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# FROM THE FURIES OF NANKING TO THE EUMENIDES OF THE INTERNATIONAL CRIMINAL COURT; THE EVOLUTION OF SEXUAL ASSAULTS AS INTERNATIONAL CRIMES<sup>1</sup>

Samantha I. Ryan

The girl shut her eyes but couldn't block out the laughter of the Bosnian Serb soldiers as they held her stick thin wrists and raped her over and over again. She doesn't remember how many times, but she remembers their laughs when they raped her and her mother, who was later shot and killed in their home in Zepa, in eastern Bosnia. The twelve-year old girl, also shot, survived and made her way to government held Zenica in central Bosnia.<sup>2</sup>

## PART I

### A. *Introduction*

Viewed alone, this statement is the heart wrenching account of the irreparable physical and psychological injuries inflicted upon a twelve-year old girl child by Bosnian Serb soldiers. When viewed in a more objective context, it is only a page or so in the volumes of testimony, gathered in both the Former Yugoslavia and in Rwanda, regarding the international crimes committed in these non-international conflicts.<sup>3</sup> Those volumes constitute only a portion of the records of crimes against humanity, committed against individual women and

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<sup>1</sup> According to Fagles, Aeschylus viewed the furies as "the force of love in hate that impels our rude beginnings toward our latter day achievements." Robert Fagles & W. B. Stanford, *Introduction to AESCHYLUS, ORESTEIA*, 23.

<sup>2</sup> *Investigators Compile Mass Rape Allegations*, ASSOCIATED PRESS (on file with Pace International Law Review).

<sup>3</sup> *See id.*

girl children all over the world including Haiti, Indonesia, Guatemala and Liberia.<sup>4</sup>

Rape is not a novel concept particular to our time. Women have been subjected to various forms of sexual assaults in times of peace and in times of war, since time immemorial.<sup>5</sup> In efforts to demoralize and humiliate the enemy, these assaults have occurred with increasing frequency in recent years, especially in internal conflicts, where women are targeted because of their affiliation with the opposition.<sup>6</sup> Historically, nations have treated these most serious crimes as the unfortunate, but unavoidable, consequences of war.<sup>7</sup>

What is particular to our time is the acknowledgement that these brutal offenses do rise to the level of international crimes when committed in certain contexts. The recent widespread and systematic atrocities committed against women in the Former Yugoslavia and Rwanda brought the prosecution of sexual assaults as international crimes, including crimes against humanity,<sup>8</sup> genocide<sup>9</sup> and war crimes,<sup>10</sup> to the forefront of inter-

<sup>4</sup> *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy*, submitted in accordance with commission resolution 1997/44, ESCOR, Comm. On Human Rights, 54<sup>th</sup> Sess., Agenda Item 9(a), at 6-7, U.N. Doc. E/CN.4/1998/54 (1998), [hereinafter *Special Rapporteur on Violence*].

<sup>5</sup> See Theodore Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993) (tracing the prohibition of wartime rape to Richard II in 1385); see generally SUSAN BROWNMILLER, *AGAINST OUR WILL, MEN, WOMEN AND RAPE*, 31-113 (Ballantine Books 1993).

<sup>6</sup> See *Special Rapporteur on Violence*, *supra* note 4, part 1, ¶ 5.

<sup>7</sup> See generally Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, (1995); see also BROWNMILLER, *supra* note 5, at 31.

<sup>8</sup> The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9\* (1999) [hereinafter *Rome Statute*]. Crimes against humanity have been defined in Article 7 of the Rome Statute as any number of certain acts listed under Article 7 "when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack . . ." *Id.* art. 7. (g) explicitly includes "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity . . ." *Id.*

<sup>9</sup> Genocide was defined under the Genocide Convention following World War II. The definition under the Rome Statute is borrowed almost directly from the convention and states in relevant part that genocide means any of the acts listed in Article 6, when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . ." *Id.* art. 6. Article 6 includes in subsection (d) "imposing measures intended to prevent births within the group . . ." *Id.* Subsection (d) is closely akin to the more traditional and euphemistic

national concern. Investigative endeavors by the United Nations, political pressures from Non-Governmental Organizations and, most of all, the accounts and testimonies of the survivors themselves, kept them there.

The conference in Rome in the summer of 1998<sup>11</sup> for the establishment of a Permanent International Criminal Court (ICC) made great strides toward rectifying many of the injustices historically associated with the prosecution of gender based crimes in international law. A few of the most positive objectives achieved at the conference include the explicit codification of sexual assaults as crimes against humanity, serious violations,<sup>12</sup> and in specific instances, grave breaches<sup>13</sup> of the Geneva Conventions of 12 August, 1949.<sup>14</sup> At the same time, the conference reinforced existing barriers to the prosecution of these crimes and erected new ones. The hurdles one must overcome are unequivocally set forth in the Rome Statute, which states that the core crimes covered by the statute are "the most serious crimes of concern to the international community as a

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references to sexual assaults used in the Geneva Conventions. See *infra* Section II C.

<sup>10</sup> The Rome Statute defined War Crimes under Article 8 as "Grave breaches of the Geneva Conventions of 12 August, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention." Rome Statute, *supra* note 8, art. 8. Article 8(b) pertains to "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law . . . ." *Id.* art. 8(b). Finally, Article 8(c) refers to cases of "armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 . . . ." *Id.* art. 8(c). Although Article 8(b) refers explicitly to rape, Article 8(c) refers to sexual assaults as "outrages upon personal dignity." *Id.* This language is borrowed verbatim from Common Article 3 to the Geneva Conventions. See *infra* Section II (C).

<sup>11</sup> See *infra* Part II D explaining the history of the International Criminal Court leading up to the Conference of Plenipotentiaries in Rome.

<sup>12</sup> See Rome Statute, *supra* note 8, arts. 8(b) and 8(c).

<sup>13</sup> *Id.* art. 8(a).

<sup>14</sup> Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

whole.”<sup>15</sup> It is no longer a question that sexual assaults committed in internal and international conflicts constitute some of the “most serious crimes of concern to the international community as a whole.”<sup>16</sup> These advances invited more questions than the delegates could possibly answer within the limited time allocated to the conference.

There are, however, certain fundamental flaws with the characterization of rape under the Rome Statute. For instance, the statute concentrates on the advances made recently by the ad hoc tribunals in the Former Yugoslavia and Rwanda to the exclusion of other legitimate areas of growth, including the work of human rights courts.<sup>17</sup> The Rome Statute should have acknowledged the difficulty in linking rape and other frequent human rights abuses to the contextual requirements necessary to establish the elements of international crimes.

These abuses are being committed on a somewhat smaller scale in the numerous countries where they occur and, therefore, have not commanded the international media attention that Rwanda and the Former Yugoslavia have commanded. In the Former Yugoslavia, thousands of women and girl children were locked in buildings, raped, forcibly impregnated and tortured on a daily basis.<sup>18</sup> It would be ludicrous to demand that the “widespread or systematic”<sup>19</sup> nature of these crimes rise to the astonishing level the world witnessed in those countries before allowing justice to intervene. It is mostly for that reason that sexual assaults should have been given a separate article under the Rome Statute, as suggested by the High Commissioner on Human Rights.<sup>20</sup>

Part Two of this article will describe the rapid development of international criminal law leading up to the conference, including the evolution of international law regarding sexual as-

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<sup>15</sup> Rome Statute, *supra* note 8, preamble.

<sup>16</sup> *Id.*

<sup>17</sup> See generally Case 10.970, Inter-Am. C.H.R. 157, OEA/ser. L/V/II.91, doc. 7 rev (1996).

<sup>18</sup> See generally The Prosecutor of the Tribunal Against Dragoljub Kunarac, Case No. IT-96-23-I, Amended Indictment (July 13, 1998) [hereinafter Foca Indictment].

<sup>19</sup> Rome Statute, *supra* note 8, art. 7.

<sup>20</sup> *The High Commissioner's Position Paper On The Establishment of A Permanent International Criminal Court*, (Geneva 15 June 1998), ¶ 39 [hereinafter *High Commissioner's Paper*].

saults in conflict situations, with a central focus on crimes against humanity. The ultimate codification of crimes against humanity under the Rome Statute contributes enormously to the criminalization of sexual assaults of international concern for two reasons.<sup>21</sup> First, although the Rome Statute allows for the prosecution of sexual assaults as war crimes,<sup>22</sup> this article will demonstrate that the evolution of international sexual assaults is intrinsically related to the development of crimes against humanity. Second, future prosecutions in both national and international courts will depend greatly upon a broad interpretation of this category of crimes.

Part Three of this article will discuss the relevant international conventional agreements pertaining to sexual assaults as human rights violations. This section illustrates the formative role that conventional human rights law has had on the shaping of international criminal law. This is especially relevant to the prosecution of sexual assaults as international crimes when they are committed by, or instigated by, those holding positions of national or organizational authority.

The Rome Statute emphasizes the need for national courts to prosecute international crimes.<sup>23</sup> This is similar to the requirement in human rights courts that victims must exhaust all of their domestic remedies before they can bring their complaint before an international court of Human Rights.<sup>24</sup> Where national courts are willing and able to take measures to punish the perpetrators of these most serious crimes, this is the correct position.<sup>25</sup> However, many of these crimes go unpunished for a

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<sup>21</sup> Although all sexual assaults, whether against women or men, are of international concern, it is only in certain contexts that these perpetrators will be subject to prosecution in an international criminal court. The Rome Statute for the Establishment of a Permanent International Criminal Court clearly stated that the core crimes within the jurisdiction of the tribunal are "the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 8, preamble.

<sup>22</sup> See Rome Statute, *supra* note 8, art. 8.

<sup>23</sup> See generally Rome Statute, *supra* note 8.

<sup>24</sup> See European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, § III, art. 26, 213 U.N.T.S. 221, E.T.S. 5. (entered into force on Sept. 3, 1953).

<sup>25</sup> See generally *Contemporary Forms of Slavery; Systematic Rape, Sexual Slavery and Slavery Like Practices During Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur*, 20 U.N. ESCOR, Commission on Human Rights, 50<sup>th</sup> Sess., Agenda Item 6, ¶¶ 91-100, U.N. Doc. E/CN.4/Sub.2/

variety of reasons, ranging from victim intimidation, in its various manifestations, to inequitable legislation and discriminatory judicial rules.<sup>26</sup> Underlying these problems is the understandable reluctance on behalf of many domestic courts to stigmatize the actions of their own government as criminal.<sup>27</sup> The majority of these ongoing violations occur in internal political struggles<sup>28</sup> and small-scale revolutions, which the international community continues to characterize as national problems and deal with them as such.<sup>29</sup>

The same problems that have plagued domestic rape cases naturally attach to international prosecutions, including the cultural stigmas relating to the victim's purity or chastity and

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1998/13 (1998) [hereinafter *Special Rapporteur on Slavery*] (examining the faults with national prosecutions of sexual assaults during armed conflict). See also *Special Rapporteur on Violence*, *supra* note 4, ¶¶ 8-11.

<sup>26</sup> See *Special Rapporteur on Slavery*, *supra* note 25. See also Case 10.970, *supra* note 17 (discussing the factual findings by Amnesty International and Human Rights Watch regarding the air of impunity surrounding sexual assaults by those in official positions, with emphasis on members of security forces).

<sup>27</sup> See generally *Special Rapporteur on Slavery*, *supra* note 25. See also Case 10.970, *supra* note 17.

<sup>28</sup> See generally *Special Rapporteur on Violence*, *supra* note 4, ¶¶ 8-11. See also David Scheffer, U.S. Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the United Nations Diplomatic Conference on the Establishment of a Permanent International Criminal Court, Testimony before Senate Foreign Relations Committee Washington, D.C., (July 23, 1998) (stating that "[i]nternal conflicts dominate the landscape of armed struggle today, and impunity too often shields the perpetrators of the most heinous crimes against their own people and others."). *Id.*

<sup>29</sup> This is evidenced by the language of the Rome Statute. Article 8, section 2(f) makes clear that Article 8, section 2(e) shall not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature." Rome Statute, *supra* note 8, art. 2(f). There is no similar qualifying language under Article 7. However, Article 7 (Crimes Against Humanity) does require a "widespread or systematic attack directed against a civilian population . . ." and it is doubtful that a riot would be viewed as such a widespread attack. See *id.*, art. 7. But see *The Fourth World Conference on Women, The Beijing Declaration and Platform for Action*, DPCSD, Annex I, ¶ 29 (1995) [hereinafter *The Beijing Declaration* and *The Beijing Platform* respectively]. Paragraph 29 of *The Beijing Declaration* expresses the clear intention on behalf of the international community to eliminate all forms of violence against women and girls. Paragraph 9 of *The Beijing Platform* expresses the call for implementation of the Platform through national legislation, reminding nations of their duties "to promote and protect all human rights and fundamental freedoms." *Id.*

the family's honor.<sup>30</sup> Thus, not only must the victim meet the ordinary challenges that serve to deter victims from charging their aggressors with these crimes, but now they must prove the additional and complex contextual requirements under international law.<sup>31</sup>

There have been allegations, especially from non-governmental organizations, that certain government authorities suppress evidence of sexual assaults in order to avoid national embarrassment in the international community.<sup>32</sup> There are also overly zealous non-governmental organizations distributing invaluable, but sometimes unreliable, information.<sup>33</sup> Finally, there is the traditional hesitancy on behalf of the international community to get involved in what is still viewed as an internal problem, especially where sexual assaults are concerned.<sup>34</sup>

Part Four will conclude this article with the assertion that sexual assaults and other gender based crimes should have been given their own article under the statute. In the absence of such an article, national courts and the international criminal court must allot those crimes that include sexual assaults, especially crimes against humanity, the broadest possible interpretation so that the courts can reach these most serious crimes of international concern. To otherwise shield the perpetrators of such crimes will only serve to reinforce the false and unjustifiable sense of impunity under which so many of these crimes have historically been committed.

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<sup>30</sup> See generally *CNN Newsstand Time, Blood For Honour* (CNN television broadcast, Jan. 10, 1999) (discussing the banning of forced gynecological exams and their relation to honour killings in Turkey).

<sup>31</sup> See *Special Rapporteur on Slavery*, *supra* note 25, ¶¶ 95-97.

<sup>32</sup> See Amy Chew, *Indonesia Military Says No Proof of Riot Rapes* (visited Nov. 14, 1998), <<http://www.huaren.org>>.

<sup>33</sup> Several photos which allegedly depicted the rape of ethnic Chinese women during the May riots in Indonesia turned out to be fraudulent. See Jeremy Wagstaff and Jay Solomon, *Some Indonesia Rape Photos on Internet Are Frauds*, *WALL ST. J.*, Interactive Edition, (visited August 20, 1998) <<http://huaren.ipoline.com/focus/id/082098.02.html>>.

<sup>34</sup> See Scheffer, *supra* note 28.



## PART II

A. *Sexual Assaults of International Consequence*

"I then told him that, in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have the details as early as possible so that the offenders could be properly hanged."<sup>35</sup>

As long as nations have seen fit to go to war, there has been rape. Rape has always been one of the most common denominators in warfare.<sup>36</sup> Men have raped out of boredom, out of displaced animosity for the enemy, to subjugate, to displace, to destroy, to impress and to conquer.<sup>37</sup> Women have always been the spoils of war.<sup>38</sup> Until the last century, the entire world understood that the nature and necessity of war justified the cruelty of rape and other inhumane acts.<sup>39</sup> Sexual assaults have been targeted against women on massive scales, especially in recent years, as a method to suppress those members of society who seek to oppose government regimes.<sup>40</sup>

According to Thucydides, once the Melians surrendered unconditionally to the Athenians, the conquerors sold all of the women and children as slaves.<sup>41</sup> The ancient Greeks considered rape during warfare to be "socially acceptable behavior."<sup>42</sup> During the Rape of Nanking by the Japanese armed forces in 1937, it is estimated that approximately 20,000 women and girls were raped and then mutilated and/or murdered.<sup>43</sup> The Germans organized concentration camp brothels during World War II.<sup>44</sup> In Vietnam, it was American soldiers.<sup>45</sup> In Bangladesh, the

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<sup>35</sup> GENERAL GEORGE S. PATTON, *WAR AS I KNEW IT*, reprinted in BROWNMILLER, *supra* note 5, at 72.

<sup>36</sup> See generally BROWNMILLER, *supra* note 5.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See generally *Special Rapporteur on Violence*, *supra* note 4, pt. I.

<sup>41</sup> Thucydides, *Reflections on the Peloponnesian War*, reprinted in CLASSIC READINGS OF INTERNATIONAL RELATIONS 183 (Phil Williams, Donald M. Goldstein & Jay M. Shafritz eds., Wadsworth Publishing Company, 1994).

<sup>42</sup> BROWNMILLER, *supra* note 5, at 25.

<sup>43</sup> See *Judgement for the International Military Tribunal for the Far East* (2 vols.), Tokyo, 1948, at 1012, reprinted in BROWNMILLER, *supra* note 5, at 58.

<sup>44</sup> See BROWNMILLER, *supra* note 5, at 63.

<sup>45</sup> See Tompkins, *supra* note 7, at 845. See also BROWNMILLER, *supra* note 5, at 115.

soldiers were Pakistani.<sup>46</sup> In Rwanda, the soldiers were Hutus,<sup>47</sup> and in the Former Yugoslavia, the perpetrators were mainly Bosnian Serbs.<sup>48</sup> The wars are different, the numbers range from 20,000 to 200,000 (Bangladesh), but the stories all have the same, horrible truth: A Bosnian woman whose eleven year old son was buried alive after he was forced to watch the soldiers rape his mother,<sup>49</sup> a thirteen year old girl in Bangladesh, kidnapped while walking home from school with her classmates was forced to "service" two men a day for six months,<sup>50</sup> and others who did not survive to tell their stories. "All I can remember is that I was the twentieth, her hair was all sticky, she was disgusting and full of sperm and that I killed her afterwards with five shots in the stomach."<sup>51</sup>

#### B. *History of Prosecutorial Efforts: Sexual Assaults as Crimes Against Humanity*

As this article begins to explore the historical underpinnings and developments in international criminal law leading to the codification of sexual assaults under the Rome Statute, it is necessary to keep one thing in mind. Following the Second World War, a dichotomy was formed between human rights and international crimes. By the time of the conference, however, thanks to the work of both the ad hoc tribunals and the regional human rights courts, the line separating the two categories had become a very fine one. As international cooperation increases and human rights violations are increasingly recognized as criminal, this distinction is of decreasing significance, especially in the realm of sexual assaults.

In the last century, the international community has witnessed two world wars, each of which unleashed the most brutish aspects of mankind, barbaric and calculating in the same

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<sup>46</sup> See *id.* at 78-86.

<sup>47</sup> See generally *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR 96-4-T, Decision of September 2, 1998. (This author feels this case provides an excellent historical context for the events in Rwanda in 1994.).

<sup>48</sup> See discussion *infra* Part II.D.

<sup>49</sup> See *Investigators Compile Mass Rape Allegations*, *supra* note 2.

<sup>50</sup> See Tompkins, *supra* note 7, at 845.

<sup>51</sup> Madeleine Rees and Sarah Maguire, *Rape As A Crime Against Humanity, The Tribunal's Procedures Discourage Women From Coming Forward*, THE INSTITUTE FOR JOURNALISM IN TRANSITION 1 (Nov. 1996).

instance. Out of the bloodshed and loss, the world grew wiser and great advances were made in the codification of international criminal law including conventions defining and prohibiting apartheid,<sup>52</sup> torture<sup>53</sup> and genocide.<sup>54</sup> This array of conventions has elevated each of these categories to the status of *jus cogens*.<sup>55</sup> As such, these crimes have been recognized and understood as prohibited under customary international law. When one seeks to gain an understanding of the relevant law, they need only consult the relevant convention, at least for a primary and uniformly accepted definition. The crime against humanity has never been codified in such a manner, although the foremost scholar on crimes against humanity has suggested the necessity of such an undertaking.<sup>56</sup>

It is in part due to the flexibility of the definition and the absence of any single controlling document on the subject that crimes against humanity, as a classification, was able to lend itself to the elevated status of sexual assaults in the international criminal arena. In defining the crimes under the jurisdiction of the international tribunals for Rwanda, Yugoslavia and ultimately the ICC, many of the definitions were excerpted directly from relevant conventions. Since crimes against humanity are not contained in a single document, the incorporation of sexual assaults under its provisions was the most effective means of accomplishing a necessary and well justified ends.

The concept of crimes against humanity arose from the vague incorporation of the principle under the Martens Clause of the Hague Convention of 1907.<sup>57</sup> The Martens Clause states in relevant part that "[u]ntil a more complete code of the laws of

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<sup>52</sup> See International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 244., G.A. Res. 3068 (XXVIII), U.N. GAOR, 28<sup>th</sup> Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973).

<sup>53</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), draft *reprinted in* 23 I.L.M. 1027, with final changes in 24 I.L.M. 535 (entered into force June 26, 1987).

<sup>54</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).

<sup>55</sup> See M. Cherif Bassiouni, "Crimes Against Humanity": *The Need For a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

<sup>56</sup> See *id.* at 475.

<sup>57</sup> See Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Convention No. IV), *reprinted in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN IN-

war has been issued, the High Contracting Parties deem it expedient to declare that . . . inhabitants . . . remain under the protection and the rule of the principles of the law of nations, as they result . . . from the *laws of humanity*.<sup>58</sup>

It was not until 1945, immediately following World War II, that crimes against humanity would receive its first formal definition. During this time of world-wide-crisis and political momentum, the Allied powers of France, the United States, the USSR and Great Britain agreed to establish the International Military Tribunal (IMT Charter) for the punishment of the major war criminals.<sup>59</sup> Although rape was not mentioned explicitly in the Charter of the International Military Tribunal<sup>60</sup> it did include "other inhumane acts."<sup>61</sup> Under Article 6(c) of the IMT Charter:

*Crimes against Humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>62</sup>

Despite the rather common sense dictate that the phrase "other inhumane acts" clearly includes rape, and the fact that sufficient evidence of rape was offered at the trials, rape was never explicitly charged at Nuremberg.<sup>63</sup> However, rape was prosecuted in the International Military Tribunal for the Far East as a "war crime."<sup>64</sup> In one of the most written about cases from the far east, General Yamashita was charged with and convicted for the commission of war crimes, including the

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INTERNATIONAL CRIMINAL LAW 638 (1992) (discussing the philosophical justifications behind this category of crimes).

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal London, August 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 (1945).

<sup>60</sup> See *id.* art. 6(c). The other two crimes under Article 6 were Crimes Against Peace and War Crimes. See *id.* art. 6.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Meron, *supra* note 5, at 425.

<sup>64</sup> See *id.*

"[t]orture, rape, murder and mass executions of very large numbers of residents of the Philippines, including women and children . . . ." <sup>65</sup>

The absence of any formal definition or convention relating explicitly to crimes against humanity caused some to look with skepticism at the Nuremberg prosecutions. The legality of prosecuting war criminals for crimes against humanity following World War II was challenged at the Tribunal as being in violation of the principles of legality, supported by the maxim "*nulum crimen sine lege, nulla poena sine lege praevia*."<sup>66</sup> The Tribunal answered, aptly:

The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.<sup>67</sup>

In the ensuing years, scholars of international law have challenged the prosecutions on similar grounds.<sup>68</sup> The inescapable truth is that the provision on crimes against humanity was incorporated into the charter "with the objective of trying Germans for crimes against other Germans . . . [and] . . . was ultimately defined . . . very narrowly."<sup>69</sup> Telford Taylor, former prosecutor at Nuremberg, noted that it was in fact "applied only to acts committed during the war" and "was limited to acts committed in connection with some other crime within the jurisdiction of the Tribunal."<sup>70</sup>

International law is a creature of evolution. This evolution is a weighted and cautious one in the criminal arena where political tides and state sovereignty have tended to carry more weight at times than human rights. The purposes behind the

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<sup>65</sup> *Yamashita v. Styer*, 327 U.S. 1, 51, 66 S.Ct. 340, 366 (1946).

<sup>66</sup> This maxim of legality stands for the proposition that without law, there can be no criminal act and thus no punishment. See BASSIOUNI, *supra* note 57, at 123.

<sup>67</sup> 22 THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461 (1949), reprinted in BASSIOUNI, *supra*, note 57, at 120.

<sup>68</sup> See BASSIOUNI, *supra* note 57, at 131.

<sup>69</sup> Panel Session, Telford Taylor Remarks, *Forty Years After Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 59 (1986).

<sup>70</sup> *Id.*

incorporation of crimes against humanity in the IMT Charter, to reach the actions of national leaders for crimes that they committed against their own people, were inconsistent with the ensuing cold war mentality. It is easy to understand the reluctance of a cold war community to embrace such a far-reaching principle in documentary or conventional form.

In the years immediately following World War II, developments in the codification of what had been termed existing international law, for the purposes of the military tribunal prosecutions in Nuremberg and Tokyo, ensued with some haste.<sup>71</sup> Firstly, in December of 1945, the four occupying powers adopted Control Council Law No. 10, which explicitly included rape as a crime against humanity.<sup>72</sup> The purpose of Control Council Law No. 10, as adopted by the occupying powers, was to establish a "uniform legal basis in Germany for the prosecution of war criminals"<sup>73</sup> by their own courts in Germany.<sup>74</sup> Control Council Law No. 10 has contributed greatly to the expansion and development of both crimes against humanity and gender based crimes.<sup>75</sup>

The next significant advance in international criminal law came in 1947 when the General Assembly requested that the International Law Commission (ILC) "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal."<sup>76</sup> A Spe-

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<sup>71</sup> There are several reasons for the haste and the dedication on behalf of the international community to codify. Among other rationales, it was a deep regret felt by many that the community had not prosecuted the Turkish for the massive atrocities that they committed against the Armenians during World War I. There was a degree of initiative to do it correctly this time, so that there may be no questions in the future that these crimes are prohibited. See Leila Sedat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation; From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L. 289, 279-299 (1994). (This author feels this article contains an excellent discussion of the role French Jurisprudence has played in the evolution of Crimes Against Humanity.).

<sup>72</sup> See Meron, *supra* note 5, at 426.

<sup>73</sup> Control Council for Germany, Official Gazette, art. II, reprinted in YOUNG-DRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (Martinus Nijhoff 1982).

<sup>74</sup> See Meron, *supra*, note 5, at 426.

<sup>75</sup> See *Report of the International Law Commission on its forty-eighth session, Chapter II Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, 51<sup>st</sup> Sess., Supp. No. 10, art. 18, U.N. Doc. A/51/10 (1996) [hereinafter *Draft Code of Crimes*].

<sup>76</sup> *Id.* at Introduction.

cial Rapporteur was assigned to the task of preparing the *Draft Code of Offenses Against the Peace and Security of Mankind*.<sup>77</sup> Simultaneously, another Special Rapporteur was assigned to the task of preparing a *Draft Statute for the Establishment of a Permanent International Criminal Court*.<sup>78</sup>

The ILC submitted its report concerning the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal to the General Assembly in 1950.<sup>79</sup> This failure to explicitly prohibit rape as an enumerated act under crimes against humanity in ILC principles is unclear, except that the definition was borrowed almost directly from the Charter. Another reason for the continued use of the euphemism "other inhumane acts,"<sup>80</sup> rather than an explicit prohibition of rape per se, relates directly to the continued misperceptions of rape as an offense against dignity and honor at a national level. Unfortunately, the ILC principles also retained the dependence of crimes against humanity on the other enumerated crimes within the jurisdiction of the court.<sup>81</sup> Crimes against humanity have subsequently been legitimized as crimes independent of either crimes against peace or war crimes. Almost fifty years later, in the ILC Report for 1996 on the Draft Code of Crimes Against the Peace and Security of Mankind,<sup>82</sup> the nexus to war has been completely eliminated and rape is explicitly prohibited. "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a

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<sup>77</sup> Later renamed *Draft Code of Crimes Against the Peace and Security of Mankind*. See *Draft Code of Crimes*, *supra* note 75. (This author believes that this report contains an excellent background summary of the progress of the ILC from 1947, when it was first requested to "formulate the principles" through the 1996 Report.) See *id.*

<sup>78</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. RTS. J. 11, 49 (1997).

<sup>79</sup> See *International Law Commission Report on the Principles of the Nuremberg Tribunal*, 5 U.N. GAOR, 5<sup>th</sup> Sess., Supp. No. 12 at 11, U.N. Doc. A/1316 (1950), reprinted in BASSIOUNI, *supra* note 57, at 624. This provision for crimes against humanity did not include rape as an enumerated act or omission, though it did include "other inhumane acts." *Id.*

<sup>80</sup> *Id.* at 625, Crimes Against Humanity.

<sup>81</sup> See *id.*, Crimes Against Peace and War Crimes.

<sup>82</sup> See *Draft Code of Crimes*, *supra* note 75.

Government or by any organization or group: (j) *rape, enforced prostitution and other forms of sexual abuse.*"<sup>83</sup>

C. *The Geneva Conventions and Additional Protocols*

The four Geneva Conventions and their Additional Protocols<sup>84</sup> contributed greatly to the protection of women in times of armed conflict both of an international and non-international character. Common Article 3 to the Geneva Conventions prohibited "outrages upon personal dignity, in particular humiliating and degrading treatment" "in cases of armed conflict not of an international character . . ." "at any time and in any place whatsoever . . ."<sup>85</sup> Article 27 of the Geneva Convention relative to the protection of Civilian Persons in Time of War provides that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>86</sup> Although this article is limited in application to cases of international armed conflict, the explicit prohibition of rape was a welcomed measure. However, one can see clearly the allusions to honor and dignity, which have given the prosecution of these crimes trouble over the years.

"Believing it necessary . . . [to] develop the provisions protecting the victims of armed conflict . . .,"<sup>87</sup> Protocol I was adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.<sup>88</sup> Article 76 of Protocol I provides for the protection of women in situations of international armed conflict, stating that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."<sup>89</sup>

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<sup>83</sup> *Id.* art. 18 (emphasis added).

<sup>84</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, art. 76, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, art. 4, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>85</sup> Geneva Conventions, *supra* note 14, Common Article 3.

<sup>86</sup> Fourth Geneva Convention, *supra* note 14, art. 27.

<sup>87</sup> Protocol I, *supra* note 84, preamble.

<sup>88</sup> See Protocol I, *supra* note 84.

<sup>89</sup> *Id.* art. 76.



Protocol II was created in order to “ensure a better protection for the victims”<sup>90</sup> of non-international armed conflicts.<sup>91</sup> This Protocol essentially buttressed the principles “enshrined in Common Article 3 to the Geneva Conventions.”<sup>92</sup> Article 4 pertains to the fundamental guarantees of “persons who do not take a direct part or who have ceased to take part in hostilities.”<sup>93</sup> It states that they shall be protected against “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”<sup>94</sup> This article clearly states the intention on behalf of the high contracting parties that these protections shall apply “at any time and in any place whatsoever.”<sup>95</sup>

D. *National and International Prosecutions after Nuremberg; The ICTFY<sup>96</sup> and the ICTR<sup>97</sup>*

“Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.”<sup>98</sup>

For nearly fifty years, between Nuremberg and the establishment of the International Tribunal for the Former Yugoslavia, the international community was silent on the prosecution of international crimes. In the interim, national courts were carrying the torch of their predecessors, fleshing out the definition of crimes against humanity. Two of the most significant advances included the granting of independent status to crimes

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<sup>90</sup> Protocol II, *supra* note 84, preamble.

<sup>91</sup> *See id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* art. 4.

<sup>94</sup> *Id.*

<sup>95</sup> Protocol I, *supra* note 84, art. 4.

<sup>96</sup> The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., Annex, at 40, U.N. Doc. S/25704 (1993) (establishing the tribunal) [hereinafter ICTY Statute], *reprinted at* 32 I.L.M. 1193.

<sup>97</sup> The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, U.N. S.C. Res. 955, U.N. SCOR, 3453<sup>rd</sup> mtg., U.N. Doc. S/Res/955 (1994) [hereinafter ICTR Statute].

<sup>98</sup> *Special Rapporteur on Violence, supra* note 4.

against humanity<sup>99</sup> and the elimination of the necessity of any nexus between crimes against humanity and war crimes.<sup>100</sup>

The effects of these positive changes can be seen in the work of the ICTY. In 1993 the Security Council, acting pursuant to their peace keeping powers under Article VII of the United Nations Charter, decided to establish an "international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."<sup>101</sup> This initiative was undertaken in response to "continuing reports of widespread violations of international humanitarian law"<sup>102</sup> including reports of "ethnic cleansing, mass killings, torture, rape, pillage"<sup>103</sup> and other atrocities of grave international concern. The usage of the term "humanitarian law" connoting egregious violations of human rights.

The definition of crimes against humanity under the ICTY Statute is similar to the definition of crimes against humanity

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<sup>99</sup> See Attorney general of Israel v. Eichman, 36 I.L.R. 277 (Israel Supreme Court 1962), reprinted in JORDAN PAUST ET. AL., INTERNATIONAL CRIMINAL LAW, 1038-1044 (Carolina Academic Press 1996). Adolf Eichman was one of the architects of the holocaust. He was kidnapped by Israel from Argentina after Argentina refused to extradite him. In the case of *Israel v. Eichman*, the court severed crimes against humanity from war crimes. In granting crimes against humanity independent status, the court stated that they attached "no practical importance to the finding of the Nuremberg Tribunal that, for the purpose of a conviction for the offense of crimes against humanity as defined in article 6(c), it was necessary to prove that it was committed in connection with one of the other two offenses therein defined." *Id.*

<sup>100</sup> *Regina v. Imre Finta*, [1994] 28 S.C.R. 4<sup>th</sup> 265 (Canada 1994), *id.*, at 1063. In the case of *Regina v. Finta*, the Canadian court took the opportunity to differentiate between crimes against humanity and war crimes. The court explained that under Canadian law, crimes against humanity are any of the inhumane acts referred to in the statutory language (murder, extermination, etc.), with the additional element that they "were based on discrimination against or the persecution of an identifiable group of people." *Id.* War crimes, according to the court, required as an additional element, "that actions constitute a violation of the laws of armed conflict." *Id.* This author feels this court contributed to the continued liberation of crimes against humanity from war crimes.

<sup>101</sup> U.N. Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. SCOR, 48<sup>th</sup> sess., Annex at 1192, ¶ 1, U.N. Doc. S/25704 (1993), reprinted at 32 I.L.M. 1159 (1993).

<sup>102</sup> *Id.* ¶ 6.

<sup>103</sup> *Id.* ¶ 9.

under the later Rome Statute.<sup>104</sup> Article 5 of the ICTY Statute reads as follows: "The International tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (g) rape."<sup>105</sup>

In the case of *Dusko Tadic*,<sup>106</sup> the tribunal took one of its most important steps away from its predecessor at Nuremberg. The tribunal was able to address some of the most relevant issues regarding the elements of crimes against humanity, which had experienced such fluctuation over the last fifty years.<sup>107</sup> In examining the charges brought against Dusko Tadic for crimes against humanity, the court noted that customary international law "no longer requires a nexus between crimes against humanity and armed conflict."<sup>108</sup> The presence of the element in the ICTY Statute required the tribunal to consider it.<sup>109</sup> Viewed from an evolutionary standpoint, the absence of any requirement of a nexus between crimes against humanity and war, per se, in the Rome Statute definition is at least partially indebted to this decision.<sup>110</sup>

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<sup>104</sup> Compare ICTY Statute, *supra* note 96, art. 5 with the Rome Statute, *supra* note 8, art. 7. One important difference is the contextual requirements. Under article 5 of the ICTY Statute, there must be a proven nexus between the acts and an armed conflict. Under the Rome Statute, there must be a proven "widespread or systematic attack." Rome Statute, *supra* note 8, art. 7. The difference is essentially, that under a strict interpretation of each article, the crimes committed by the Germans in the camps would probably not be seen as armed conflict, whereas the same crimes would be easily categorized as both a widespread and systematic "attack directed against a civilian population." *Id.*

<sup>105</sup> See ICTY Statute, *supra* note 96, art. 5. Although the contributions made by the ICTY are circumscribed slightly due to the ad hoc nature of the Tribunal, they are highly significant and well worth examining.

<sup>106</sup> International Criminal Tribunal for the Former Yugoslavia: Excerpts from the Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion, *reprinted in* 36 I.L.M. 908 (1997) [hereinafter *Tadic*].

<sup>107</sup> Beyond the substantive issues of the *Tadic* case, it is also significant to note that Dusko Tadic was initially indicted for sexual assaults committed against witness "F." The Prosecutor later withdrew the charges when the witness refused to testify against Tadic. See Order on the Prosecution Motion to Withdraw Counts 2 through 4 of the Indictment without Prejudice, No. IT-94-1-T (May 15, 1996).

<sup>108</sup> *Tadic*, *supra* note 106, at 937.

<sup>109</sup> See *id.* at 938. The requirement of a nexus between crimes committed and an armed conflict is not present under the statute for the International Criminal Court.

<sup>110</sup> See *The High Commissioner's Position Paper*, *supra* note 20, ¶ 31.

Not all of the national cases involving crimes against humanity made positive contributions toward the expansive interpretation of this category. The French Court of Cassation in the *Matter of Barbie*<sup>111</sup> determined that, in order to be found guilty of Crimes against Humanity, one must intend to carry "out a common plan by systematically committing inhumane acts and persecutions in the name of a state practicing a hegemonic political ideology."<sup>112</sup> This requirement was never explicitly mentioned in the Nuremberg Charter, nor was it adopted in the Nuremberg Principles developed by the International Law Commission.<sup>113</sup> Unfortunately, aspects of this requirement found their way into the definition of crimes against humanity under the Rome Statute which defined crimes against humanity under Article 7.<sup>114</sup> A small amount of analysis is required to understand how the requirement of a policy or plan is figured into the definition of crimes against humanity under the Rome Statute. The relevant portion of the definition states:

For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.<sup>115</sup>

The statute then defines an "attack directed against any civilian population"<sup>116</sup> as:

"a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a *State or organizational policy* to commit

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<sup>111</sup> Cass. Crim., Dec. 20, 1985, J.C.P. 1986, IIG 20, 655, *discussed in* Leila Sedat Wexler, *supra* note 71, at 359.

<sup>112</sup> *Id.* at 350.

<sup>113</sup> *But see* United States v. Altstoetter, *et al.* (The Justice Case), III Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, 1946-1949, *reprinted in* PAUST ET. AL., *supra* note 99, at 1034. In the Altstoetter case, the court states in dicta that "governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions." *Id.*

<sup>114</sup> *See* Rome Statute, *supra* note 8, art. 7.

<sup>115</sup> *Id.* art. 7(1)(a).

<sup>116</sup> *Id.* art. 7(2)(g).

such attack.”<sup>117</sup> This element under the Rome Statute is in place in order to prevent the international prosecution of unrelated acts of cruelty, which occur in conflict situations.

This requirement unnecessarily increases the burden of fulfilling the *mens rea* requirement for crimes against humanity. The aim in these situations is to hold individuals accountable for their actions when they violate the laws of humanity. Can an individual be allowed to escape culpability for their actions merely by saying that there did not exist such a state or organizational plan or policy to commit such an attack? This seems to be the inverse of the infamous failed Nuremberg defense, “I was only following orders.” To require proof of such a plan or policy runs contrary to logic. There can be no justification for the commission of sexual assaults by a person acting under authority or the color of authority in the same way that there can be no legitimate excuse for torture. Therefore, in future prosecutions under the Rome Statute, the existence or absence of evidence establishing a state or organizational policy to commit such an attack should not be given such consideration that it forecloses the prosecution of a legitimate claim.

A related issue discussed in the *Dusko Tadic* case is the definition of civilian population.<sup>118</sup> The court held that in regards to crimes against humanity “a wide definition of civilian population . . . is justified.”<sup>119</sup> The court then examined the term “population” and found that although the prohibited acts must be “directed against a civilian population,”<sup>120</sup> this does not mean “that the entire population of a given state or territory must be victimized by these acts in order for the acts to constitute a crime against humanity.”<sup>121</sup> The tribunal deciphered this requirement merely to “exclude single or isolated acts which, although constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against

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<sup>117</sup> *Id.* (emphasis added).

<sup>118</sup> See Geneva Conventions, *supra* note 14, Common Article 3. Common Article 3 refers to the civilian population as “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause . . . .” *Id.*

<sup>119</sup> *Tadic*, *supra* note 106, at 941, ¶ 643.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

humanity.”<sup>122</sup> This requirement ensures that isolated and unrelated acts, punishable under national laws, will not be brought before the international court unless it is reasonably related to an attack “directed against” a civilian population.<sup>123</sup> The court concluded that “the emphasis is not on the individual victim but rather on the collective.”<sup>124</sup>

The court found that the requirement that the act be committed as part of a “widespread or systematic” attack was formulated to assure, once again, that isolated acts were excluded.<sup>125</sup> One of the more complex issues faced by the court was whether a single act in and of itself can constitute a crime against humanity.<sup>126</sup> The court stated that so long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity.<sup>127</sup>

Another significant advance made by the ICTY came in the form of the “Foca Indictment,”<sup>128</sup> the first indictment to deal exclusively with sexual assaults. The “Foca Indictment,” amended on July 13, 1998 deals exclusively with the repeated rape, enslavement and detention of several women in the city and municipality of Foca.<sup>129</sup> Once the Serbian forces had overtaken Foca, they began confining the population in detention facilities, in apartments and in motels.<sup>130</sup> The men and women were separated, and those who attempted to resist were beaten, subjected to sexual assaults and/or killed.<sup>131</sup> The amended indictment contains twenty-one counts related to the sexual violence that was committed either directly by Kunarac or by soldiers under his authority.<sup>132</sup> The charges include several

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<sup>122</sup> *Id.*

<sup>123</sup> See ICTY Statute, *supra* note 96, art. 5.

<sup>124</sup> *Id.*

<sup>125</sup> See Tadic, *supra* note 106, at 943.

<sup>126</sup> See generally *id.*

<sup>127</sup> See *id.* at 941.

<sup>128</sup> See generally Foca Indictment, *supra* note 18.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* ¶¶ 1.1-1.10.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* ¶¶ 5.1-10.4.

counts of rape as crimes against humanity,<sup>133</sup> and as Violations of the Laws and Customs of War.<sup>134</sup>

The Security Council established The International Criminal Tribunal for Rwanda in a similar manner as its companion in the Former Yugoslavia. The Council considered reports of massive human rights violations, including sexual assaults, and determined that "this situation" constituted "a threat to international peace and security."<sup>135</sup> The definition of crimes against humanity under the ICTR statute, Article 3 reads as follows: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national ethnic, racial or religious grounds: (g) Rape."<sup>136</sup>

The conviction of Jean Paul Akeyesu<sup>137</sup> on September 2, 1998 is significant, as it was the first time that a defendant has ever been convicted under international law of sexual assaults as crimes against humanity and genocide.

Witness JJ testified that when they arrived at the bureau communal the women were hoping the authorities would defend them but she was surprised to the contrary. In her testimony she recalled lying in the cultural center, having been raped repeatedly by Interahamwe, and hearing the cries of young girls around her, girls as young as twelve or thirteen years old. . . . The second time she was taken to the cultural center to be raped, Witness JJ recalled seeing the Accused standing at the entrance of the cultural center and hearing him say loudly to the Interahamwe, 'Never

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<sup>133</sup> See Foca Indictment, *supra* note 18, ¶ 5.6. The counts relating to sexual assaults as crimes against humanity explicitly charge the accused with acts of torture under article 5(f) of the ICTY Statute, as well as rape under article 5(g) of the ICTY Statute. See *id.*

<sup>134</sup> See *id.* The counts relating to sexual assaults as Violations of the Laws and Customs of War explicitly charge the accused under article 3 of the ICTY Statute, for rape and torture, noting these crimes are recognized by Common Article 3 to the Geneva Conventions, *supra* note 14; see also Protocol II, *supra* note 84, art. 4(2)(e).

<sup>135</sup> ICTR Statute, *supra* note 97, preamble.

<sup>136</sup> *Id.* art. 3.

<sup>137</sup> Jean-Paul Akayesu served as bourgmestre of the Taba Commune from April 1993 until June 1994. As bourgmestre, he was "charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect." See *The Prosecutor v. Jean-Paul Akayesu*, *supra* note 47, § 1.5.

ask me again what a Tutsi woman tastes like' and 'Tomorrow they will be killed.' . . . According to Witness JJ, most of the girls and women were subsequently killed, either brought to the river and killed there, after having returned to their houses, or killed at the bureau communal.<sup>138</sup>

The initial indictment did not include charges of sexual assaults.<sup>139</sup> There have been several reasons espoused as to how and why the indictment was amended after the initial testimony of Witness J, who stated that her six year old daughter had been "raped by three Interahamwe when they came to kill her father."<sup>140</sup> According to the Tribunal, subsequent to the testimonies of Witness J and Witness H, the prosecutor initiated further investigations into the matter.<sup>141</sup> The Tribunal acknowledged the expressed interest of non-governmental organizations (NGOs) in the prosecution of sexual assaults by the tribunal.<sup>142</sup> The Tribunal felt that the concern expressed by the NGOs' was "indicative of public concern over the historical exclusion of rape and other forms of sexual violence from investigation and prosecution of war crimes."<sup>143</sup> There were other reports issued by the same NGOs that it was in fact the presence of the female justice on the tribunal, and it was her urgings that led to the amended indictment.<sup>144</sup>

#### E. *The Permanent International Criminal Court*

If there were a people who made open profession of trampling justice under foot,-who despised and violated the rights of others whenever they found an opportunity,-the interest of human society would authorize all the other nations to form a confederacy in order to humble and chastise the delinquents . . . . To form and support an unjust pretension, is only doing injury to the party

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<sup>138</sup> *Id.* ¶ 117.

<sup>139</sup> *See id.* § 1.2.

<sup>140</sup> *Id.* § 1.5 ¶ 105.

<sup>141</sup> *See id.* ¶ 107.

<sup>142</sup> *See* The Prosecutor v. Jean-Paul Akayesu, *supra* note 47, § 1.5 ¶ 107.

<sup>143</sup> *Id.*

<sup>144</sup> Bill Berkeley, *The Trial of One Man Illuminates the Central Mystery of Rwanda's Genocide: How so Many Ordinary People Could participate in so Monstrous a Crime*, THE WASH. POST, Oct. 11, 1998, at W10.



whose interest is affected by that pretension; but to despise justice in general, is doing an injustice to all nations.<sup>145</sup>

It is not that the world has previously failed to acknowledge that sexual assaults, or assaults on one's dignity and honor, are prohibited by the laws of war and humanity. It is only that we have grown increasingly aware of our abilities to work together as a community. We have gained wisdom and mobilized some of our greatest minds toward the creation of a more civilized world. In this new world, all people, men, women and children of all races and nationalities, will be free from brutish insults to their personal sovereignty, their integrity, their dignity, their physical person and their spiritual person. We have learned that there are certain things a government cannot do to its own citizens with impunity.

This truth has made us stronger and wiser. With this wisdom comes such an awe-inspiring responsibility that we should take pause. That pause is for fear of acting foolishly, for fear of threatening the advances we have made in such a short time span, and sometimes, simply to admire the impossible terrain we have traveled.

A combination of hope, apprehension and political will combined to facilitate one of the most remarkable events in our recent history: the conference in Rome for the Establishment of a Permanent International Criminal Court. Apprehension, hope, politics and idealism are the undercurrents of the Rome Statute. The motivating force, or the impetus, behind the conference was the establishment of tribunals by the United Nations to bring justice to the Former Yugoslavia and Rwanda in the wake of those atrocities. The precedent for the establishment of the court, both substantively and procedurally, was a combination of the post-World War II tribunals and those more recently established in the Former Yugoslavia and Rwanda.

The genesis of the International Criminal Court is often attributed to the abandoned efforts by the Preliminary Peace Conference to establish an international tribunal after the First World War.<sup>146</sup> Public outrage over the atrocities committed

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<sup>145</sup> EMMERICH DE Vattel, *Justice Between Nations*, (1857) *reprinted in* CLASSIC READINGS OF INTERNATIONAL RELATIONS 183 (Phil Williams, Donald M. Goldstein & Jay M. Shafritz eds., Wadsworth Publishing Company, 1994).

<sup>146</sup> See Leila Sedat Wexler, *supra* note 71, at 298.

during World War I, mainly the mass slayings of the Armenians by the Turkish people, prompted the Conference to "nominate[] a fifteen member commission to determine responsibility for the war."<sup>147</sup> Similarly, it was the public outcry during and after the highly publicized events in the Former Yugoslavia and Rwanda which encouraged the international community in its effort to create a Permanent International Criminal Court in the early 1990's. It was this commission that recommended, among other things, the creation of a "high tribunal" to try "all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity."<sup>148</sup> A further similarity between the two endeavors is that scholars have referred to the United State's abstention as the primary deterrent to the creation of the Court.<sup>149</sup>

In the wake of the atrocities of World War II, the United Nations General Assembly acknowledged the need for a permanent international tribunal, similar in spirit to the military tribunals set up by the allied powers in Nuremberg and Tokyo.<sup>150</sup> In 1948, the ILC was mandated to codify the Nuremberg Principles and to prepare a draft statute establishing an International Criminal Court.<sup>151</sup> The cold war, a lack of political initiative and international solidarity prevented the ILC from pursuing the work until forty years later.<sup>152</sup> In 1989, Trinidad and Tobago, in need of international assistance to curtail the narcotics trafficking in their nations, suggested that work resume on the creation of the international tribunal.

In 1994, the ILC presented the final version of the draft statute to the sixth committee of the 49<sup>th</sup> session of the General

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (quoting *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95 at 123 (1920)).

<sup>149</sup> The United States did not vote in favor of the ICC, and many are afraid that without the U.S. support, the court will be ineffective, if it comes into existence at all. The United States is the largest backer of the Rwanda Tribunals, contributing some 46 million dollars last year alone. Without the military and economic support of the U.S., the worst fate may become a reality. See David Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, *Remarks to UN General Assembly's Sixth Committee* (Oct. 21, 1998).

<sup>150</sup> See Patricia Viseur Sellers and Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 72 (1997).

<sup>151</sup> See *id.* at 73 (citing G.A. Res. 260 (iii) B (1948)).

<sup>152</sup> See *id.* at 73.

Assembly.<sup>153</sup> The ILC recommended that the General Assembly (GA) call a conference of Plenipotentiaries to draw a treaty in order to enact the statute. The GA then established an ad hoc committee on the Establishment of a Permanent International Criminal Court<sup>154</sup> and directed it "to review the major substantive and administrative issues arising out of the Draft Statute prepared by the International Law Commission and, in light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries."<sup>155</sup>

The GA then created a Preparatory Committee [hereinafter Prep Com] to draft a text "with a view to preparing a widely acceptable consolidated text of a convention for an International Criminal Court as the next step towards consideration by a conference of plenipotentiaries."<sup>156</sup> The Prep Com held six sessions between 1995 and 1998, ultimately completing one of the most comprehensive, issue-laden texts known to mankind.<sup>157</sup> The Draft Statute presented in Rome contained more than 1300 brackets full of undecided text, each bracket infinitely debatable.<sup>158</sup> Article 7, containing the definition of crimes against humanity finally agreed upon by the members of the conference, reads as follows:

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<sup>153</sup> See *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 5, U.N. Doc. A/CONF.183/10 (1998).

<sup>154</sup> See *id.*

<sup>155</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR 49<sup>th</sup> Sess., Supp. No. 22, ¶ 255, U.N. Doc. A/51/22 (1995).

<sup>156</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶ 1, U.N. Doc. A/CONF.183/2 (1998) [hereinafter *Draft Statute*].

<sup>157</sup> See generally *id.* An article could be written examining the difference between the text of the *Draft Statute* and the Rome Statute. This article is not the place for this analysis. It is worthwhile noting the complexity of the Draft Statute. For instance, a crime against humanity was defined as any of the following acts when committed:

[as part of a widespread [and] [or] systematic commission of such acts against any population]: or [as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds].

*Id.* It should be clear then, from the history of the statute, that a nexus to armed conflict is absolutely and unarguably no longer a requirement as it once was under the IMT Charter.

<sup>158</sup> See generally *id.*

For the purpose of this statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.<sup>159</sup>

It is necessary to an understanding of the purpose and nature of the Rome Statute to note the inclusion of the language "widespread or systematic attack directed against a civilian population"<sup>160</sup> in the definition of crimes against humanity. This language, borrowed practically verbatim from the ICTR and ICTY statutes is discernibly different and more restrictive than the language used by the ILC in the Draft Code of Crimes Against the Peace and Security of Mankind. That language only required that the act be "committed in a systematic manner or on a large scale and instigated by a government or by any organization or group."<sup>161</sup> The difference is that the Rome Statute definition requires a higher degree of proof.

The Rome Statute requires that there exist an "attack," *per se*, which presents a greater burden of proof. Also, to prove the attack, one must establish that there was a "state or organizational policy to commit the attack."<sup>162</sup> As will be discussed in the next section, it is almost impossible in many of the situations in which these violations actually occur, to prove the existence of such a policy or plan. However, the grave and seemingly organized nature of these widespread government abuses and the nature of the common traits of the victims, may seem improbable absent such a plan. One concern is the difficulty to prove the existence of a plan or policy, especially where evidence of such matters will most likely rest in the hands of the perpetrator. This presents a problem similar to that in certain United States Courts of proving selective prosecution against the government. The evidence one needs to pursue such a claim rests in the hands of the perpetrator and is almost impossible to ascertain without the cooperation of this party.

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<sup>159</sup> Rome Statute, *supra* note 8, art. 8.

<sup>160</sup> *Id.* art. 7(1).

<sup>161</sup> *Draft Code of Crimes*, *supra* note 75, art. 7(2)(a).

<sup>162</sup> Rome Statute, *supra* note 8, art. 7(2)(a).

The High Commissioner on human rights recommended that the international communities concern for the explicit prohibition of rape under international law would justify the inclusion of a "provision solely devoted to this issue."<sup>163</sup> Unfortunately the members of the conference considered no such article. In fact, it was debated at the conference whether certain forms of sexual violence would be included at all under the statute.<sup>164</sup> The idea that sexual assaults might not have been included was unlikely considering the precedent which had been so recently set by the international tribunals in Rwanda and the Former Yugoslavia,<sup>165</sup> the implicit prohibition of such treatment under the Geneva Conventions,<sup>166</sup> and the various women's conventions and declarations.<sup>167</sup>

It is not difficult to understand why sexual assaults were not given their own provision or article under the statute. It is the same reason that torture was sub-categorized as a crime against humanity. It pertains to the dichotomy mentioned earlier between human rights violations and international crimes which has outlived its usefulness.

It is a principle of *jus cogens* that torture is prohibited under international law regardless of its connection to a systematic or widespread attack, and yet it was not independently prohibited under the statute. The absurdity should begin to become clear. When is an international crime not an international crime? When it does not satisfy the criteria of the Rome Statute. The International Criminal Court is not a court of Human Rights unlike the regional European or American Courts. It was created for the punishment of international crimes, and as such, it is not an instrument for the prosecution of human rights violations. If one perceives the elimination of aggression as the argument or theme of the Rome Statute, than the requirement of an attack directed against a civilian population is

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<sup>163</sup> *High Commissioner's Paper*, *supra* note 20, ¶ 39. The High Commissioner also noted the "disproportionate impact on women and girl children during . . . armed conflict." *Id.* ¶ 42.

<sup>164</sup> *See National Abortion Laws will not be Undermined by Inclusion of Forced Pregnancy as a Crime Against Humanity, Pledges Women's Caucus, On the Record - Volume 1, Issue #9* (June 29, 1998) (visited June 1999) <<http://www.igc.org/lccc>>.

<sup>165</sup> *See supra* Part II.D.

<sup>166</sup> *See supra* Part II.C.

<sup>167</sup> *See infra* Part III.

more understandable. To determine, in effect, that the nations of the world no longer accept rape as a legitimate method of warfare, or condone it as an unfortunate consequence of internal conflict, is a commendable advance.

The false dichotomy propagated by the Rome Statute is the harsh contextual division between human rights violations and international crimes. Human rights violations, such as torture and rape, have been ruled upon by the European and American regional Courts as violations of the laws of nations.<sup>168</sup> The criminality of these acts has been acknowledged where they are authorized or instigated by public officials, or where a public official knows of the violation and fails to intervene. The international community was given the opportunity to prohibit human rights violations, such as sexual assaults, as international crimes and this simply was not done.

One of the greatest advances in terms of crimes against humanity since Nuremberg, was the elimination of any nexus to war. The difference between a widespread or systematic attack directed against a civilian population, pursuant to a plan or policy, and war, civil or international, seems to be only a matter of semantics. This is not to say that war is a necessary prerequisite to crimes against humanity.

The difference between an attack directed against a civilian population and war may best be discerned by looking to the situation in Haiti when it was under the military dictatorship of "Lieutenant General Raoul Cedras, Brigadier General Philippe Biamby, and many of the 7,000 members of the Armed Forces of Haiti under their command."<sup>169</sup> During this time, rape was a common means of oppressing and punishing men and women the government believed supported the previous democratic government of President Aristide,<sup>170</sup> which the regime had overthrown in 1991.<sup>171</sup> In 1994, the National Commission for Truth and Justice "concluded . . . that sexual violence committed against women in a systematic manner for political reasons

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<sup>168</sup> See Case 10.970, *supra* note 17, Part VB3.

<sup>169</sup> Michael P. Scharf, *Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INTL L. J. 1, 5 (1996).

<sup>170</sup> See generally *id.*

<sup>171</sup> See generally *id.*

in Haiti constituted a crime against humanity."<sup>172</sup> The National Commission for Truth and Justice granted amnesty to the perpetrators of these heinous crimes in exchange for the peaceful reinstatement of the democratic government of President Aristide.

Another obstacle to the prosecution of sexual assaults of international concern in the Rome Statute is the article relating to jurisdiction.<sup>173</sup> This obstacle is the reason given by the United States for voting against the statute.<sup>174</sup> Under the Rome Statute, jurisdiction over non-signatory states is predicated on one of two things; the consent of the territory of which the perpetrator is a national, or the territory in which the crime was committed.<sup>175</sup> The problem here, of course, is that a territory can abstain from ratifying the statute and proceed with impunity to act in violation of the laws of nations as explicitly codified by the statute. Considering, as explored in the next section, the fact that many of the violations of the Rome Statute continue to occur in internal conflicts in countries which will not ratify the statute, one must wonder what the ultimate effectiveness of the statute will be in terms of bringing these perpetrators to justice. For instance, what would have happened if Rwanda had not been a contracting party? Would the international community have been precluded from prosecuting the perpetrators of these most heinous crimes by virtue of the very statute intended to implement laws forbidding their actions?

This article acknowledges that political compromise was necessary for the achievement of international co-operation in this endeavor to create a permanent court for the punishment of the most serious crimes of international concern. However, the Rome Statute must be viewed in an objective and a realistic light for what it is. A restatement of international criminal law as it stood at the time of the conference, much like the IMT Charter. The inclusion of rape and other sexual assaults of comparable gravity under the relevant articles was exactly that.

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<sup>172</sup> *Draft Code of Crimes*, *supra* note 75, art. 18 cmt. 16.

<sup>173</sup> *See Rome Statute*, *supra* note 8, art. 12(2)(a).

<sup>174</sup> David Scheffer, *supra* note 28.

<sup>175</sup> *See Rome Statute*, *supra* note 8, arts. 12(2)(a), 12(2)(b).

## PART III

A. *Relevant Documents and National Incidents*

When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as dirty or spoiled. Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.<sup>176</sup>

The international community's concern for, and commitment to, the elimination of all forms of discrimination against women, including acts of sexual violence, are clearly evidenced by recent conventions and advancements in the areas of international criminal law and human rights. The explicit inclusion of rape as a crime against humanity under the Rome Statute is a great accomplishment. The statute itself contains certain provisions that were included for purposes that are fairly self-evidentiary. For instance, the preamble to the Rome Statute states that the ICC will prosecute only the "most serious crimes of concern to the international community as a whole."<sup>177</sup> According to article 17, pertaining to issues of admissibility, the "Court shall determine that a case is inadmissible where . . . the case is not of sufficient gravity to justify further action by the Court."<sup>178</sup>

Furthermore, in order for a crime against humanity to be prosecuted, and thus a sexual assault as such, there must be evidence of a "state or organizational policy to commit the attack"<sup>179</sup> of which the particular crime or act was a part. It is almost impossible in many of the situations in which these violations actually occur to prove the existence of such a plan. These provisions may, if not properly checked, operate as arbitrary and unnecessary obstacles to the achievement of the goals of the international community where the advancement and protection of women in conflict situations is concerned.

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<sup>176</sup> *Special Rapporteur on Violence*, *supra* note 4, at 4.

<sup>177</sup> Rome Statute, *supra* note 8, preamble.

<sup>178</sup> *Id.* art. 17(1)(d).

<sup>179</sup> *Id.* art. 7(2)(a).



The community has begun implementing measures to affect and increase universal awareness of the repeated and egregious violations of women's rights which plague women all over the world. Violence against women "cut[s] across lines of income, class and culture"<sup>180</sup> and both "violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms."<sup>181</sup> These human rights and fundamental freedoms were enshrined in the *Universal Declaration of Human Rights* in 1948.<sup>182</sup> The *Universal Declaration of Human Rights* stated in unequivocal language that everyone, regardless of sex or any other arbitrary factor, "is entitled to all the rights and freedoms set forth in this declaration,"<sup>183</sup> including the right to "life liberty and the security of person."<sup>184</sup> This post World War II declaration, adopted by an idealistic international community, has been built upon in the ensuing years by several conventions relative to the advancement and protection of women's rights. A few of the most recent documents are listed in chronological order below:

- 1) *The Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace, and Political Participation*;<sup>185</sup>
- 2) *The Convention on the Elimination of all Forms of Discrimination against Women* (Women's Convention) and its proposed *Optional Protocol*;<sup>186</sup>

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<sup>180</sup> *The Beijing Declaration*, *supra* note 29, at 409; *The Beijing Platform*, *supra* note 29, ¶ 112.

<sup>181</sup> *Id.*

<sup>182</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A, 3 GAOR, U.N. Doc. 1/1777 (1948).

<sup>183</sup> *Id.* art. 2.

<sup>184</sup> *Id.* art. 3.

<sup>185</sup> *Report of the World Conference of the International Women's Year*, U.N. Doc. E/CONF.66/34, pp. 2-7, 19-20. The Declaration of Mexico stated in ¶ 11, "The human body, whether that of woman or man, is inviolable and respect for it is a fundamental element of human dignity and freedom." *Id.*

<sup>186</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. Res. 180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, U.N. Doc. A/ 34/46., entered into force on Sept. 3, 1981 [hereinafter Women's Convention]: *Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, reprinted in 21 BROOK. J. INT'L. L. 679, 785. See also *Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women*, Commission on the Status of Women, 43<sup>rd</sup> Sess., Agenda Item 6, U.N. Doc. E/CN.6/1999/WG/L.2 (1999). In the *Draft Code of Crimes*, the ILC noted in its commentary

- 3) *Nairobi Forward looking Strategies*;<sup>187</sup>
- 4) *The Vienna Declaration and Programme for Action, adopted by the World Conference on Human Rights*;<sup>188</sup>
- 5) *The Declaration on the Elimination of Violence Against Women*;<sup>189</sup>
- 6) *The Beijing Declaration and Platform for Action*.<sup>190</sup>

Each of these documents not only express the intention on behalf of the international community to curtail violence

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to article 18 that rape and other sexual assaults "are forms of violence that may be specifically directed against women and therefore constitute a violation of the Convention on the Elimination of all Forms of Discrimination against Women." *Draft Code of Crimes*, *supra* note 75.

<sup>187</sup> *Nairobi Forward-looking Strategies for the Advancement of Women*, adopted by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women in 1985, [hereinafter *Nairobi Forward-looking Strategies*] reprinted in *A THEMATIC GUIDE TO DOCUMENTS ON THE HUMAN RIGHTS OF WOMEN* (Gudmundur Alfredson & Katarina Tomasevski eds. 1995). Paragraph 55 states: "Effective institutions and procedures must be established or strengthened to monitor the situation of women comprehensively and identify the causes, both traditional and new, of discrimination and to help formulate new policies and effectively carry out strategies and measures to end discrimination." *Id.*

<sup>188</sup> *Vienna Declaration and Programme for Action*, 1993 World Conference on Human Rights in Vienna from 14 to 23 June 1993, U.N. Doc. A/Conf.157/23 (1993) [hereinafter *Vienna Declaration and Programme for Action*]. The *Vienna Declaration and Programme for Action*, adopted in 1993 stated unequivocally in paragraph 18: "Gender based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice . . . are incompatible with the dignity and worth of the human person, and must be eliminated." *Id.*

<sup>189</sup> *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48<sup>th</sup> Sess., U.N. Doc. A/Res/48/104 (1994), preamble [hereinafter *DEVAW*]. The preambular language states: "Concerned that . . . women in situations of armed conflict, are especially vulnerable to violence, Convinced that . . . there is a need for . . . a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women . . ." *Id.*

<sup>190</sup> See *The Beijing Declaration and The Beijing Platform For Action*, *supra* note 29. This document is divided into two parts, the *Beijing Declaration* which resembles, in format, a preamble and the *Platform for Action*, which consists of six chapters. These six chapters begin with the "mission statement" which explains the nature of the Platform and its basic purpose. Chapter Two outlines the "global framework" in which the Conference occurred. Chapter Three is a brief list of the most "critical areas" of concern. Chapter Four, constituting the bulk of the document, describes strategic objectives and actions to be implemented on a national and international level in different relevant areas in need of reform. These areas range from social and economic status to violence against women and children. Chapter Five discusses implementation on national and international levels, placing most of the responsibility on national governments. Chapter Six relates to financial arrangements, which should be made in order to secure the implementation of the document. See *id.*

against women<sup>191</sup> but also serves to evidence the international community's concern with these most serious crimes. Suggestions have been made that the community should fully implement measures to combat violence against women.<sup>192</sup> On both an international and national level, there exists a need to strengthen current modes of implementation and to create and adopt new methods, such as the Optional Protocol to the Women's Convention.<sup>193</sup>

The Women's Convention<sup>194</sup> was adopted by the General Assembly on December 18, 1979, and entered into force on September 3, 1981.<sup>195</sup> The central purpose of the Women's Convention, though fairly self-evident, was the elimination of all forms of discrimination against women.<sup>196</sup> For the purposes of the convention, the term "discrimination against women" included "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>197</sup> Violence against women, whether during times of peace or times of war is closely linked to those prejudices embedded in the principles of inequality and discrimination which the Women's Convention con-

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<sup>191</sup> See *Draft Code of Crimes*, *supra* note 75 (stating that the Women's Convention implicitly protects women against sexual assaults); See also *DEVAW*, *supra* note 189 noting that the principles protecting the security of all women are enshrined in international instruments, including the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. *Id.*

<sup>192</sup> See *DEVAW*, *supra* note 189, preamble. See also *High Commissioner for Human Rights Calls For Firm Action To Ensure Women's Rights Everywhere are Fully Honored*, U.N. Doc. HR/98/13, (1998); *Report of the Expert Group Meeting, Gender Based Persecution*, pt. IV, U.N. Doc. EGM/GBP/1997/R (1997).

<sup>193</sup> See *Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women*, *supra* note 186. See also *DEVAW*, *supra* note 189, preamble.

<sup>194</sup> Interestingly enough both Rwanda and Yugoslavia are parties to the Women's Convention and were parties at the time of their violations. See *Women's Convention*, *supra* note 186.

<sup>195</sup> See *id.*

<sup>196</sup> See *id.* at preamble.

<sup>197</sup> *Id.* art. 1.

demned.<sup>198</sup> The *Beijing Declaration and Platform for Action*, upholding and re-affirming the Women's Convention,<sup>199</sup> states that "low social and economic status of women can be both a cause and consequence of violence against women."<sup>200</sup>

The *Nairobi Forward Looking Strategies for the Advancement of Women*,<sup>201</sup> adopted by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women in 1985, was a comprehensive plan to elevate the positions of women worldwide. Governments from all over the world gathered together in Nairobi to try to understand the mechanisms that suppress women in various societies, and to find new ways to alleviate these overwhelming burdens. The Governments acknowledged that there existed "discriminatory legislative provisions in the social, economic and political spheres."<sup>202</sup> These obstacles must be eliminated if women are to become contributing members of society. These very real boundaries to self-actualization affect not only women, but the growth of the entire society.<sup>203</sup>

The *Beijing Declaration and Platform for Action* was formulated at the Fourth World Conference on Women<sup>204</sup> held in Beijing in 1995. The Conference was held for the purposes of reaffirming the international community's "commitment to [t]he equal rights and inherent dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of all Forms of Discrimination against Women."<sup>205</sup> The Governments present at the confer-

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<sup>198</sup> See *Beijing Platform*, *supra* note 29, ¶ 112.

<sup>199</sup> See *Beijing Declaration*, *supra* note 29, ¶ 7.

<sup>200</sup> *Beijing Platform*, *supra* note 29, ¶ 112.

<sup>201</sup> See *Nairobi Forward-looking Strategies*, *supra* note 187.

<sup>202</sup> *Id.* ¶ 50.

<sup>203</sup> See generally *id.* at ch. 1, (noting the inter-relatedness of poverty and marginalization or inequality.) Paragraph 47 states: "Discrimination promotes an uneconomic use of women's talents and wastes the valuable human resources necessary for development and for the strengthening of peace." *Id.*

<sup>204</sup> The conference was held in Beijing, September 4-15, 1995.

<sup>205</sup> *Beijing Declaration*, *supra* note 29, ¶ 8. The Women's Convention is one of many conventions and/or declarations re-affirmed by Governmental commitment to the *Beijing Declaration and Platform for Action*. Most notably is *Nairobi Forward-looking Strategies for the Advancement of Women*. See *Nairobi Forward-looking Strategies*, *supra* note 187.

ence recognized that most of the goals set out in the *Nairobi Forward-looking Strategies for the Advancement of Women* have not been achieved.<sup>206</sup> The mission of the Governments present at the conference was to intensify their efforts<sup>207</sup> in order to sustain social development and social justice.<sup>208</sup>

The necessity and propriety of this body of international law is most eloquently evidenced by the vast accounts of women from all over the world who have come forth to have their stories recorded. The need for implementation and action may be understood once it is recognized that the violent sexual assaults against women in Rwanda and Yugoslavia represent only a portion of the ongoing violations committed against women.

A mob of angry men jumped the barricades and swept onto the tollway leading into Jakarta, their numbers forcing the terrified drivers to stop. In one car were two young ethnic Chinese girls. They were pulled screaming from the vehicle and partially stripped. Right there in front of the mob they were repeatedly raped, their suffering a gruesome spectator sport for the rampaging gang . . . . It is also clear that the Muslim dominated armed forces did nothing to protect the victims from the terrible wave of violence that swept Jakarta, and there is evidence that in the lead-up crisis, rage against the relatively wealthy Chinese was fanned by Senior Soerharto Government officials and military leaders as a means of deflecting attention from the Government.<sup>209</sup>

"Where is the Proof?" armed forces Chief General Wiranto asked at a news conference . . . . When we went to the homes, the alleged victims denied reports or suggestions that they had filed rape reports."<sup>210</sup> The proof, as General Wiranto<sup>211</sup> refers to it, was gathered by NGOs including the Indonesian Human Rights Commission.<sup>212</sup> NGOs have estimated that during the mid-May

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<sup>206</sup> See *Beijing Platform for Action*, *supra* note 29, at ch. 2, ¶ 28.

<sup>207</sup> See *Beijing Declaration*, *supra* note 29, ¶ 32.

<sup>208</sup> See *id.* ¶ 36.

<sup>209</sup> Louise Williams, *Report Tells of Ethnic Rape Rampage*, (visited Nov. 14, 1998) <<http://www.smh.com.au/news/9807/15/text/world4.html>> [hereinafter *Rape Rampage*].

<sup>210</sup> Amy Chew, *Indonesia Military says no proof of riot rapes* (visited Nov. 14, 1998) <<http://www.hueren.org>>.

<sup>211</sup> General Wiranto is the Military Chief of President B.J. Habibie who came into power following the ouster of former President Suharto in May 1998.

<sup>212</sup> See *Rape Rampage*, *supra* note 209.

1998 riots in Jakarta, which led to the ouster of President Suharto, approximately 168 women were raped.<sup>213</sup> These attacks targeted the ethnic Chinese women specifically because of their ethnic background.<sup>214</sup> Alternative statements have been made by government officials claiming that allegations are the mere fabrications of organizations that wish to see the reputation of the government shredded. Threats have been issued against those organizations that have attempted to counsel victims while gathering information about the rapes.<sup>215</sup>

One young girl was put in a tank of water with a Timorese man and soldiers forced them to have sex in front of the soldiers in the tank of water . . . The Special Rapporteur has received a large number of submissions regarding sexual violence in East Timor by Indonesian security forces. Among the violations complained of are sexual violence, rape, forced marriage, forced prostitution . . . Indonesian State authorities have not responded in accordance with their international obligations. No cases have thus far resulted in prosecution.<sup>216</sup>

The Report of the Special Rapporteur on Violence Against Women is filled with passages such as this from countries with stable and unstable political environments including: Afghanistan, Algeria, Bosnia, Guatemala, Haiti, India, Japan, Liberia, Mexico, China and Peru.<sup>217</sup> Considering the pivotal role played by religion in establishing an individual's identity within the larger cultural framework, it is not strange that the report of the young girl, above, was taken from the former Bishop of Dili, East Timor.<sup>218</sup> When a woman is denied "equal access to the power structure that controls society"<sup>219</sup> the only authority she may feel comfortable confiding in, may be a local religious figure.

Where they have adequate procedural mechanisms in place to protect both the witnesses and the defendants, national

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<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> See Human Rights Watch, 1998 Reports, *Indonesia: The Damaging Debate on Rapes of Ethnic Chinese Women, Introduction* (visited Oct. 1, 1999) <<http://www.hrw.org/hrw/reports98/indonesia3/intro.htm>>.

<sup>216</sup> *Special Rapporteur on Violence*, *supra* note 4, at 7.

<sup>217</sup> See *id.* at pt. 1.A.

<sup>218</sup> See *id.*

<sup>219</sup> See *Nairobi Forward-looking Strategies*, *supra* note 187, ¶ 46.

courts should certainly be the primary forum for prosecution of these activities.<sup>220</sup> Unfortunately, in many countries, the legal systems are inadequate to protect the victims and prosecute the offenses.<sup>221</sup> These legal barriers, when increased in potency by the societal undercurrents of shame associated with rape, can be deadly. For instance, although China has established rape laws, a woman is not encouraged to come forward with allegations for fear of shaming herself and her family.

In 1994, the National Commission for Truth and Justice concluded that "sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity."<sup>222</sup> In 1998, the Special Rapporteur on Contemporary Forms of Slavery noted that a single case of serious sexual violence may be prosecuted as a crime against humanity "so long as prosecutors link that single violation to a larger series of violations of fundamental human rights or humanitarian law that evidence a widespread or systematic attack against a civilian population."<sup>223</sup> In 1998, the High Commissioner on Human Rights, supported the explicit inclusion of rape under the Rome Statute "whether in the provisions on war crimes and crimes against humanity, or in a separate provision solely devoted to this issue."<sup>224</sup>

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<sup>220</sup> See *Special Rapporteur on Slavery*, *supra* note 25, ¶¶ 95-100.

<sup>221</sup> See *id.* The *Special Rapporteur on Slavery* states in paragraph 96:

A general survey of municipal legal systems reveals the following examples of gender based discrimination codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim . . . rape being defined as acts committed by a man against a woman (not his wife), even though men are also the victims of sexual violence; procedural laws requiring women to take independent action to initiate prosecutions of rape by the prosecutor's office; evidentiary laws which accord less weight to evidence if presented by a women . . . substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim . . .

*Id.*

<sup>222</sup> *Draft Code of Crimes*, *supra* note 75, art. 18 cmt. 16.

<sup>223</sup> *Special Rapporteur on Slavery*, *supra* note 25, ¶ 43.

<sup>224</sup> *High Commissioner's Paper*, *supra* note 20, ¶ 39.

## PART IV

A. *Observations and Recommendations*

One of the greatest accomplishments made at the conference was placing gender issues at the forefront of international concern. However, as suggested by the High Commission on Human Rights in their Position Paper, sexual assaults should have been given their own article under the Rome Statute.<sup>225</sup> Neither the false dichotomy between sexual assaults as international crimes and human rights violations nor the continuing fallacy that prosecution depends on numbers or detailed policies can continue. The unarguable truth is that international law, as it stands, forbids rape when it is committed by a person acting under authority or the color of authority. It has been analogized to torture, subcategorized as a crime against humanity, a war crime and a form of genocide. Under international law, rape no longer needs to be made contingent upon those contexts that have grown up around such categories as crimes against humanity. There is no legitimate punitive justification for rape; not as a means to punish, not as a means to oppress, not as a means to shame nor to attain information. The international community must realize that the focus should not be on establishing that such an act was committed in a certain context which is forbidden, but that there is no acceptable context for the commission of rape by an authority or someone act acting under the color of authority. These crimes cannot go unpunished. Where the national courts are unable or unwilling to do so, the international community must rise to the responsibility.

Omission of a separate article in the Rome Statute requires that the articles that do explicitly prohibit rape and other forms of sexual assault, especially crimes against humanity, must be interpreted as broadly as possible. It must be interpreted as broadly as it has been in recent years, if not more, in order to reach these most heinous crimes of international concern as noted in this article. Our dignity requires it. Our humanity demands it. Our justice depends on it.

The international community has striven to create a mechanism that will help to deter the atrocities witnessed by the world in this last century. The creation of the International

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<sup>225</sup> See *id.*



Criminal Court is a means of encouraging international peace and cooperation amongst nations and as such it is a triumph. This is an acknowledgement of the rapid evolution of international criminal law in the last century and a commitment to the future we all share. As we head into the next millenium, there is no question that the elimination of sexual violence against women and girl children is of the utmost concern to the international community. Nor is there any doubt that women and girls are more susceptible to such attacks during times of conflict. These violations of fundamental human rights are the "most serious crimes of concern to the international community as a whole"<sup>226</sup> and as such must be prosecuted by the International Criminal Court where national courts are unable or unwilling to do so.<sup>227</sup> Anything less betrays the advances made in the last fifty years and sentences the victims to physical and psychological suffering worse than any conviction.

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<sup>226</sup> Rome Statute, *supra* note 8, art. 5(1).

<sup>227</sup> On a personal note, while this article fully accepts the contextual requirements defining crimes under the statute, it occurs to the author that the terminology employed by the statute should not be used to belittle complainants nor to alienate them. The political powerlessness and the obstacles to educational and legal resources evidenced by various documents described in this paper are substantial enough burdens without the international community adding to them.