groups).

97. See Green, *supra* note 12, at 193 (explaining "as long as the intent to impregnate can be established, the crime of attempted forced impregnation may be shown even if pregnancy does not result").

98. See *id.* at 193 n.85.

99. See *id.*

100. See *id.*

101. See *infra* Section IV.B. (discussing Akayesu case and others under ICTR).

102. See Meakic and Tadic Indictments, *supra* note 67, at 1014 (stating "[f]rom about 25 May to about 30 August, 1992, Serb forces collected and confined more than 3,000 Bosnian Muslims and Bosnian Croats from the opstina of Prijedor, Bosnia-Herzegovina, in the former Yugoslavia, in inhumane conditions, under armed guard, in the Omarska 'camp' . . . [T]he Serb forces killed, raped, sexually assaulted, beat and otherwise mistreated the prisoners at Omarska").

103. *Id.*

104. *Id.* at 1030.

H was threatened with a knife that both his eyes would be cut out if he did not hold Harambasic's mouth closed to prevent him from screaming; G was then made to lie between the naked Harambasic's legs and, while the latter struggled, hit and bit his genitals. G then bit off one of Harambasic's testicles and spat it out and was told he was free to leave.¹⁰⁵

For these and a long list of other terrible offenses, the prosecutor charged Tadic and Meakic with Grave Breaches of the Geneva Convention under Article 2(b) (torture or inhuman treatment), Violations of the Laws or Customs of War under Article 3 (cruel treatment) and Crimes Against Humanity under Article 5(i) (other inhumane acts).¹⁰⁶ Interestingly, the Tribunal did not charge Tadic with violating Article 5(g) (rape) even though in the above-mentioned example, he forced G to perform fellatio upon Harambasic.¹⁰⁷ In charging the crimes the way they did, the prosecutor began to change the international legal approach to sexually related crimes. Instead of looking at the sexually violent acts as rape, the ICTY recognized that criminals had used sexual violence as a power tool, to punish and humiliate their victims.

The change to prosecutions for rape further evolved in 1995 when a prosecutor, for the first time, characterized sexual violence as *torture*.¹⁰⁸ The defendant, a Muslim official named Hazim Delic, forced numerous female prisoners to repeated forcible sexual intercourse, sometimes in public and sometimes by more than one rapist.¹⁰⁹ This change in the manner of rape characterization drew international attention. The day after the judgment,¹¹⁰ the Washington Post printed, "the multiple convictions... placed responsibility on military and civilian commanders for atrocities committed by subordinates

105. Franke, *supra* note 39, at 1169. See also Meakic and Tadic Indictments, *supra* note 67, at 1031 ¶ 5.1 (stating that Harambasic died from attack).

106. Meakic and Tadic Indictments, *supra* note 67, at 1033.

107. See *id.* at 1031 (finding prisoner ordered to lick victim's genitals).

108. See Delalic, *supra* note 90, at ¶ 14 (charging Delic with torture for acts of forcible sexual intercourse and rape).

109. See *id.* (discussing crimes against Grozdana Cecez and witness A). Delic and others subjected Cecez to repeated incidents of forcible sexual intercourse over a period from around 27 May 1992 through early August 1992. During this period, Ms. Cecez was raped by three different persons in one night and on another occasion she was raped in front of other persons. Witness A was subjected to repeated incidents of forcible anal and vaginal intercourse by Delic over a period from around 15 June 1992 until the beginning of August 1992. Delic raped Witness A during her first interrogation and continued to rape her every few days over a six-week period thereafter.

110. See *id.* at ¶ 1262 (holding Hazim Delic guilty of torture by way of deplorable rapes of two women detainees in Celebici prison-camp).

and established that ‘acts of rape may constitute torture under customary law.’”¹¹¹

Rape prosecutions evolved from cases charging rape as a “crime against humanity” to constituting a violation of almost all other crimes under the ICTY Statute, including genocide. However, the Tribunal had yet to use rape to try an accused criminal for the crime of genocide. This reality changed in 1997 when, instead of charging Serbian official Milan Kovacevic with rape and/or torture as enumerated in his indictment, the prosecutor chose to charge Kovacevic with genocide.¹¹² The charges against Kovacevic presented the ICTY with an opportunity to re-evaluate the genocide standard, but Kovacevic died in custody before his case reached a trial on the merits.¹¹³

As evidence of the difficulty in prosecuting genocide in general, in October 1999, the ICTY acquitted a war criminal of charges of genocide although he had admitted to offenses relating to torture and murder of at least twelve Croat and Muslims in northern Bosnia.¹¹⁴ The Tribunal acquitted the defendant in that case, Jelusic, because the Prosecutor lacked evidence linking his violent, terrible acts to an overall, organized campaign to destroy the Muslim people.¹¹⁵ Where the ICTY has failed to prosecute rape as a form of genocide, however, the ICTY’s sister tribunal in Rwanda has succeeded.¹¹⁶

IV. RWANDA

A. Background Information Concerning the Conflict in Rwanda

In the early 1990’s, political propaganda perpetuated and created differences between two Rwandan tribes, the Tutsi and the Hutu. Politicians manipulated these differences and created a volatile situation where the two tribes sought to destroy each other.¹¹⁷ In just three months in 1994, at least

111. See Trueheart, *supra* note 51.

112. See Prosecutor v. Kovacevic, Case No. IT-97-24-I (ICTY Jan. 28, 1998) (visited March 5, 2000) <<http://www.un.org/icty/indictment/english/kov-ii970313e.htm>>.

113. See *id.*

114. See Prosecutor v. Jelusic, Case No. IT-95-10-FT (ICTY Oct. 19, 1998) (visited March 5, 2000) <<http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.htm>> at ¶ 109 (finding Jelusic guilty of sixteen violations of laws or customs of war, twelve for murder, three for cruel treatment, and one for plunder, and fifteen for crimes against humanity, that is, twelve counts of murder and three counts of inhumane acts).

115. See *id.* at ¶ 107 (acquitting Jelusic of genocide, finding his acts not physical expression of affirmed resolve to destroy group in whole or in part.).

116. See *infra* Part IV.B (discussing use of rape evidence in genocide prosecutions).

117. See Human Rights Watch/Africa, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996) (visited March 5, 2000) <<http://www.hrw.org/hrw/reports/1996/Rwanda.htm>> (stating “[i]n the years preceding the genocide, the organizers used propaganda to heighten fear and hatred between Hutu and Tutsi”).

500,000 people, mainly Tutsis, died in brutal massacres.¹¹⁸ The violence included atrocities similar to ones documented in the former Yugoslavia including widespread rape and sexual violence.¹¹⁹ In response to international pressure, the UN Security Council formed the International Tribunal for Rwanda (ICTR) in November 1994.¹²⁰

While the ICTR functions separately from the ICTY, five of the eleven judges sitting in the appeals chamber in each tribunal, are common to both tribunals.¹²¹ This shared appellate judge arrangement allows for an international bench that can learn from both tribunals and may facilitate the eventual creation of the International Criminal Court (ICC).¹²²

B. Sexual Violence Case Law under the ICTR

On September 2, 1998, the ICTR issued a landmark decision convicting Jean-Paul Akayesu, a Hutu tribe member, of the crime of genocide based on his *and* his subordinates' acts of rape and ethnic cleansing.¹²³ In issuing its judgment in the pivotal *Akayesu* case, the ICTR defined genocide as "the act of committing certain crimes, including... causing serious physical or mental harm to members of the group with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."¹²⁴

C. Establishing the Necessary Proof to Support a Genocide Conviction

In *Akayesu*, the ICTR first evaluated whether enough evidence established a pattern of genocide before they looked to the evidence surrounding Akayesu personally.¹²⁵ The Tribunal considered evidence such as statements of certain political leaders and lyrics of popular songs and slogans of the Hutus.¹²⁶ For

118. See *id.* (stating that "[d]uring the months of April to July 1994, between 500,000 and one million Rwandan men, women and children were slaughtered in a genocide of the Tutsi minority and in massacres of moderate Hutu who were willing to work with Tutsi").

119. See Franke, *supra* note 39, at 1165-66 n.198 (noting "[t]he International Criminal Tribunal for Rwanda, a sister United Nations war crimes tribunal to ICTY, has undertaken prosecution of similarly heinous sex-based atrocities committed in 1994 during the ethnic war in Rwanda").

120. See Human Rights Watch, *supra* note 117 (reporting that in late 1994, United Nations Security Council created ICTR to bring organizers of genocide to justice).

121. See Goldstone *supra* note 18, at 234.

122. See ICC Statute, *supra* note 9.

123. See Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T (ICTR Sept. 2, 1998) [hereinafter *Akayesu* Judgment], reprinted in 37 LL.M. 1399, 1401 (1998) (summarizing that Akayesu was indicted on 13 counts of genocide, crimes against humanity, and violations of Geneva Conventions, including extermination, murder, torture and rape).

124. See *id.* at 1402 ¶ 13 (defining genocide).

125. See generally *id.*

126. See *id.* at 1403 ¶ 16 (quoting expert witness who stated as follows: "on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular... these people had

example, Hutus believed that their children, later on, should not know what a Tutsi looked like unless the children referred to history books.¹²⁷ The fact that the Hutus killed newborn Tutsis and that the Hutus checked national identity cards before killing people, further established evidence of an intent to destroy an ethnic group.¹²⁸

Next, the ICTR, presuming Akayesu's innocence, heard the testimony of numerous witnesses establishing Akayesu's presence at, and encouragement of, multiple rapes of Tutsi women.¹²⁹ The Tribunal noted that no pre-established international definition of rape existed.¹³⁰ In response, the Tribunal enunciated a broad, progressive international definition of rape as:

A physical invasion of a sexual nature, 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. The [Tribunal] notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey upon fear or desperation may constitute coercion.¹³¹

D. *The Significance of the ICTR's Genocide Conviction*

In addition to successfully prosecuting the first rape-based genocide conviction, the ICTR decision in *Akayesu* has had two other significant impacts. First, as discussed above, the ICTR developed the first international definition of rape. Second, the ICTR announced that a criminal could receive multiple convictions for the same act.¹³² Therefore, a particular act could constitute both genocide and a crime against humanity. After determining that the Hutus systematically chose Tutsi women to rape, the ICTR convicted

the intention of completely wiping out the Tutsi from Rwanda").

127. See *id.* (indicating that perpetrators intended to wipe out another population so that "...[t]heir children, later on, should not know what a Tutsi looked like, unless they referred to history books").

128. See *id.* at ¶ 17-18 (reporting testimony showing intention to wipe out Tutsi group in its entirety, since even newborn babies were not spared and showing that systematic checking of identity cards, on which ethnic group was mentioned, made it possible to separate Hutu from Tutsi, with latter being immediately arrested and often killed).

129. See *id.* at 1404 ¶ 27 (explaining brutal and repeated rapes of women where Akayesu was present and encouraged such acts).

130. See *id.* at 1406 ¶ 37 (noting "[t]he Chamber also had to define certain crimes which constitute offences under its jurisdiction, in particular, rape, because to date, there is no commonly accepted definition of this term in international law").

131. *Id.* at ¶ 38.

132. See *id.* at ¶ 40 (reporting "[t]he Chamber then expressed its opinion that with respect to the crimes under its jurisdiction, it should adhere to the concept of notional plurality of offences (cumulative charges) which would render multiple convictions permissible for the same act. As a result, a particular act may constitute both genocide and a crime against humanity").

Akayesu of genocide¹³³ based on his role therein.¹³⁴ Later in the judgment, the ICTR also convicted Akayesu of crimes against humanity based on his role in the systematic rapes.¹³⁵

Although the full impact of the *Akayesu* case may not be known for years, the international community has already taken significant notice of the decision.¹³⁶ Foreign leaders, including numerous diplomats and ambassadors of the United Republic of Tanzania,¹³⁷ and leaders from Finland, Norway, Iran, Malaysia, Egypt, Pakistan, Bosnia and Herzegovina, Lesotho, Zambia and Liechtenstein have commended the ICTR for finding that an act of rape can constitute the crime of genocide.¹³⁸

V. THE RIPPLE EFFECT OF THE ICTR'S GENOCIDE CONVICTION

On September 4, 1998, two days after convicting Akayesu, the ICTR pronounced its first sentence for the crime of genocide based on a separate case where the defendant pled guilty.¹³⁹ Jean Kambanda, the defendant in that case, served as Prime Minister during the genocide in Rwanda.¹⁴⁰ On May 1, 1998, Kambanda became the first person to accept culpability for genocide before an international court.¹⁴¹ In the first genocide sentence by an international court, the ICTR sentenced Kambanda to life in prison for his role slaughtering more than 500,000 Rwandans in 1994.¹⁴²

Later in 1998, the ICTR accepted another guilty plea for genocide. Omar Serushago pled guilty to genocide and three charges of crimes against

133. On October 2, 1998, the ICTR sentenced Akayesu to three life sentences, plus 80 years for other violations. *Rwandan Mayor Sentenced for Genocide: Jailed for Three Lifetimes*, AP, Oct. 2, 1998, available at AFRICA NEWS ONLINE (visited March 5, 2000) <www.africanews.org/east/rwanda>.

134. See *Akayesu Judgment*, *supra* note 123 at 1508-09 ¶ 51-55 (finding Akayesu had committed crimes and had requisite criminal intent to commit crimes in his indictment)

135. See *id.* at ¶ 63 (finding accused criminally liable).

136. Web search on "rape as genocide" found 980 articles (Feb. 19, 2000).

137. See *Rwandan Mayor Sentenced*, *supra* note 133 (noting that several ambassadors and other diplomatic representatives in United Republic of Tanzania, expressing views of their governments, commented that ICTR was doing commendable job in bringing justice to perpetrators).

138. See *UN: Assembly Appraises Progress Made by War Crimes Tribunals*, PRESSWIRE, Nov. 9, 1999, at M2 available at 1999 WL 24367071 (noting positive comments made by leaders from Finland, Norway, Iran, Malaysia, Egypt, Pakistan, Bosnia and Herzegovina, Lesotho, Zambia and Liechtenstein).

139. See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S (ICTR Sept. 4, 1998), (visited March 5, 2000) <<http://www.un.org/ict/english/judgements/kambanda.html>> (sentencing Kambanda to life imprisonment based on his guilty pleas).

140. See *id.* (stating Kambanda was Prime Minister).

141. See *id.* (noting Kambanda pled guilty to all six charges).

142. See *id.* (noting that "[t]he heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact").

humanity based on acts of murder, extermination and torture.¹⁴³ In exchange, the prosecutor dropped the charge of crimes against humanity based on rape.¹⁴⁴ The fact that he pled guilty to the majority of the charges, in exchange for dropping only the rape count, shows that rape holds significant weight in the eyes of the prosecutor, the ICTR and the defendant. On February 4, 1999, the ICTR sentenced Serushago to fifteen years in prison with credit for time served.¹⁴⁵

Akayesu's case started a pattern for Rwandan war criminals to plead guilty to the harsh, and rarely successfully prosecuted, crime of genocide. For example, as previously noted, Jean Kambanda pled guilty to genocide on May 1, 1998.¹⁴⁶ Later, in May 1999, the ICTR found two other Rwandan war criminals Kayishema and Ruzindana guilty of genocide.¹⁴⁷ As these convictions demonstrate, the *Akayesu* case opened the door for the ICTR (and arguably the ICTY) to prosecute and convict people for genocide.

VI. PREDICTING THE FUTURE IMPACT OF THE ICTR'S GENOCIDE CONVICTION

A. *The International Criminal Court*

The sister tribunals of the ICTR and ICTY served as models in the drafting of the treaty establishing an International Criminal Court (ICC), which will have its seat at the Hague.¹⁴⁸ The ICC Statute, while more thorough and detailed than the other two tribunals' statutes, contains several similarities to them. Unlike the ICTY and ICTR enabling statutes, the ICC Statute specifically provides definitions for several crimes against women. Crimes against women fall under "crimes against humanity" and "war crimes."¹⁴⁹

143. See *Prosecutor v. Serushago*, Case No. ICTR-98-39-S (ICTR Dec. 14, 1998), reprinted in 38 I.L.M. 854, 855-858 (1998).

144. See *id.* at 855.

145. See *id.* at 864-865.

146. See *Prosecutor v. Kambanda*, *supra* note 139 (stating that Kambanda pled guilty).

147. See *UN: Assembly Appraises Progress Made by War Crimes Tribunal*, *supra* note 136 (stating that ICTR issued Kayishema life sentence and Ruzindana 25 year sentence).

148. See ICC STATUTE, *supra* note 9, at art. 3.

149. See *id.* at art. 7(1)(g) (stating that "crimes against humanity" includes following acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack. . . . rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"). See also *id.* at art. 8(2)(b)(xxii) and (e)(vi) (defining war crimes as "violations of the laws and customs applicable in international armed conflict...namely the following acts: . . . committing rape, sexual slavery, enforced prostitution, forced pregnancy. . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"); *id.* at art. 8(2)(e)(vi) (defining other serious violations of laws and customs

Under the ICC, prosecutors might have an easier time convicting war criminals for rape as a crime against humanity than under the ICTY or ICTR for two reasons. First, the section "Crimes Against Humanity," is more detailed in its definitions of the various terms.¹⁵⁰ The clarity in terms will make it easier to meet the requirements of showing the defendant committed the crime. Second, under the ICTY and ICTR, prosecutors need to prove persecution¹⁵¹ as an element of the crime; by contrast, the ICC Statute lists persecution as one of eleven alternative acts that constitute a crime against humanity.¹⁵²

The Articles addressing the Grave Breaches of the Geneva Conventions, the Crimes Against Humanity, and general provisions governing such aspects as liabilities of people acting within their official capacity, are quite similar among the three statutes. However, the ICC Statute further includes Article 8 "War Crimes," a section not explicitly contained within the ICTY or ICTR Statutes.¹⁵³ Article 8 contains three main categories of war crimes: grave breaches of the Geneva Conventions, violations of the laws and customs of war, and violations of Article 3 common to the Geneva Conventions for internal armed conflicts.¹⁵⁴

Close examination of the genocide sections also reveals a slight difference. Article 6 of the ICC, governing genocide, contains language identical to that found in Article 4 of the ICTY and Article 2 of the ICTR.¹⁵⁵ However, the ICTY and ICTR specify the punishable acts, namely a) genocide, b) conspiracy to commit genocide, c) direct and public incitement to commit genocide, d) attempt to commit genocide, and e) complicity in genocide.¹⁵⁶ The drafters of the ICC omitted these specifications from the ICC

of war applicable in armed conflicts not of an international character, including: committing rape, sexual slavery, enforced prostitution, forced pregnancy. . . . enforced sterilization and any other form of sexual violence also constituting a serious violation of Article 3 to the four Geneva Conventions).

150. See *id.* at art. 7 (including in statute, definition for: attack, extermination, enslavement, deportation, torture, forced pregnancy, persecution, crime of apartheid, enforced disappearance of persons as well as other details not contained under ICTR or ICTY statutes).

151. See Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L LAW 22, 32 (1999) (explaining that persecution "is defined to include acts against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender. . . . or other grounds that are universally recognizable as impermissible under international law,' but only in connection with other crimes and not as a separate crime").

152. See ICC STATUTE, *supra* note 9, at art. 7(1) (listing eleven acts that when committed as part of widespread or systematic attack directed against civilian population, constitutes "crimes against humanity").

153. See *id.* at art. 8. Compare ICTY Statute, *supra* note 62, art. 3 with ICTR Statute, art. 5. See *United Nations: Security Council Resolution 955 (1994) Establishing The International Tribunal For Rwanda*, 33 I.L.M. 1598 (1994) (regarding violations of customs and laws of war).

154. See ICC STATUTE, *supra* note 9, at art. 8.

155. See *id.* at art. 8. See ICTY Statute, *supra* note 62 at art. 4; ICTR Statute, at art. 2.

156. See ICTY Statute, *supra* note 62, at art. 4 §3(a)-(c); ICTR Statute, at art. 2 §3(a)-(c).

article on genocide. Arguably, the drafters intend genocide to have a broader impact on convictions. By leaving out the specifications, the drafters allow the ICC prosecutors to bring genocide charges more easily for such actions as rape.

Following the trend created by the ICTY and the ICTR regarding international humanitarian law, the ICC has the capacity to bring war criminals and their victims even closer to justice. Victims have easier access to justice because the war crimes listed under the ICC have no statute of limitations, so prosecutors can bring charges even years after the event.¹⁵⁷ In addition, the ICC can require the defendant to pay restitution and compensation to the victim.¹⁵⁸

Further, the ICTY and ICTR lack specific provisions in most articles for the prosecution of rape. This vagueness creates the risk of narrow application of the definitions, thereby excluding rape from prosecution. To correct this vagueness error, several women's human rights groups have actively involved themselves in the drafting of the ICC.¹⁵⁹ The Women's Caucus for Gender Justice, involved in drafting the ICC statute, suggested that rape and sexual violence receive recognition i) as crimes in themselves, and ii) as constituting one or more of the enumerated crimes against the person, including the most severe crimes of violence.¹⁶⁰

VII. CONCLUSION – REMEMBERING THE REALITIES OF RAPE ITSELF

Rape and sexual violence need international attention to prosecute the perpetrators. Precedent thus far has established a strong case for bringing perpetrators to justice. The ICC Statute follows this path towards prosecution and lists rape as an element in various articles.¹⁶¹ In supporting the drafting of the ICC Statute, the United States believes the ICC will "also serve as a more effective deterrent than the uncertain prospect of costly new ad hoc tribunals."¹⁶²

Following the recommendation of the Women's Caucus and the precedent established by the ICTY and ICTR, the ICC must ensure that rape receive recognition as its own crime in addition to constituting an element of another crime. The Tribunals' successes in prosecuting the planners and perpetrators

157. See ICC STATUTE, *supra* note 9, at art. 29 (providing that seriousness of crimes make them not subject to any statute of limitations).

158. See ICC STATUTE, *supra* note 9, at art. 75.

159. One group, for example, is the Women's Caucus for Gender Justice.

160. See Stephens, *supra* note 8, at 109 n.3.

161. See e.g., ICC STATUTE, *supra* note 9, at art. 8 (2)(b)(xxii) and (e)(vi).

162. David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L LAW 12, 13 (1999).

of sexually violent war crimes should deter soldiers in future armed conflicts, and may lead to closer scrutiny of sexual assault crimes in domestic legal systems as well.

